REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO.1 OF 2021

JOHN MUNENE KABUGUA…..……..…… APPELLANT

VERSUS

DANIEL PIRI MWATATA……..……..…..…...……1ST RESPONDENT

LELAH BOMA……..……..…..……2ND RESPONDENT

(Being an appeal against part of the Judgment of the Senior Principal Magistrate (Hon. J M Kituku) dated 28th November, 2020 in Kilifi in Senior Resident Magistrate's Court Case No. 337 of 2017, John Munene Kabugua vs Daniel Piri Mwatata and Lelah Boma)

JUDGMENT

This appeal arises from a Judgment dated 28th November 2020 by Hon. J M Kituku (SPM) in ***Kilifi SRM Case No. 337 of 2017***. The appellant herein being aggrieved by part of the Judgment lodged a Memorandum of Appeal dated 26th November 2020 and listed the following grounds:

1. The Honourable Magistrate has erred in fact and in law in failing to appreciate that there was interlocutory Judgment against the 1st Respondent and that the pending issue against the 1st Respondent was on assessment of damages.

2. The Honourable Magistrate has erred in fact and in law in failing to grant prayer for specific performance of the contract for the sale of a house without land at Mtomondoni and finding that the alternative prayer for refund was adequate.

3. The Honourable Magistrate has erred in fact and in law in awarding alternative prayer for refund despite the glaring evidence that the appellant was entitled to orders of specific performance.

4. The Honourable Magistrate has erred in fact and in law in failing to appreciate all the facts on record and failing to apply the principles of the law of contract and breach.

5. The Honourable Magistrate erred in fact and in law in failing to appreciate the principles of granting specific performance.

6. The Honourable Magistrate erred in fact and in law in finding that the appellant had made out a case for specific performance in the first instance.

7. The Honourable Magistrate erred in fact and in law in reaching a wrong conclusion of granting the house to the 2nd Respondent after correctly finding that the 2nd agreement between the 2nd Respondent and James Mwatata and Nelly Chuma was unenforceable for want of capacity.

8. The Honourable Magistrate erred in fact and in law in failing ti award loss of the rental income in the sum of Kshs. 15,000/- to the appellant by the 1st and 2nd Respondents from June, 2017 until payment in full when there was interlocutory judgment against the 1st Respondent.

9. The Honourable Magistrate erred in fact and in law in failing to appreciate the law relating to contracts under section 3 of the Law of Contract Act.

10. That the Learned Magistrate erred in both law and fact by failing to consider, analyse and appreciate the law and appellant's

written submissions.

11. The Learned Magistrate erred in both law and fact in being biased against the Appellant.

A brief background to this Appeal is that by an Amended Plaint dated 31st October 2017, the Appellant herein sued the Respondents in the lower court seeking for orders *inter alia* specific performance and in the alternative a refund of the purchase price, damages for breach of contract and loss of income from June 2017. According to that Plaint, the Appellant entered into an agreement for sale with the 1st Respondent, of a Swahili house at Mtomondoni area on 19th September 2016, for the price of Kshs 750,000/-. Upon completion of the purchase price, the Appellant learnt that the 2nd Respondent had equally purchased the house from James Mwatata and Nelly Mbodze Chuma, and that she was even in the process of renovating the same.

Subsequently, the trial Magistrate entered Judgment in favour of the Appellant in the following terms:

i. Refund of Kshs. 750,000/- with interest from the date of filing the suit until payment in full.

ii. Damages for breach of contract – Kshs 500,000/-

iii. Costs and interest from the judgment date and payment in full.

iv. 1st Defendant will also pay costs of the 2nd Defendant.

This Appeal was first filed before the High Court which directed that the same be transferred to this court upon determination of a Preliminary Objection on jurisdiction filed by the 2nd Respondent. On 22nd September 2021, the parties herein agreed to have the appeal canvassed by way of written submissions which were duly filed.

APPELLANT'S SUBMISSIONS

Counsel submitted on the grounds of the Appeal and stated that she would reiterate the contents of her submissions before the Learned Magistrate (page 65 and 112) of the Record of Appeal and the authorities cited therein.

On the issue of Interlocutory Judgment, Counsel submitted that once Interlocutory Judgment was entered against the 1st Respondent, it meant that the 1st Respondent was 100% liable, and that the only issue left for the trial court to determine was assessment of damages.

Ms Osino relied on Order 10 rule 7 of the Civil Procedure Rules, 2010 which provides:

"Where the Plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in form No. 13 of Appendix A, enter interlocutory Judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders."

Counsel also cited the cases of Nzole Mwachiti Lugo v Mrima Hamisi Pole HCCA No. 57 of 2011 at Mombasa, and Martha Shighadai v Kenya Power & Lighting Co Ltd & another[1988] eKLR and submitted that the issues for determination on liability as against the 2nd Respondent ought to have been analyzed in light of the entry of Judgment as against the 1st Respondent and the Learned Magistrate erred in failing to do so and proceeded to analyze the issues as though the 1st Respondent had defended the suit.

Ms Osino relied on the case *of* ***Nickson Muthoka Mutavi v Kenya Agricultural Research Institute [2016] eKLR*** and submitted that an appellate court could only interfere with quantum if the trial court took into account irrelevant factors leaving out relevant factors; where the award was too high or too low as to amount to an erroneous estimate and where the assessment was not based on any evidence.

It was Counsel's submission that the trial Magistrate erred in refusing to grant an order of specific performance yet there was an Interlocutory Judgment against the 1st Respondent and that since the 2nd Sale Agreement was unenforceable it was erroneous to find that an order of specific performance wound cause hardship to the 2nd Respondent yet he was not a party to the contract. That the finding by the court that the 2nd Respondent was a bona fide purchaser for value without notice hence would suffer undue hardship lacked any legal basis as her agreement with third parties had already been found to be enforceable by the court.

Ms Osino further submitted that the court therefore erred in opting for the alternative prayer when the Appellant had already established the basis of being granted the prayer for specific performance in the first instance.

In addition, Counsel submitted that the Trial Magistrate failed to appreciate the fact that the 2nd Respondent failed to discharge the burden of proof of payment of the purchase price as envisaged under Sections 107, 109 and 112 of the Evidence Act. And further cited the case of ***Tima Farouk Athman v Faiza Ahmed Salim & 4 others [2018] eKLR***.

On loss of rental income, Counsel submitted that there was clear corroboration of the Appellant's testimony by the 2nd Appellant who confirmed that she collected monthly rent at the rate of Kshs. 15,000 and that the Trial Magistrate erred in finding that that there was no

proof of rent.

On the issue of vacant possession, counsel submitted that the court erred in finding that since specific performance had been declined, then the Appellant was not entitled to vacant possession. Counsel therefore stated that the Appellant was entitled to prayers of specific performance, vacant possession and rent in view of the evidence on record.

Counsel submitted that they were not contesting the award of damages of Kshs 500,000/ and urged the court to allow the appeal as prayed.

2ND RESPONDENT'S SUBMISSIONS

Counsel reiterated the evidence on record in the lower court and submitted that the Learned Magistrate evaluated the evidence before him and arrived at the correct conclusion that specific performance in the circumstances of the case would cause undue hardship to the 2nd Respondent. Further that there was no evidence before the trial court to show any wrong doing of the 2nd Respondent to warrant the drastic orders sought by the Appellant in this Appeal against the 2nd Respondent.

Counsel urged the court to dismiss the appeal with costs to the Respondent

ANALYSIS AND DETERMINATION.

This is an Appeal against part of the Judgment delivered by the lower court where the Appellant was aggrieved by the court not granting an order of specific performance as prayed in the plaint.

In the case of ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*** the Court of Appeal stated as follows regarding the duty of first appellant Court: -

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -***
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> ***"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

The court is cognizant of its role as a first Appellate court in this matter which is to consider the evidence, revaluate and draw its own conclusions depending on the evidence presented before it from the record.

Similarly, in the case of ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, the Court of Appeal stated that;

> ***"An appeal to this Court from a trial by the High 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 allowances in this respect"***

The Appellant submitted on 11 grounds of Appeal and the main ground that the court will deal with is whether the court erred in granting an alternative prayer of refund and not the main prayer of specific performance, whether the court erred in finding that the loss of rental income had not been proved and the issue of vacant possession.

The evidence on record from the trial court was that the Appellant entered into an agreement dated 19th September 2016 for sale of a house with the 1st Respondent at a consideration of Kshs. 750,000/- which he paid in full vided in three instalments of Kshs. 400,000, Kshs. 220,000/- and Kshs. 130,000 respectively.

The 1st Respondent did not participate in the trial but the 2nd Respondent told the trial court that she purchased the same house from one James Mwatata at a consideration of Kshs. 1,400,000/-. She produced a Sale Agreement dated 24th October 2016. It was her evidence that she started to collect rent immediately and to renovate the house. On cross examination, she confirmed that although she did not have a bank slip, she made payment through a bank transfer on 24th October 2016.

DW2, James Mule Chari testified that he witnessed the said agreement between the 2nd Respondent and the said James Mwatata. That he witnessed the bank transfer at KCB Mtwapa. He added that he became the 2nd Respondent's agent to collect rent upon the purchase.

It is on record that the suit house was sold to two different people, the Appellant and the 2nd Respondent. The trial court also found and held that the said James Mwatata having been a witness in the first agreement between the Appellant and the 1st Respondent was estopped from claiming ownership of the same house in the 2nd agreement. The court found that the 2nd agreement was unenforceable.

This is where trouble started when the court found that the second agreement was unenforceable and went ahead and considered that an order of specific performance would cause hardship to the 2nd Respondent whose agreement had been faulted.

Was the Trial Magistrate right in considering the hardship that would be caused to the 2nd Respondent whose agreement was found to be unenforceable. It is on record that the Appellant was the first to enter into an agreement for sale of the house of which he paid in full.

A party must satisfy the principles for grant of specific performance as was laid down in the case of ***Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited (2006) eKLR,*** wherein Justice Maraga (as he then was) stated that:-

> ***"Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles"***
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> ***"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. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant."***

The Appellant complied with the agreement dated 19th September 2016 whereby he paid the full purchase price as was required. The 1st Respondent reneged on his obligation and sold the suit property to the 2nd Respondent which agreement the court found to be unenforceable. Having found that the 2nd Respondent's agreement was unenforceable, it followed that the 2nd Respondent should not have benefited from an unenforceable agreement. The court further found that the Appellant had proved his case and ordered for a refund of the purchase price together with damages of Kshs 500, 000/-.

The trial court having found that the agreement did not suffer from any illegality, should have proceeded to grant the main prayer which was specific performance. Even though the court has discretion to grant a suitable order in the circumstances of the case where a party seeks for alternative prayer, the discretion must be exercised judiciously.

It is a common occurrence that parties usually claim for alternative prayers in case the first prayer is not granted or tenable. It follows that the parties in such cases are interested in the main prayer and the alternative prayer as a fallback position.

This being a purchase of a property and the moment the Appellant fulfilled the terms of the agreement he was entitled to the suit property to the exclusion of others. On the issue whether the Appellant was entitled to rental income, rental income is a special damage which must be specifically pleaded and proved.

The Appellant specifically pleaded for Kshs 15, 000/- for rental income illegally collected from the suit property from June 2017 of which the 2nd Respondent admitted to collecting after the purported purchase of the suit property. The Appellant stated in his amended witness statement that he discovered the second sale when he went to collect rent in May 2017. It is evident therefore, that the Appellant has never benefited from the rent of the said house. The fact that the 2nd Respondent produced evidence and admitted to receiving rental income of Kshs 15,000. from the suit property of which is not disputed, the Appellant therefore was entitled to such rental income.

However, the trial court declined to issue this order for reasons inter alia that there was no basis for granting the same when specific performance was not allowed. According to the trial court, an order for refund of the purchase price and interest thereon was sufficient to cover the same.

I have considered the grounds of Appeal, the submission by counsel and find that the Learned Magistrate erred in not granting an order of specific performance on the ground that it would cause hardship to the 2nd Respondent whose agreement was found to be unenforceable. The 2nd Respondent should not have benefitted from an agreement that was faulted to be null and void.

The upshot is the Appeal has merit and is therefore allowed as prayed.

The 2nd Respondent to give vacant possession within 45 days from the date of this Judgment failure to which eviction notice to issue.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.