



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E015 OF 2021

BAOBAB DEVELOPMENT GROUP LIMITED.....APPELLANT

VERSUS

JASPER MWENDA IKIARA.....RESPONDENT

(Appeal from the Judgment and Decree of the Honorable S.G. Gitonga (Mrs) Resident Magistrate at the Chief Magistrate' Court at Milimani delivered on 12th February 2021 in Milimani CMCC 1787 of 2016)

BETWEEN

JASPER MWENDA IKIARA.....PLAINTIFF

VERSUS

BAOBAB DEVELOPMENT GROUP LIMITED.....1ST DEFENDANT

ALLAN GEORGE NJOGU KAMAUT/A A.G.N.

KAMAU ADVOCATES.....2ND DEFENDANT

JUDGMENT

1. This Appeal originates from the judgement of the Resident Magistrate, Hon S.G. Gitonga (Mrs) as delivered on 12th February 2021 in CMCC No 1787 of 2016. On some preliminary aspect, following the Notion of Motion application dated 12th March 2021, this Court differently constituted granted the following orders:

THAT until further orders by the court, there shall be a temporary stay of execution of the judgement delivered by Hon S.G.Gitonga RM on 12th February 2021 in Milimani CMCC No 1787 of 2016 on condition that the applicant deposits in court a sum of Kshs 1,500,000 as security within 21 days from the date hereof in default of which the stay lapses automatically without reference to the court.

2. In the Memorandum of Appeal dated 12th March 2021, the appeal was made on the following grounds:

i. The learned Magistrate erred in law and fact in finding that the Appellant had breached the pre-contract agreement between the Appellant and the Respondent.

ii. The learned Magistrate erred in law and misdirected herself in failing to find that the Respondent breached the pre-contract between the parties and therefore was not entitled to refund of the deposit.

iii. The Appellant was not given a chance to call its evidence and the Court thereby arrived at an erroneous decision that the Appellant breached the contract between the parties.

iv. In finding that the Respondent was entitled to full refund of Kshs 1,500,000/- the learned magistrate misdirected herself in law and in fact by re-writing the contract between the parties.

v. The learned Magistrate erred in law and in fact by refusing or failing to consider the pleadings filed and the evidence on record thereby arrived at an erroneous and/or wrong decision that the Appellant had breached the contract and was liable to refund the Respondent the sum of Ksh. 1,500,000/-

3. It is upon the following grounds that the Appellant sought the following orders:

i. This Appeal be allowed;

ii. The judgement delivered on 12th February 2021 be set aside in entirety;

iii. The costs of the Appeal be awarded to the Appellant.

4. The Appellant and Respondent filed written submissions on 9th December 2021 and 14th January 2022 respectively. The Court fixed the matter for highlighting of submissions on 17th February 2022.

5. The crux of the Appeal is that it challenges the Court's finding that the Appellant breached the contract entered into on the 12th January 2012. Referring to page 153 of the Record of Appeal, it was highlighted that the court acknowledged that the pre-contract agreement was binding yet proceeded to consider evidence not presented.

6. It was further submitted that at page 160 of the record, the Respondent failed to present any evidence that the Appellant breached the contract.

7. In their written submissions, the Appellant highlighted that the court is duty bound to evaluate and review evidence adduced in the trial court. For this, they relied on the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, that:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

8. It was further averred that the Court formulated its own facts and misapprehended the facts by stating it as a "well-marinated idea". Additionally, the Court unilaterally framed new issues for determination which issues were neither pleaded nor responded to by the Appellant. Therefore, the learned Magistrate abandoned her role as an independent and impartial adjudicator and descended into the arena of the conflict.

9. The Appellant further stated that the sale agreement was duly drafted and sent to the Respondent for review. However, the Respondent did not revert with comments or reservations whatsoever, as is the usual practice in contract negotiations. Further, without any justifiable cause, he wrote a letter seeking the deposit amount. This should have been interpreted as a breach by the Respondent and not by the Appellant.

10. According to the Appellant, considering that the transaction was not completed on account of the Respondent's breach, the court misdirected itself in its finding. Moreover, the Respondent had not alleged coercion, fraud, or undue influence yet the Court found that the Appellant had more bargaining power than the Respondent.

11. It was further alleged that the decision of the Court had infringed on the Appellant's constitutional right to fair trial. Relying on the Court of Appeal case of Prime Salt Works Ltd v Kenya Industrial Plastics Ltd (2000) LLR 986 where it was held that Courts to be bound by the two cardinal principals "**no man shall be judge in his own case and that no man shall be condemned unheard**".

12. It was submitted that the trial magistrate rewrote the pre -contract between the parties herein and failed to give effect to the clause of default. This was by the failure to uphold that the Respondent breached the terms of the contract and was thus liable to forfeit 10% of the purchase price. For this they relied on the Court of Appeal case of Pius Kimaiyo Langati vs Cooperative Bank of Kenya (2017) Eklr where it was held that:

"We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

13. The Respondent, in relying on the G.K Macharia case & Another v Lucy N. Mungai [1995] eKLR, submitted that the court had discretion to formulate its own issues to make a decision. For this reason, they submitted that there was no infringement on right to fair trial.

14. In the written submissions, Counsel submitted that the pre- contract advice is evidence of antecedents written negotiations and expectations of parties and as such it is not to be interpreted or used for the purpose of construing the words of an intended written contract by the parties to comprehensively record the terms of the agreement which they intended to make. The pre- contract advise merely established an objective background of facts which were known to the parties and the subject matter of the contract at the point of negotiations. It did not in any way express the entire agreement between the parties.

15. On the question of the court formulating its own issues while determining a matter, Counsel referred to the Court of Appeal case of G.K. Macharia & another v Lucy N. Mungai [1995] eKLR where it was stated that:-

“It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from these provisions the Court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties.”

16. The Respondent testified that from his due diligence, he found out that the property did not exist. According to the Respondent, the Appellant had refused to take him to view the property as earlier agreed and neither was he furnished with a copy of the certificate of lease during the negotiations. Further, the Appellant failed to produce any evidence to controvert the Respondent’s claim as to the non-existent of the property and therefore any reasonable person was likely to conclude from the Appellant’s conduct, that the property indeed never existed and the development of the villa’s was a mere idea prescribed on paper.

17. With regard to infringement of right to fair trial, it was submitted that when the matter proceeded for defense hearing on 21.11.2019 and 22.01.2020 the Appellant’s advocates chose to call one witness who was the 2nd Defendant and thereafter closed it case, after which parties were directed to file their closing submissions. It was submitted that the learned magistrate accorded the Appellant an equal opportunity to be heard and this being an adversarial litigation where all parties were represented, it was left to the advocates to present their cases before the court and not for the court to direct parties on how to conduct their respective cases and which witnesses to call. For this reason, the Appellant cannot argue that there was an infringement of its right to fair trial.

18. Further counsel submitted that the trial court did not re-write the contract for the parties however, in her analysis of the evidence and facts placed before her, the court while quoting the case of *LTI Kisii Safari Inns Ltd. & 2 Others –vs- Deutsche Investitions –Und Entwicklungsgesellschaft & Others [2011] eKLR* acknowledged that this was a situation that required the court to exercise its equitable power and protect the Respondent from being taken advantage of.

19. Counsel for the Respondent concluded her submission by urging this Court to dismiss the Appeal with costs.

20. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In *China Zhongxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR* it was stated as follows:

“The appropriate standard of review established in these cases can be stated in three complementary principles:

- a) First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
- b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
- c) It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”***

21. The High Court in the *China Zhongxing Construction Company Ltd* case (*supra*) cited the Court of Appeal for East Africa in *Peters vs Sunday Post Limited [1958] EA 424* where Sir Kenneth O’Connor stated as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484.”

22. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

23. I have considered the grounds of the appeal, the oral and written submissions by the parties. I have also considered the authorities relied on by the parties. The issues which in my opinion arise for determination can be summarized as follows:

- i. Whether there was any breach of the pre-contract agreement dated 17th January 2012?***
- ii. Whether the appellant was denied a chance to present its evidence before the trial court?***
- iii. Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought?***
- iv. Who should bear the costs of the Appeal?***

Whether there was any breach of the pre-contract agreement dated 17th January 2012.

24. The Appellant case before the trial court was that, the Respondent had failed to approve the sale agreement and had repudiated the contract and demanded a refund of the deposit. According to the Appellant, the Respondent having breached the contract was supposed to forfeit the 10% of the purchase price as was stipulated in the agreement.

25. The Respondent testified that indeed there was a pre-contract advice agreement which was signed by both parties. The pre-contract advice was in respect to the purchase of property known as Villa Number 39 erected on Title No. 3402 situated at the Village Malindi for a purchase price of Ksh 7,500,000/-

26. It was the Respondent's case that he paid a deposit of Ksh 1,500,000/- vide cheque No. 000414 and 000415. He also stated that he did not sign the sub lease agreement due to the discrepancies between the precontract advice and the sub lease agreement. Owing to the said discrepancies, he was entitled to a refund of his deposit of Ksh 1,500,000 that had been paid to the Appellant.

27. In the instant case, save for the pre-contract agreement or advice dated 17th January 2012, there was no any other agreement that was executed by the parties. It is not in doubt that the pre-contract agreement was drafted by the Appellant and the same was to be subject to another contract which was never executed by the parties. In the circumstances, I would agree with the decision of the trial court that the parties were bound by the existing pre-contract agreement in so far as ascertaining the conduct of the parties, the intention of the parties and the circumstances under which the pre-contract agreement was made.

28. As per the evidence that was adduced during trial, the Respondent testified in his evidence in chief that he refused to sign the agreement because there were variances between the pre-condition and the agreement. One of the discrepancies was that the sub lease was not specific on its operation date. The second one was that the deposit paid was to be held by the lawyer as a stakeholder and not to be utilized as part of the purchase price, the third one was that a different financier had been proposed. The Respondent further testified that the Appellant declined to take him to the site even after he had requested to be shown its location. It was his testimony that he conducted due diligence on his own, which entailed travelling to Malindi, hiring a surveyor and visiting the land's registry. According to the Respondent, after undertaking due diligence, he established that the land did not exist. He also stated that he not issued with any development plans and certificate of lease. According to the him, these were crucial irregularities which informed his decision not to sign the agreement.

29. A pre-contract agreement usually involves the payment of a deposit by the purchaser. The deposit under such an agreement is usually refundable if the developer does not complete the unit within the time frame and specification set out in the contract or as the parties may agree.

30. Although a pre-contract agreement may give rise to an order of specific performance, depending with how it has been drafted, the same must comply with the provisions of Section 3(3) of the Law of Contract Act for an order of specific performance to issue in matters to do with land. That is why the parties were to execute another agreement as was to be the case herein.

31. Having perused the entire record of appeal and having evaluated the evidence that was adduced during trial, it is evident that the Appellant was in breach of the pre-contract agreement. There was no evidence adduced by the Appellant to challenge the testimony that was adduced by the Respondent and as such it is the finding of this court that trial court made no error its judgment that the Appellant had indeed breached the pre-contract agreement.

Issue No. ii

Whether the appellant was denied a chance to present its evidence before the trial court?

32. The Appellant also submitted that the trial court erred in not giving them a chance to call their evidence. It was also stated that on 13th November 2018 the Counsel for the Appellant informed the Court that the substituted witness statement was prepared. However, the Court did not give any directions on the same and on 21st October 2021 when the matter came up for defence hearing, its witness was not heard. According to the Appellant, this led the court arrive at an erroneous decision by failing to consider their evidence.

33. Counsel further submitted that **Article 50 of the Constitution of Kenya 2010** entrenches the right to fair hearing to wit;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

34. Counsel also referred to **Article 25 (c) of the Constitution** on the right to fair trial and the case of ***Prime Salt Works Ltd v Kenya Industrial Plastics Ltd (2000) LLR 986*** the Court of Appeal of Kenya held that: ***“The implicit in the concept of fair adjudication lie two cardinal principles, namely that no man shall be judge in his own case and that no man shall be condemned unheard. These two principles, the rules of natural justice, must be observed by courts save where their application is excluded or by necessary implication.”***

35. On this issue, the Respondent disputed the fact that the Appellant was not accorded a fair hearing and that their right to fair trial was violated. Counsel submitted that the matter proceeded for defence hearing on 21st November 2019 and 22nd January 2020 wherein the Appellant's Advocates chose to call only one witness who was Allan George Njogu Kamau an Advocate and they subsequently closed their case.

36. However, upon perusal of the record, this Court finds that the Appellant was properly accorded an opportunity to attend the trial and adduce their evidence. It is therefore the finding of this Court, that this ground of appeal cannot stand.

Issue No. iii

Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought?

37. It was submitted by the Appellant that the trial court misapprehended the law and facts in finding that the Appellant had breached the pre-contract agreement between the Appellant and the Respondent. Further, the trial court re-wrote the contract between the parties thus descending into the arena of the conflict. Counsel also submitted that the right to a fair hearing is a fundamental principle of natural justice and by failing to give the Appellant the opportunity to lead its evidence, the court seriously misdirected itself. Therefore, the judgment against the Appellant should not stand.

38. In the Respondent's pleadings that were filed at the lower court, they had prayer for judgment to be entered against the Appellant for Ksh 1,500,000/- being the refund for the purchase price, interest on the same and costs of the suit. After the hearing of the suit, the learned trial magistrate delivered her judgment on 12th February 2021 where she found that the Respondent had proved her case against the Appellant on a balance of probability and entered judgment for the Respondent as against the Appellant as follows; payment of refund of Ksh 1,500,000/- together with interest at court rates and costs of the suit and interest.

39. In view of the foregoing, it is the finding of this court that the trial magistrate did not misdirect herself in granting the reliefs that were sought by the Respondent since the Respondent had proved her case to the required standard. It is therefore not open for this court to interfere with the same.

Issue No. iv

Who should bear the costs of the Appeal?

40. By dint of the Provisions of **Section 27 of the Civil Procedure Act, Chapter 21**, Laws of Kenya, costs are at the discretion of the Court. Nevertheless, costs do follow the event unless there is good cause to deprive the successful party of such costs. I do not see any reason to depart from the same. In respect of the subject matter the order that commends itself to me to grant, is that the Appellant shall bear the costs of this Appeal.

Final orders

41. I am satisfied that the learned magistrate addressed herself properly on the law and took account into all relevant factors in arriving at her decision. Having addressed all the issues that were synchronized herein before, I now conclude as hereunder;

i) This appeal is devoid of merit and it is dismissed.

ii) Costs of this Appeal be and are hereby awarded to the Respondent.

Judgment accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF MARCH 2022

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Appellant.

Ms. Nyabenge for the Respondent.

Court Assistant; Caroline Nafuna