



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

E.L.C APPEAL NO. 71 OF 2018

STEPHEN GITAU NJOROGE.....APPELLANT

-VERSUS-

GEORGE NGURE KARIUKI.....RESPONDENT

(Being an appeal arising from the Judgement issued on 20

November 2018 by Hon.Kibiru (CM) in Machakos CMCC No.874 OF 2015.)

BETWEEN

STEPHEN GITAU NJOROGE.....PLAINTIFF

-VERSUS-

GEORGE NGURE KARIUKI.....DEFENDANT

J U D G E M E N T

Introduction

By a Memorandum of Appeal dated the 30th November, 2018 the Appellant appeals against the whole of the Judgement delivered by **Hon. A G Kibiru** Chief Magistrate at Machakos Chief Magistrates' Court on the 20th November, 2018. The genesis of this appeal is the Judgement of the Chief Magistrate Hon. A G Kibiru in Machakos CMCC No. 87A of 2015, where the trial court proceeded to enter judgement in favour of the Plaintiff (Appellant) but declined to grant an order for specific performance and directed the Defendant (Respondent) to refund the purchase price with interest from date of filing suit.

The Appellant being dissatisfied by the whole Judgement filed an appeal at the Machakos Environment and Land Court on 30th November, 2018.

The Memorandum of Appeal contained the following grounds:

- i. The Learned Magistrate erred in law and in fact in holding that the Plaintiff had not made out a case for specific performance.
- ii. The Learned Magistrate erred in law and fact in failing to find that the purchase of plot No. Land Reference 12715/2707 was a separate and concluded transaction.
- iii. The Learned Magistrate erred in Law and fact in failing to acknowledge the common linkage between the cause of action and issues between the Appellant and Respondent in the payment for services rendered.
- iv. The Learned Magistrate erred in law and fact in failing to establish that the purchase of plot No. Land Reference 12715/2707 was fully paid for.
- v. The Learned Magistrate erred in law and in fact in failing to take into consideration the requirements of specific performance in a concluded sale.

It is proposed to pray to this court for orders that:

- a. This appeal be allowed.
- b. The orders issued by the Learned Magistrate on 20th November, 2018 be set aside.
- c. The Honourable Court do make further such orders as it may deem fit and just in the interest of Justice.
- d. The Appellant be granted the costs of the Appeal.

The Appeal was canvassed by way of written submissions.

Submissions

The Appellant in his submissions provided a background of the dispute herein and contended that he had executed an undertaking on the 1st November 2012. The Appellant submitted that the Orders issued by the Learned Magistrate on the 20th November 2018 be set aside as he had made out a case for specific performance. He argued that he had complied with the terms of the sale agreement between the Respondent and himself by paying the purchase price for the plot No.LR.12715/2707 in full.

Further, that the Learned Magistrate erred in law and in fact in failing to find that the purchase of Plot No. Land Reference 12715/2707 was a separate and concluded transaction. He contended that the Learned Magistrate failed in acknowledging the common linkage between the cause of action and issues between the Respondent and himself in the payment of the services rendered. To buttress his averments, he relied on the following decisions: **FM v EKW [2019] eKLR**; **Fred I M Imbatu v Rashid K Too [2018] eKLR** and **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR**.

The Respondent in his submissions reiterated the background of the lower court suit. He submitted that it was established in evidence that the Appellant did not transfer the shares in Clauste Motors Limited and neither did he pay the stamp duty, registration and transfer fees in terms of the 2nd Agreement. Further, it was on that basis that the Learned Magistrate entered judgment as he did. He contended that the Purchase of the suit property Land Reference Number 12715/2707 was incomplete as the Appellant was required by clause 4 of the Second Agreement in consideration for sale, to transfer shares in the above named Company as consideration for the plot which he failed to, as well as pay stamp duty and registration fees to facilitate the transfer including registration of the suit plot in his name. He explained that the Appellant purported to vary the terms of the Agreement. He was hence in breach and no specific performance could be imposed on him. He insists in the circumstances; the Learned Magistrate's findings ought not be disturbed. He reiterated that the Appellant failed to tender enough evidence to support his claim. He submitted that the Learned Magistrate was guided by the evidence on record by both parties. He further submitted that the trial Magistrate did not err in fact and law in failing to grant an Order of specific performance to the Appellant as he failed to transfer the shares in consideration for the sale of the suit property as stipulated by clause 4 of the Sale Agreement which is not in dispute. Further, he failed to pay for the outstanding stamp duty fees and registration fees in respect of plots No. 1, 2 and 3. To buttress his averments, he relied on the following decisions: **Henry Mwangi Gatai & another v Margaret Wanjiku Godwin & 2 others [2018] eKLR** where it cited the case of **Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited (2006) eKLR** and **Gitanga Mwaniki & Anor vs Annunciata Waithira Kibue , 2013 eKLR** in which the court favourably cited the case of **Aziz Vs Bhatia brothers Ltd (2001) 1 EA 7 .**

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and the rivaling submissions, I have summarized the following issues for determination:

- Whether the Appellant is entitled to orders of specific performance.
- Whether the evidence of the parties was considered before the entry of judgement in this matter.
- Whether the Appeal is merited.
- Who should bear the costs of the Appeal.

Before I proceed to deal with all the aforementioned issues jointly, I wish to provide a background of this matter and highlight an excerpt from the impugned judgement which is the fulcrum of the Appeal herein. Vide a Complaint dated the 6th February 2012, the Appellant (Plaintiff) sought for the following orders against the Respondent (Defendant):

- i. An Order of Injunction against the Defendant/Respondent restraining him from selling, leasing or in any other way dealing with the suit plot L.R.No.12715/2707.**
- ii. An Order of specific performance directing the Defendant to forthwith transfer L.R.NO.12715/2707 to the plaintiff.**
- iii. In default of (a) above, the Deputy Registrar of this Honorable Court be authorized to sign all documents necessary for the transfer of the said plot L.R.NO12715/2707 to the plaintiff.**
- iv. In the alternative, the Defendant be ordered to compensate the plaintiff the current market value of L.R.NO.12715/2707.**
- v. Cost of this suit.**

The trial Magistrate after considering the evidence presented by the Appellant and the Respondent, delivered a judgement on 20th November, 2018 in the following terms:

- i. That the Defendant shall refund the sum of Kshs 100,000/= less Kshs 55,226/= to the Plaintiff being Kshs 44,774/=.**
- ii. That the amount shall attract interest at 12% from date of filing suit till payment in full.**
- iii. That since the agreement was frustrated by failure to transfer shares which both party can be fully blamed and since each party has partly succeeded in their respective claims each party shall bear his own costs for the suit.**

The Appellant being aggrieved by the said judgement filed the instant Appeal. On the issue whether the Appellant is entitled to orders of specific performance and if the evidence presented was considered by the trial magistrate, it emerged that he had purchased three plots from the Respondent being plot Numbers L.R.12715/2705; 2706 and 2707 respectively. Further, that the first two plots were duly transferred to him; however, the Respondent was yet to transfer the 3rd plot being number 12715/2707 which is the suit plot. The Appellant produced a sale agreement for the said suit plot and prayed for an order of specific performance as he claimed to have paid the purchase price in full. He testified that they had agreed to convert the costs of repairing the Respondent's motor vehicles to cover part of the purchase price, which fact the Respondent denied. On cross examination, the Appellant confirmed that he was to transfer shares of Clauste Motors Limited to Respondent as part-payment of the suit plot. Further, he was supposed to pay stamp duty, registration and transfer fees which he did not. It was his testimony that he had paid Kshs 100,000/= as part payment for the suit plot. Further, there was still a balance of Kshs 100,000/= unpaid for the said suit plot. The Appellant denied owing Kshs. 82,340/- which was claimed by the Respondent in his counterclaim. In the Respondent's testimony, he was categorical that the Appellant was to pay stamp duty, registration and transfer fees for the plots, as per clause 4 of the agreement which he never did. Further, that the Appellant was to transfer shares in Clauste Motors Limited where he was a director, to the Respondent but he reneged on the same. The Respondent in his testimony denied owing the balance of the purchase price and insisted that since the Appellant did not meet the terms of the Agreement for the sale of the suit plot, he declined to sell it.

Upon analyzing the evidence presented as well as the exhibits produced, I note on 18th November 2002 the parties entered into an agreement for the sale (Agreement 1) of Plot Numbers 1 & 2, (also known as L.R. No. 12715/2705 and L.R. No. 12715/2706) respectively to the Appellant. On the same date, the 18th November 2002, the parties entered into another agreement (Agreement 2), which excerpt, I wish to highlight herebelow:

“ 1. The property being sold is ALL THOSE plots marked 3 and 12 being subdivision of Land Reference Number known as 12715/97 and the Vendor is the beneficial owner.

2. The purchase price is Kenya Shillings Four Hundred Thousand (Kshs. 400,000) for the two plots.

4. In consideration of the allocation and transfer of shares in the company known as Clauste Motors Limited whereby the Vendor and Purchaser are shareholders, the Vendor herein do transfer plots 3 and 12 whose value is Kenya Shillings Four Hundred Thousand (Kshs.400,000). The said purchase price is the value of the shares.

11. The Purchaser shall pay for the stamp duty and registration fees on transfer and both parties shall share the Advocates costs”

It emerged in evidence that the Appellant despite paying KShs. 100,000 to the Respondent for the suit plot, failed to pay stamp duty including registration and transfer registration fees for the two previous plots that were transferred in his name. Further, that it is the Respondent who paid for the same and transferred the plots to the Appellant's name. The Appellant further declined to transfer the shares of Clauste Motors Limited to the Respondent as agreed. The Respondent on the other hand declined to transfer the suit plot to the Appellant and insisted he owed him money.

On the prayer for specific performance, I will proceed to highlight various cases in respect to the same.

In the case of Gurdev Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti, where the Court of Appeal in Civil Appeal No. 165 of 1996, held that the underlying principle in granting the equitable relief of specific performance is that, "the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action"

In the case of Thrift Homes Ltd V. Kenya Investment Ltd 2015 eKLR, the court stated that, “specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

Steadman - vs- Steadman (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

See also the cases of Alton Homes Limited & another v Davis Nathan Chelogoi & 2 others [2018] eKLR; Anne Murambi v John Munyao Nyamu & another [2018] eKLR and Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited (2006)

eKLR.

In associating myself with these decisions and applying them to the circumstances at hand, I find that since the Appellant never presented any deed of variation to the second agreement, to confirm the terms of the said second agreement were challenged, he is actually the one who reneged on the terms of the said Agreement in respect to the suit plot. Further, there was also no evidence presented nor any addendum to the Agreement to confirm that they were to convert the repair costs of the Respondent's motor vehicles to the purchase price. I note in his evidence the Appellant even admitted that he failed to pay stamp duty, transfer including registration fees and never transferred the shares of Clauste Motors Limited to the Respondent as had been agreed. From the facts presented in the lower court, I find that the Appellant failed to adduce evidence to prove payment of the full purchase price for the suit plot. To my mind, I find that the Appellant did not have clean hands when he filed the suit and some of his actions amounted to misrepresentation. It is against the foregoing that I find the Appellant has not fulfilled the requirements for specific performance and hence was not entitled to the orders as sought.

From my analysis above, I find that the Learned Magistrate did not err in law and in fact in holding that the Appellant had not made out a case for specific performance. I find that the Learned Magistrate was right when he declined to make a finding that the purchase of plot No. Land Reference 12715/2707 was a separate and concluded transaction. Further, I find that the Learned Magistrate did not err in law and fact in failing to acknowledge the common linkage between the cause of action and issues between the Appellant and Respondent in the payment for services rendered. To my mind, it seems the Appellant wanted the Learned Magistrate to rewrite the terms of the contract between them in respect to the suit plot, which the trial court could not do. I find that the Learned Magistrate was right to find that the purchase price for plot No. Land Reference 12715/2707 was not fully settled.

In the circumstance, I find the Appeal unmerited and will dismiss it with costs. I will proceed to uphold the Judgement of **Hon. A G Kibiru** Chief Magistrate at Machakos Chief Magistrates' Court delivered on the 20th November, 2018.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST JANUARY, 2022

CHRISTINE OCHIENG

JUDGE