



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELCA 5 OF 2019**

JANE NJOKI KARANJA

JOHN MUGO KARANJA (suing through **their Attorney**).....1<sup>ST</sup> APPELLANT

CECILIA MUTHONI KURIA.....2<sup>ND</sup> APPELLANT

VS

PAUL KIHARA KURIA.....1<sup>ST</sup> RESPONDENT

GRACE WAITHERERO KURIA.....2<sup>ND</sup> RESPONDENT

*(An appeal from the judgement of Hon A M Maina (SPM) delivered on the 10/12/2018, Thika CMCC No. 468 OF 2006)*

**JUDGEMENT**

1. The Appellant instituted this appeal vide a Memorandum of Appeal dated 14/01/2019 against the trial Court Judgment rendered on 10/12/2018 in **Thika CMCC Civil Suit No. 468 of 2006**. The said memorandum of appeal contains nine grounds of appeal THAT; -

**a. The Learned Magistrate erred in law and in fact in refusing to award costs of the suit in favor of the Appellant despite unequivocal admission by the Respondent that the Appellant fully performed her part of the agreement.**

**b. The Learned Magistrate erred in law and in fact by failing to appreciate that the suit was filed due to the Respondents' failure to perform their part of the contract.**

**c. The Learned Magistrate erred in law and in fact by failing to appreciate that the suit was filed due to the Respondents' failure to restate the Appellant for the failure to complete the agreement between them.**

**d. The Learned Magistrate erred in law for declining to award costs despite finding that the Respondents refused to obtain the relevant consent from the Land Control Board.**

**e. The Learned Magistrate erred in law and in fact in that she failed to follow the laid down principles in awarding interests and costs of a suit.**

**f. The Learned Magistrate erred in law and in fact by failing to consider the heavy resources expended by the Appellant in prosecuting the suit for 12 years when the Respondent had mounted a strong opposition against the suit.**

**g. The Learned Magistrate erred in law and in fact by failing to award interest on the sum of Kshs. 600,000.00 paid by the Appellant despite finding that the Respondent received the said funds as far back as 2005.**

**h. The Learned Magistrate erred in law and in fact for failing to consider the time value of money which has been lost between 2005 when the same was paid to the Respondents and 10<sup>th</sup> January 2019.**

**i. The Learned Magistrate erred in law and in fact when she failed to give any justifiable reasons for failure to award interests and costs of the suit.**

2. The Respondents opposed the appeal. Further, they filed a cross-appeal (*sic*) dated 30/1/2019 through the firm of A.G Opiyo & Company Advocates who acted for them in the trial Court. However, on 13/5/2020 the Respondents filed a notice of change of advocates appointing the firm of Kiarie Njuguna & Company Advocates to act for them in place of the former firm.

3. By way of a brief background, the Appellant sued the Respondents vide a plaint dated 12/6/2006 seeking to enforce a sale agreement for purchase of land parcel known as LOC. 16/KIGORO/278 (hereinafter referred to as the suit land). The Appellant prayed for judgement *inter alia* that;

**a. Specific performance do issue for the Respondents to apply, attend and obtain Land Control Board consent to transfer title the suit land,**

**b. In the alternative, a refund of the entire purchase consideration already paid together with 30% breach of contract penalty in consonance with paragraph 7 of the 17<sup>th</sup> February 2005 for sale and all outgoings.**

**c. Costs and interests from the date of the commencement of the sale transaction.**

4. The suit was contested and set down for hearing. The Appellant's case vide a power of attorney donated to her by Jane Njoki Karanja and John Mugo Karanja was that the sale agreement for purchase of the suit land was frustrated for lack of Land control board consent. This was despite payment of Kshs. 600,000/= out of the agreed Kshs. 900,000/= being the purchase price. The Appellant testified as the sole witness and produced the sale agreement, proof of payments as exhibits in support of her claim.

5. On the other hand, the Respondents filed their statement of defence dated 12/7/2006 and denied existence of any valid sale agreement as alleged. That if any such agreement existed, it was tainted with illegalities thus unenforceable. They listed particulars of illegality including accusing the Appellant for attempting to evade payment of stamp duty as required in law, bribing the police to coerce them to transfer the suit land, possessing an irregular power of attorney. The Respondents averred that any purported sale agreement was breached by the Appellant by instigating unlawful arrest and prosecution of the 1<sup>st</sup> Respondent in Thika criminal case no. 5712 of 2005.

6. The 1<sup>st</sup> Respondent equally testified singly as DW1. He acknowledged receipt of Kshs. 600,000/- from the Appellant but blamed the Appellant for frustrating the intended transfer of the suit land. That failure to attend LCB on their part was due to a subsequent agreement to misrepresent the purchase price as Kshs. 500,000/- to save on stamp duty payable. That he feared committing himself to that agreement because the same would mean the purchase price was already paid in full and in excess of Kshs. 100,000/=. DW1 relied on the documents listed in his List of Documents dated 12/1/2016 which he produced as exhibits.

7. Upon hearing the parties and evaluating the evidence before it, the trial Court found that the impugned sale agreement dated 17/2/005 was null and void mainly for three reasons; the 2<sup>nd</sup> Respondents had not signed it as required by Section 3 of the Law of Contract Act, that the balance of Kshs.700,000/- was payable after obtaining LCB but the same was not done instead a further Kshs. 400,000/- was paid and lastly that the second agreement made on 16/3/2005 vitiated the earlier agreement. The payment of Kshs. 600,000/- having been conceded, the Court ordered a refund of the same within 30 days failing which it would attract interests at Court rates. Each party was ordered to bear their own costs hence the instant appeal.

8. Upon admission of the appeal, the parties were directed to canvass the appeal by way of written submissions. It appears that the Respondents abandoned their cross-appeal since directions were not taken on it. Their submissions were also silent on the cross-appeal.

9. The firm of **Waithaka Ngaruiya & Associates** filed submissions dated 8/9/2021 on behalf of the Appellant.

10. The Appellant recounted the genesis of the suit and drew three issues for determination. On whether this Court can interfere with the exercise of the trial Court discretion, reliance was placed on Section 27 of Civil Procedure Act that generally costs follow the event unless the Court or judge shall for good reason otherwise order. That having duly performed her part but the Respondents failed to obtain the Land Control Board Consent thereby necessitating filing of the suit, the trial Court did not give a good reason for declining an award of costs.

11. Secondly, the Appellant reiterated that there would be no suit had the Respondents performed their end of the bargain. Thus she was rightfully entitled to costs as prayed.

12. Lastly, on the issue of interest on the decretal sum, the Appellant cited Section 26 of Civil Procedure Act. She opined that the trial Court ought to have considered the time lapse since payment of Kshs. 600,000/= and monetary inflation thereof. The decisions in the cases of **Stanley Kaunga Nkarichia v Meru Teachers College & Another [2016] eKLR** and **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR** were cited.

13. Conversely the Respondent filed submissions dated 17/9/2021 through the firm of **Kiarie Njuguna & Company Advocates**. Supporting the trial Court findings, the Respondent pointed out that indeed costs follow the event as submitted by the Appellant. The event in this case was construed as the order for specific performance that was declined. That the alternative was for refund of the deposit of the purchase price alongside the 30% penalty. That accordingly the Appellant's claim failed and if costs were to follow the event, it is the Respondents who ought to have been awarded costs. They were emphatic that Courts have in similar contracts of sale were void and could not confer any benefit including an award for costs. The case of **Kerugoya ELC Appeal No. 2 of 2015 Peter Omoke Omonyi v Charles Kamau Muthoni and Nairobi ELC Appeal No. 38 of 2014 Joseph Gichuki Kariuki & 3 others v Robert Kimani** were cited in support of that proposition.

14. On the issue of interests, the Respondent submitted that as a result of the Court's finding that the sale agreement was void, the penalty clause cannot be enforced as envisioned. The Respondents maintained that the Appellant had not demonstrated how the Learned magistrate fell into error in arriving at her decision. They implored the Court to dismiss the appeal with costs.

15. The sole issue for determination is whether the appeal is merited.

16. As a first appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal is as stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123**.

17. The guiding parameters for this Court are therefore, on first appeal; the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, 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 lastly 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.

18. In this case, as I understand the appeal, the Appellant is not disputing the trial Court's finding that the sale agreement was void and thus unenforceable. Undoubtedly, an order of specific performance decrees the due completion of a contract in its proper form. As a common law principle, the Court will not decree specific performance where, if at trial, evidence is tendered to the effect that the vendor is unable to convey the land. The bone of contention is on the issue of interests for Kshs. 600,000/- and costs.

19. A glean of the prayers in the Appellant's plaint listed in **para. 3** above shows that the alternative prayer 2 sought 30% penalty as agreed by the parties. The sale agreement was found to be void and thus a party cannot seek to enforce a clause therein.

20. In addition to that, the prayer for the penalty and interests are fundamentally different. As rightly pointed out by the Respondent, the Appellant did not seek interests on the amount of Kshs. 600,000/- already paid. It is trite that parties are bound by their pleadings and Courts cannot rewrite contracts for parties.

21. The third prayer was couched in the foregoing terms; **"costs and interests from the date of the commencement of the sale transaction."** Even if this Court was to expand the interpretation of this prayer, the Appellant's argument would not stand. This is because, according to the parties, only Kshs. 200,000/= was paid on the date of the impugned sale agreement and not Kshs. 600,000/= as contended now. The balance was to be paid way later after completion of the transfer.

22. Lastly, on the prayer for costs, Section 27 of the Civil Procedure Act provides;

**"27. Costs**

**(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.**

**(2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."**

23. The Section is clear that an award of costs is in the discretionary preserve of the Court. In this case the suit was dismissed and the Learned Magistrate directed each party to bear its own costs. The Appellant has argued that since it is the Respondent who failed to obtain Land Control Board consent and therefore prompting the Appellant to file the suit, the Appellant ought to have been awarded costs. As already indicated, it is not open for this Court to overturn the trial Court finding on the agreement being void. Be that as it may, the other reason for voiding the contract was that it was not executed in line with Section 3(3) of the Law of Contract Act.

24. Ultimately, it is the view of the Court that the Appellant has not demonstrated any manifest error on the part of the Learned Magistrate's decisions and thus the appeal fails.

25. Costs to the Respondent.

26. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 25<sup>TH</sup> DAY OF MARCH 2022 VIA MICROSOFT TEAMS PLATFORM.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Appellant – Ms Gichio

Respondent 1 – Mrs. Githaiga

Respondent 2 - Tumu

Ms. Phyllis – Court Assistant