REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 29 OF 2018

SILAS MUTUMA KABWIMA...APPELLANT

VERSUS

JOSPHAT NTONGAI M'ITHUNGAI...RESPONDENT

(Being an appeal from the Judgment of Hon. C. Kemei (R.M.) delivered on 8th October, 2013,

in Maua CM CC No.238 of 2010)

JUDGMENT

A. PLEADINGS

1. The appellant in the lower court had sued the respondent for breach of contract of sale dated 14.6.2006 of 2 acres out of **L.R Kirima Kieru/Kiolu/536** where he had paid **Kshs. 47,000/=** out of **Kshs. 60,000/=** agreed price but the respondent declined to transfer the land. He sought for specific performance and liquidated damages of **Kshs. 180,000/=** plus costs and interest or in the alternative a refund of **Kshs. 47,000/=.**

2. The respondent filed a defence stating the appellant took vacant possession and the transfer had been effected but the appellant had failed to clear the balance as agreed or at all. Instead, he counterclaimed for damages for breach of the contract.

B. TESTIMONY

3. The appellant told the court the respondent visited his house offering to sell him a shamba at **Kshs. 60,000/=** after which they visited the lawyer's offices who drew an agreement dated 14.8.2006 for **L.N No. Kirima Kieru/Kiolu/563** where he paid a deposit of **Kshs. 34,000/=.**

4. After 4 years without the transfer, he stated a demand letter dated 10.8.2010 was written but on visiting the lands office at Athiru, he established the parcel number offered for sale did not exist hence demanded for a refund. He stated he was only paid **Kshs. 31,000**/= hence the reason he claimed for damages of **Kshs. 180,000/=** as agreed. He produced the sale agreement and the demand letter as **P exh 1 and 2.**

5. PW2 told the court he was sent by the appellant to seek for the refund from the respondent after the aborted sale agreement. He talked to the respondent together with his father and some elders who he agreed to make a refund. He insisted the respondent did not transfer any land to the appellant as alleged or at all.

6. The respondent failed to offer his defence on 25.7.2013.

C. THE GROUNDS OF APPEAL.

7. The appellant complains the trial court erred in law and in fact in finding that the error on the prayers fatal without regard that the proper date was pleaded in the suit; dismissed the claim on a mere typing error and or a technicality; denied him substantive justice and ruled against the weight of the law and available evidence.

8. The claim by the appellant was based on breach of the land sale agreement dated 14.8.2006. The terms of the agreement were that the consideration would be **Kshs. 60,000/=** payable in two instalments of **Kshs. 47,000/=** at the signing of the agreement and **Kshs. 13,000/=** balance upon transfer.

9. The appellant's submissions dated 19.10.2021 are that the court rightly found that the respondent owed the appellant **Kshs. 22,000/=** but instead of awarding him the monies, dismissed the case on a typographical error in the prayers over a date of 14.8.2006 instead of 14.6.2021 which was mere error amendable under **Section 100 of the Civil Procedure Act**. Reliance was placed on ***Joseph Francis Makokha –vs- Raphael Simiyu Wekesa & Another [2009] eKLR***.

10. On the other hand, the respondent submits parties are bound by pleading and issues flow from pleadings as held in ***Independent Electoral & Boundaries Commission & another –vs- Stephen Mutinda Mule & 3 others [2014] eKLR.***

11. It is submitted the trial court was right since the appellant failed to produce the exhibits – sale agreement and that the trial court rightly declined to enforce the sale agreement as it had ignored and or disregarded any evidence not flowing from the pleadings and could not interpret the intention of parties outside the specific pleadings as held in ***Raila Amollo Odinga & Another –vs- Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR.***

12. Further, it was submitted the evidence tendered did not support the pleadings and no amendments to the pleadings were made before the conclusion of the suit as per **Order 8 Rule 3 Civil Procedure Rules** to correct the alleged sale agreement. Reliance was placed on ***Galaxy Paints Co. Ltd –vs- Falcon Guards C. Ltd [1998] eKLR and David Sironga Ole Tukai –vs- Francis Arap Muge & 2 Others [2014] eKLR*** on the proposition that a judgment must stem from issues arising from the pleadings and that a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made.

13. In the instant case, it was submitted the trial court was right not to adjudicate on the enforcement of a non-existing sale agreement purportedly breached and not proven.

14. It is submitted if the appellant could have pleaded the correct date of the alleged sale agreement, the only remedy available would have been a refund of the outstanding balance and not liquidated damages and not specific performance since the suit parcel had been found to be non-existence. Reliance was placed on ***Thrift Homes Ltd –vs- Kays Investments Ltd [2015] eKLR*** on the proposition that, specific performance could not issue if the sale agreement had some defect, mistake or illegality.

15. This being an appeal of the first instance, the court is mandated to rehear or reappraise itself on the lower court record and come out with independent findings and conclusion bearing in mind the trial court had the opportunity to hear and see the witness first hand. **See *Peter –vs- Sunday Post Ltd (1958) EA 424.***

16. Having gone through the pleadings, the evidence and submissions, the issues for determination are:-

> **i. If the pleadings disclosed a cause of action against the respondent.**
>
> **ii. If the pleadings had material defects.**
>
> **iii. If the pleadings material defects were curable under the law.**

17. The appellant filed a plaint dated 1.9.2010 in which he pleaded the sale agreement dated 14.8.2006 and its details at paragraphs 3 and 4 and the particular breach of paragraph 5 namely receiving **Kshs. 47,000/=** out of **Kshs. 60,000/=** and failing to give vacant possession after the report contrary to clause 2 and 3 of the agreement, failing to transfer the title, failing to seek for land control board consent.

18. He sought for damages for breach as per clause 7 of the agreement, specific performance or in the alternative, a refund of **Kshs. 47,000/=.**

19. The respondent entered appearance, put in a defence and defence to counterclaim admitting the sale agreement, receipt of **Kshs. 47,000/=,** sated he handed over vacant possession but the appellant refused to clear the balance of **Kshs. 13,000/=.**

20. At paragraph 5 of the counterclaim, he admitted the sale agreement was made on 14.8.2006 which was a typing error and that they had agreed about liquidated damages of **Kshs. 180,000/=** from whoever would breach the sale agreement.

21. He averred the appellant had sought for a refund of the deposit. **Kshs. 10,000/=** was refunded and the appellant vacated the land, demanded the balance of **Kshs. 37,000/=** through clan elders and hence **Kshs. 15,000/=** was paid through an agent leaving a balance of **Kshs. 22,000**/=. He however counterclaimed for damage for breach of contract dated 14.8.2010.

22. The appellant filed a reply to defence and defence to counterclaim dated 24.11.2010, stating he was always willing to pay the balance of **Kshs. 13,000/=,** denied receiving any refund or being put into possession.

23. The record indicates the respondent filed a list of witnesses and list of documents dated 6.4.2011. The appellant filed a list of documents dated 19.4.2011 and attached the two documents which he produced as **P exhs 1 and 2** being the sale agreement dated 14.8.2006 and demand letter dated 10.8.2006.

24. On the first issue, it is evident the parties dispute was over the sale agreement dated 14.8.2006 which was said to have been breached through counter accusation by both parties.

25. Paragraph 3 of the plaint sets the date of the sale agreement as 14.8.2006 whereas the prayer talks of 14.6.2006. The respondent's defence at paragraph 5 sets the date as 14.8.2006 while the list of documents dated 19.4.2011 puts the date as 14.8.2006. The sale agreement

is also attached in the aforesaid list. Similarly, PW1 produced the original sale agreement and the demand letter.

26. In my view therefore, I see no variance at all and or mistake and or confusion. The error on the month in the prayer at the bottom of the plaint was in my view not fatal at all but was curable **suo moto.**

27. The typing error in my view did not occasion any prejudice or injustice to the respondent who proceeded to file a defence and counterclaim to the plaint despite the typing error. **See *Joseph Francis Makokha –vs- Raphael Simiyu Wekesa & Another [2009] eKLR, Central Kenya Ltd –vs- Trust Bank Ltd & 5 others [2000] eKLR, Ali Okata Watako –vs- Mumias Sugar Co. Ltd [2012] eKLR, Julius Nzioki Wambua –vs- Mohamed Salim Khamis & another [2020] eKLR, Printing Industries Ltd & Another –vs- Bank of Baroda [2017] eKLR.***

28. Consequently, the defect was minor and curable under the law given the court has wide discretion to do substantive justice under **Sections 1A, 1B of the Civil Procedure Act and Article 159 of the Constitution**. The defect was not so fatal as to go to the core of the suit and or prejudice or occasion injustice to the parties.

29. Turning to the construction of the sale agreement, it is trite law a court of law cannot rewrite a land sale agreement for parties and courts are bound to enforce the will of the parties in a contract as long as the terms and conditions are clear and an unambiguous, valid, and lawful. **See *Julius Njue Makokha –vs- Augustino Kinyua Njiru & Another [2019] eKLR and Thrift Homes Ltd –vs- Kays Investment Ltd [2015] eKLR.***

30. In this case, the appellant pleaded the respondent was to receive **Kshs. 47,000/=** and hand over vacant possession and transfer the land. The sale agreement did not impose timelines. It however imposed duties on each of the contracting parties. The respondent acknowledged receipt of **Kshs. 47,000/=** at the signing of the agreement on 14.8.2006. Possession was to be taken forthwith. The appellant claimed he was not handed over vacant possession.

31. In the demand letter dated 10.8.2010, the appellant stated there was discovery that the land did not exist. The respondent did not deny such a fundamental breach. In his witness statement, the respondent stated that when he went to collect the balance, the appellant told him his land was far so he needed his money back and hence started refunding the same until the balance remaining was **Kshs. 22,000/=** as at the filing of the suit.

32. In paragraph 4 of the agreement, the parties stated there would be transfer and registration in favour of the appellant without undue delay.

33. In my considered view therefore, it is obvious there was breach of the sale agreement by the respondent soon after the agreement was executed of clauses No. 2 and 3 by failing to hand over vacant possession yet he took a substantial deposit.

34. There is no evidence that the respondent gave the appellant a copy of the title deed and or made subdivisions to remove the appellant's two acres from the five acres of land he was selling. The respondent did not testify as to when he went to hand over vacant possession.

35. Even after there was inordinate delay in handing over vacant possession and or causing the subdivision and transfers, there is no evidence parties ever sought to make the agreement work.

36. Further, after the demand letter dated 10.8.2010 which was written over 4 years after the sale agreement, there was no evidence from the respondent that he honoured the request by either rectifying the default breach by refunding the money.

37. My finding therefore is that it was the respondent who breached the sale agreement by not handing over vacant possession and title documents such as the land control board consent and transfer in favour of the appellant. **See *Gitonga Wambugu Kariuki & 2 Others –vs- Eliud Timothy Mwamunga [2018] eKLR.***

38. Consequently, and following breach, the appellant was perfectly entitled to give notice which he did to rescind the agreement and seek for a refund together with liquidated and damages as agreed.

39. The next issue to determine having found the respondent to have breached the sale agreement is the consequences thereof.

40. In determining the issue, the court must fall back to the question of whether time was or not of essence and if it was whether or not compliance notice was issued. **See *Housing Company of East Africa Ltd –vs- Board of Trustees of National Social Security Fund & another [2019] eKLR.***

41. The respondent was to hand over vacant possession immediately and thereafter get the balance of the purchase price upon effecting the transfer. He never met the two conditions. He was notified of the breach. Therefore, the appellant was in my view entitled to seek for the refund of the deposit paid.

42. As regards damages for the breach, the same was pleaded and prayed for in the plaint. Evidence was also lead to that effect by PW1.

43. The purpose of a rescission of an agreement is to restore parties to their original position before the execution of the contract. **See *Karanja Mbugua & Another –vs- Mary Bin Holdings Co. Ltd [2014] eKLR.***

44. The consequences of the breach were held in ***Mwangi –vs- Kiiru [1987] eKLR*** to result to a secondary obligation to pay damages. The appellant sought for **Kshs. 180,000/=** as agreed in the sale agreement.

45. In ***Capital Fish Kenya Ltd –vs- Kenya Power & Lighting Company [2016] eKLR***, the court held as a general legal principle, courts do not normally award damages for a breach of contract unless the respondent was shown to have oppressive, outrageous, insolent or highhanded.

46. In this case, the respondent failed to hand over vacant possession or effect the transfer on time or at all. The consequence of non-performance had been agreed upon in writing at Kshs. 180,000/=. In my view, it was fair and reasonable amount. The appellant has had to file a suit to seek the refund even after reaching out to the respondent for an out of court settlement through the intervention by the clan.

47. In the premises, I allow the appeal. the appellant's claim in the lower is hereby allowed save the refund shall be adjusted to Kshs. 22,000/=.

48. Costs to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16TH DAY OF MARCH, 2022

In presence of:

Gichunge for appellant - present

Mutembei advocate for respondent – absent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE