REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ELC APPEAL CASE NO. 10 OF 2021

JOEL MWANGANGI KITHURE.....APPELLANT

VERSUS

PRISCAH MUKORIMBURI.....RESPONDENT

***(Being an appeal from the Judgement and order of the Honourable* Hon. P. N. Maina (Mr.) SPM) delivered on the 21st November, 2019 in Marimanti S.P.M.C. Environment & Land Court No. 17 of 2012 (formerly Marimanti P.M. C.C. NO.12 of 2015)**

JUDGEMENT

A. INTRODUCTION

1. The appellant **JOEL MWANGAGI KITHURE** filed this appeal against the Judgement of Hon .P.N Maina (Mr.) SPM) delivered on the 21ST November, 2019 and set out the following 4 grounds of appeal:

i. *The learned magistrate erred in law and fact in failing to grant the prayer for specific performance when the Appellant deserved the same.*

ii. *The learned magistrate erred in law and in facts in finding that the Appellant breached the sale agreement when the evidence is clear that it was the Respondent who actually breached the agreement.*

iii. *The Learned Magistrate erred in Law in fact in failing to give the alternative remedy of refund of the purchase price even when the defendant had conceded that she was willing to refund the same.*

iv. *The Learned Magistrate erred in Law and in fact in deciding the whole case against the Law and the weight of evidence.*

2. The Appellant prays for the lower court judgment to be set aside and his prayers in the plaint be allowed with costs.

BACKGROUND OF THE APPEAL

3. The gist of the case in a nutshell is that the Appellant in his plaint pleaded that on or about 19th March 2012 the Appellant entered into a sale agreement with the Respondent over Land Parcel No.882 Chiakariga "B" Adjudication section measuring 2 acres at a consideration price of Kshs. 180,000/= which the Appellant paid in full. The Appellant further pleaded that in breach of the said agreement the Respondent refused to transfer the suit land to him. The Appellant's claim against the Respondent was for the transfer of the suit land to him plus the costs of the suit.

4. The Respondent in her defence denied the Appellant's claim against her and stated that it was the Appellant who had actually breached the sale agreement between them by failing to pay the consideration in time. The Respondent pleaded that the prayer sought by the Appellant was not available granted that the penalty clause in the agreement did not provide for specific performance in the event of breach, but provided for payment of damages by the party in breach. The Respondent further contended that the Appellant was entitled to a refund of Kshs.130,000/= granted that the land the subject of sale was agricultural land which is subject to section 6 and 7 of the Land Control Act.

5. The learned magistrate considered the matter and held inter alia that the parties therein were bound by the terms of their contract and therefore means that both the Appellant and the Respondent failed to live up to their obligations under the contract and failed to perform their respective obligations.

6. The learned magistrate also determined the issue of whether the Appellant was entitled to an order for the transfer of LR NO.882 CHIAKARIGA 'B' ADJUDICATION SECTION as prayed, that is, an order for specific performance. The trial court held that it could not

determine who the bona fide owner of the suit land was and thus it was not prudent to grant specific performance as it was not clear who was the eventual owner of the suit land and hence the Respondent might not be in a position to deliver the necessary documents to effect the transfer of the suit land to the Appellant. Lastly the court held that it was clear that the Appellant had failed to prove his case against the Respondent on a balance of probabilities. The trial magistrate accordingly upheld the Respondent's defence and dismissed the Appellant's case.

7. It is on that background that the Appellant being aggrieved filed the appeal herein.

8. The appeal was ventilated by way of written submissions which were duly filed by the Appellant and the Respondent dated the 9th of December 2021 and the 20th of January 2022 respectively.

SUBMISSIONS BY THE APPELLANT.

9. The appellant submitted on Ground number 1 that the Learned Trial Magistrate erred in Law for not granting a prayer for specific performance. The appellant avers that the Appellant entered into an agreement for sale of 2.0 Acres to be excised from parcel of land number 882 CHIAKARIGA "B" Adjudication section. That the consideration was Ksh. 130,000/=. That the Appellant paid Ksh. 130,000/= in two monthly installments of Ksh. 65,000/= on the 19th March 2012 and another sum of Ksh. 65,000/= Paid on the 29th June 2012 and acknowledgement receipt issued. That he further paid a sum of Ksh. 50,000/= for the semi-permanent structure. It was submitted that these facts were not denied by the Respondent in her defence as she admitted entering into a sale of land agreement on the 13th March 2012.

10. The appellant submitted that it is evidently clear that the parties herein entered into a sale of land agreement and that the Appellant performed part of his bargain by paying the entire consideration amount. That the explanation advanced by the Respondent for not transferring is that the High court at Chuka had issued a stay order restraining any further adjudication in the area. The appellant contends that that cannot be considered as a breach on the part of the Appellant. That unless the order of the High Court had declared that the subject parcel did not belong to the Respondent, the Respondent could not cite frustrations of the agreement by external force, unproduced and unsubstantiated order of the High court.

11. The appellant further submitted that Section 6 and 7 cited by the Respondent only applied where it is land registered under the Land Registration Act and that the same cannot apply to unregistered land. From the foregoing it was Appellant's submissions that it is clear that when the court established that there was a valid agreement, specific performance should have been issued since the agreement was in compliance with section 3(3) of the Law of Contract Act.

12. The appellant further contends that from the judgement of the Learned Magistrate, it is not in doubt that the Appellant paid the entire decretal sum of Ksh. 130,000/= and as indicated in the agreement that he declared valid. That the learned magistrate only faults the Appellant for paying the balance of the decretal sum on the 29th June 2012 instead of 30th May 2012 without amending or reviewing the agreement. The Appellant submitted that blaming the Appellant entirely for being 30 days late in paying the balance of purchase price was unfair and unjust to the Appellant. That if the Respondent wanted to repudiate the agreement on that basis alone, she should have declined to receive the balance of Decretal sum from the Appellant, adding that from the Respondent's pleadings and evidence, her only reason for not performing part of her bargain was unsubstantiated and unproduced moratorium by Chuka High Court, not delay in payment. The Appellant submitted that by blaming the Appellant for breach of agreement the trial magistrate erred in Law and facts.

13. The appellant contends that the Respondent conceded and admitted in her pleadings having received the contractual sum of Ksh. 130,000/= but denied receipt of Ksh. 50,000/= from the Appellant and that parties are bound by their pleadings. The Appellant has submitted that for the interest of justice, the trial court should have at least ordered for refund of the money advanced to the Respondent. That in her witness statement the Respondent had stated that the Appellant should be awarded the purchase price together with damages for breach of contract.

14. The appellant submitted that the trial magistrate should have compelled the Respondent to comply with her consciousness and pay the Appellant what she had offered.

15. The appellant submitted that he had tabled evidence and documents that were all admitted by the Respondent. That it was clear from the evidence on record that there was a contract that the Appellant performed part of his bargain by paying the entire purchase price as agreed and on the other part, the Respondent despite enjoying the Appellant's money took no initiative of transferring the agreed 2.0 Acres of land to the Appellant.

16. The appellant submitted that the Respondent did not single out any action she took to perform her contractual obligation and was clearly at fault for breaching the agreement. That by blaming an order of Chuka High Court as the reason for non-performance was an afterthought and an explanation of a fraudster who is enjoying and benefiting from her own mistakes.

17. The appellant relied on the case of; **Steadman –vs- Steadman [1976] AC 536,540** in which the court held; ***" if one party to an agreement stands by and lets the other party incur expenses or prejudice his position on the faith of the agreement being valid, he will not be allowed to turn around and assert the agreement is unenforceable."***

18. The appellant prayed that the Appeal be allowed and the judgement of the lower court be set aside and substituted with an order of specific performance.

19. The appellant also cited the case of **Macharia Mwangi Maina & 87 others –vs- David son Mwangi Kagiri[2014] eKLR in which the Court of Appeal** held as follows:-

"This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice."

THE RESPONDENT'S SUBMISSIONS

20. The respondent submitted that the appeal filed by the appellant raises two important issues. The first is whether the court has powers to grant an order not specifically pleaded in the plaint and the second is the interpretation of Order 42 Rule 2 of the Civil Procedure Rules. The respondent submitted that the Appellant never prayed for specific performance nor for an alternative remedy of refund of the purchase price and there cannot be a basis for awarding the same.

21. The respondent contends that no matter how many times the matter is canvassed before court, the appellant is not entitled to specific performance or a refund of the purchase price and that the court has no basis to grant the same.

22. The respondent cited the case of Reliable Electrical Engineers V/S Mantrac Kenya Limited (2006) eKLR wherein Justice Maraga (as he then was) stated:

"The jurisdiction of Specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy…"

23. On the second issue as to whether the appellant met the requirement of order 42 rule 2, the Respondent submitted that the appellant ought to have filed certified copy of the decree and or order appealed against. That the absence of attaching certified copy of the order the appellant ought to have gone extra mile of even attaching letter addressed to the Magistrate's court requesting for the said certified copy to justify its absence. The Respondent submitted that such failure is fundamental and renders the Appeal invalid.

24. Lastly the respondent submitted that cost follows the event and persuaded the court to grant the respondent costs upon dismissing the appeal.

ANALYSIS & DETERMINATION

25. I have perused and considered the Record of Appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. The issue for determination as I can deduce from the grounds of appeal are whether the learned magistrate erred in law and fact when, by his judgment dated 21st November, 2019, he disallowed the Appellant's prayer for specific performance and whether the learned magistrate should have ordered for the refund of the purchase price paid.

26. In their written submissions, counsel for the Respondent raised an issue that the appeal has not met the requirement of Order 42 Rule 2 of the Civil Procedure Rules. Counsel for the Respondent submitted that the appellant ought to have filed a copy of the decree and or order appealed against. It is their submissions that such failure is fundamental and renders the appeal incompetent and invalid. I will dispense with this issue first before I deal with the main issues.

27. The issue raised by the Respondent's counsel is that the appeal is incompetent for the reason that the appellant failed to file a certified copy of the decree appealed against. To answer the Respondent's argument, I am guided by the finding of the Court of Appeal in the Case of ***Emmanuel Ngade Nyoka –VS- Kitheka Mutisya Ngata Civil Appeal No. 63 of 2016 [2017] eKLR*** where it was held:

"starting with the first issue, it is true that the record of appeal before the first appellant court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the Civil Procedure Rules…

…the Respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

"The word "decree" has been defined by the Civil Procedure Act Cap 21 to include judgment. Infact the Civil Procedure Act as provided at Section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up".

This is the essence of the proviso to the definition of the term "decree". According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. consequently, he reasoned the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon court to go for substantive justice as opposed to technicalities. Further, holding otherwise would have run counter to the overriding objective as captured in section 1A and 1B of the Civil Procedure Act. Finally, one would ask what prejudice did the Appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any."

28. Whereas the Appellant failed to annex a certified copy of the decree, he did attach a certified copy of the judgment which would suffice in the absence of a certified copy of the decree. Further, it has not been shown what prejudice the Respondent suffered by the failure to annex the certified copy of the decree. I therefore find that the Appellant's failure to annex the certified copy of the decree cannot be the basis for dismissing the appeal.

29. Turning to the substantive issues herein, it is common ground that on 19th March, 2013, the Appellant entered into a sale agreement with the Respondent over land parcel No. 882 Chiakariga 'B' Adjudication Section measuring 2 acres. The Appellant averred that the agreed consideration was Kshs.180,000/= which he allegedly paid in full. I have perused the said sale agreement, and I do agree with the trial court's finding that it is clear that the consideration stated in the said sale agreement is Kshs.130,000/= for both the soil and the developments thereon. That is also the amount the Respondent admitted receiving.

30. In the plaint, the Appellant's claim against the Respondent was for an order of transfer of the suit land. The Appellant's evidence was that the Respondent simply failed to honour the terms of the sale agreement by refusing to transfer the suit land. The Respondent on her part stated that it was the Appellant who failed to honour the terms of the sale agreement by failing to pay the balance of the purchase price on or before 30th May, 2012 as agreed. From the evidence on record, it is clear that the stated balance was paid on 29th June, 2012 and not on or before 30th May, 2012 as stipulated in the agreement. As clearly observed by the learned magistrate, there was no evidence of any amendments to the terms and conditions of the said agreement. Therefore, the late payment of the balance of the purchase price resulted in a breach on the part of the Appellant.

31. On the other hand, the Respondent in her evidence attempted to give the circumstances that led her not to transfer the suit land to the Appellant. The Respondent stated that she could not transfer the suit land because there was a court order stopping the adjudication process and also because of an objection made by her son against the transfer. In my view, had the Appellant met her obligations as stipulated in the sale agreement, the excuses raised by the Respondent would have been of no effect. However, the Respondent also blamed the Appellant for failing to honour the timelines set out in the sale agreement. I am therefore in agreement with the findings of the learned magistrate that both parties failed to live upto their obligations. In my considered view, the learned magistrate was justified in declining to grant the order for specific performance.

32. The other issue to determine is whether the learned magistrate should have ordered for the refund of the purchase price. In her statement of defence, the Respondent contended that the Appellant was entitled to a refund of Kshs. 130,000/= granted that the suit land was agricultural land which was subject to Section 6 and 7 of the Land Control Act. In response, the Appellant filed a Reply to Defence in which he joined issues with the Respondent. This, in my view, was enough reason for the learned magistrate to order for a refund.

33. This court is alive to the doctrine of unjust enrichment. The Respondent would clearly be enriching herself injustly by retaining the land and the money paid to her by the Appellant. Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a Defendant to retain such a benefit would result in his/her being unjustly enriched at the Plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice. This was the emphatic language of Madan, JA (as he then was) in the case of ***Chase International Investment Corporation and another –v- Laxman Keshra and others (1978) KLR 143 at page 154*** where it was firmly and unequivocally laid down that in Kenya, a claim may properly be founded for restitution where it would be unjust to allow a party to retain the benefits of an unjust enrichment. The learned Judge stated inter alia:

> ***"woe unto the day when it is lost sight in Kenya, which would also be contrary to the spirit of section 3(c) of the Judicature Act. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights on the basis of technical objections and artificial distinctions oblivious to justice and substance."***

34. And on the authorities approved by Madan and Wambuzi, JJA (as they then were) in the case of ***Chase International Investment Corporation (supra***), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the Defendant has been enriched by the receipt of a benefit, (2) that he has been so enriched at the expense of the plaintiff to allow the Defendant to retain the benefit in the circumstances of the case. These subordinate principles of the general principle of unjust enrichment are interrelated. They clearly show the nature of restitutionary claims, and how people incur restitutionary obligations.

35. In other words, the idea of unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the Plaintiff. The gist is that a Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to make restitution. Lord Goff of Chievely and Professor Gareth Jones state in their monumental treatise, The Law of Restitution, 5th Edition (1998) at PP 11-12:

> ***"Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."***

36. In the case of ***Willy Kimutai Kitilit –vs- Michael Kibet [2018] eKLR***, the Court of Appeal held inter alia, that:

> ***"The doctrine of equity are part of our laws although Section 3 of the Judicature Act subordinates common law and the doctrine of equity to the constitution and written law in that order. Section 3(3) of the Law of Contract Act and Section 38(2) of the Land Act as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppe is omitted but as the decision in Yaxley –vs- Gotts [2000] ch. 162 (Yaxley's case) on which the court in Macharia Mwangi Maina decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppe overlaps and both are concerned with equity's intervention to provide relief against unconscionable conduct."***

37. In the above case, the Court of Appeal further stated:

> ***"There is another stronger reason for applying the doctrine of constructive trust and proprietary estoppe to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which builds the courts in interpreting any law (Article 10(1)(b). Further, by Article 159(2)(e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the constitution…"***

38. In the present case there is no denial that the purchase price was paid. The Respondent clearly pleaded that the Appellant was entitled to a refund of the purchase price of Kshs. 130,000/=. I do not therefore see any reason as to why the learned magistrate did not apply the doctrine of equity to grant refund as admitted by the Respondent. In my opinion, the learned magistrate erred by failing to make an order for refund for justice to prevail in this case, particularly taking into account that the Respondent admitted to the same in the defence.

39. In the result, I find merit in the appeal and hereby set aside the judgment of the learned magistrate delivered on 21st November, 2019 and substitute it with an order of refund of Ksh.130,000/= to the Appellant. Considering the circumstances of this case, I order that parties bear their own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY FEBRUARY, 2022 IN THE PRESENCE OF:

C/A: Ann

Mrs. Otieno for Respondent

N/A for Ms. Kijaru for Appellant

C. K. YANO,

JUDGE.