



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 03 OF 2020**

**JEREMIAH KIAMBI.....APPELLANT**

**VERSUS**

**JOSEPH MURORI.....1<sup>ST</sup> RESPONDENT**

**FRANCIS MUNYUA.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. S. Ndegwa (P.M.)*

*delivered on 18<sup>th</sup> December, 2019, in Maua SPM CC No.42 of 2015)*

**JUDGMENT**

**A. PLEADINGS**

1. The appellant in a plaint dated 15.9.2015, sued the 1<sup>st</sup> respondent in the lower court for breach of constructive trust to transfer to him **L.R. No. Abothuguchi/Kijja/1459** which he sold to him on 4.12.2012 and purported to resell to the 2<sup>nd</sup> respondent. He sought for a declaration that the 1<sup>st</sup> respondent was estopped from reneging on the sale agreement, invalidation of any purported sale and transfer of the same parcel of land to the 2<sup>nd</sup> respondent, specific performance and a permanent injunction restraining the respondents from evicting him or in any way whatsoever interfering with his quiet occupation and use of the suit land.
2. The respondents through a joint defence and counterclaim dated 3.11.2018 opposed the suit claiming that the appellant had dishonoured the agreement by refusing to clear the balance of **Kshs. 150,000/=** on time or at all, failure of which he resold the land to the 2<sup>nd</sup> respondent after mutually agreeing with the appellant to surrender the land and thereafter, the 2<sup>nd</sup> respondent took vacant possession.
3. The respondent averred what the 2<sup>nd</sup> respondent bought and was transferred to him was  $\frac{1}{4}$  an acre and not  $\frac{1}{2}$  acre initially sold to the appellant and which was in a different locality hence the appellant had no right to invade it or cultivate on it. They denied that there could be any constructive trust by virtue of breach. They counterclaimed for liquidated damages for the alleged breach and a permanent injunction restraining the appellant from remaining on or interfering with the 2<sup>nd</sup> respondent's parcel of land.
4. In his reply to defence and defence to counterclaim dated 10.4.2017, the appellant denied the alleged breach of a contract and the resultant claimed damages of **Kshs. 420,000/=**.

**B. TESTIMONY**

5. The appellant adopted his witness statement dated 15.9.2015 and produced a sale agreement dated 4.12.2012, mutation form for **L.R No. Abothuguchi/Kijja/1459**, certificate of official search, demand letters dated 24.11.2013 and 1.8.2015 and acknowledgement receipt for payment to the 1<sup>st</sup> respondent as **P exh 1 -5** respectively.
6. He stated he had been in occupation of the suit land with effect from 2012 soon after the sale agreement, built a house thereof and that the 1<sup>st</sup> respondent did not involve him while purporting to resell the suit land to the 2<sup>nd</sup> respondent nor had he refused to pay the balance. Similarly, the appellant insisted he was entitled to the prayers sought and could not be evicted for he was lawfully in the suit land. As regards the balance, the appellant stated he failed to do so after the land was sold to the 2<sup>nd</sup> respondent after 3 years.
7. Further, the appellant denied receiving a demand letter dated 3.3.2017 and ever attending a meeting with the 1<sup>st</sup> respondent at the chief's

office where there was an agreement that he moves out of the suit land as alleged.

8. PW2 told the court he witnessed **Kshs. 40,000/=**, part of the purchase price being paid to the 1<sup>st</sup> respondent on dates he could not recall for half an acre while the appellant was constructing a house on the land.

9. DW1 produced a letter dated 8.9.2015 as **P exh 4**. As a chief of the subject area, he confirmed that the appellant and the 1<sup>st</sup> respondent had visited his offices and agreed that the appellant was to be given a two months to vacate the land in favour of the 2<sup>nd</sup> respondent who had purchased it. He also confirmed that the appellant had constructed a home on the subject land and was still in occupation at the time the suit was filed.

10. DW2 adopted his witness statement dated 16.2.2018 and clarified he sold the land to the 2<sup>nd</sup> respondent lawfully and openly after the appellant failed to clear the balance as agreed in **P exh 1** at the time of the transfer. He testified he had subdivided the land and sold a portion to the 2<sup>nd</sup> respondent and the other ¼ acre to third parties which the appellant did not object to.

11. DW1 insisted that they did not attend any land control board meeting for the requisite consent to transfer the land to the appellant.

12. Further, DW1 stated he did not engage the appellant regarding the sale to the 2<sup>nd</sup> respondent since the notification had been done during the chief's meeting and that he was willing to refund **Kshs. 60,000/=** to the appellant.

13. DW3 adopted his witness statement dated 18.2.2018 and produced the sale agreement dated 15.5.2015 and a chief's letter. He told the court he conducted a search found out the land was in the name of the 1<sup>st</sup> respondent, got his title, he visited the land and found out that the appellant was in occupation. He therefore sought for the chief's intervention for the appellant to vacate the land. At the meeting the appellant requested and was given two months to move out as indicated in **D exh 4**.

14. Further, DW3 stated the appellant had failed to vacate the land and instead chased away his workers. He prayed for the orders sought in the counterclaim.

15. In cross examination, DW3 testified that he did not view the land or take a land surveyor to the land before he bought it though he knew where the land and since he was also guided by mutation form. He confirmed he attended the land control board meeting.

### **C. GROUNDS OF APPEAL**

16. The appellant appealed against the decision rendered by the lower court for failing to appreciate the concept of constructive trust in his favour hence the property could not be available for sale to the 2<sup>nd</sup> respondent; that the court failed to find the sale to the 2<sup>nd</sup> respondent invalid and fraudulent; that the court failed to find it was the 1<sup>st</sup> respondent who had breached the sale agreement and could not be entitled to liquidated damages of **Kshs. 420,000/=**; it failed to find that due to his occupation and developments thereon, he deserved the orders sought and that the 2<sup>nd</sup> respondent should only have been entitled to a refund; it wrongly ordered for specific performance when there was no such contract between him and the 2<sup>nd</sup> respondent; there was no justification to award damages to the 1<sup>st</sup> respondent and lastly holding against the weight of the available evidence.

### **D. WRITTEN SUBMISSIONS**

17. The appellant's written submissions to this appeal are dated 24.6.2021 whereas those of the respondents are dated 28.10.2021.

18. The appellant has submitted that he has given the substantial payment of the purchase price, development of the suit land and the refusal by the 1<sup>st</sup> respondent to go to the land control board meeting and transfer the land, the concept of constructive trust was applicable in his favour. Reliance was placed on ***Edgar Erick Omoto & 7 Others –vs- Samuel Kisorio Moiben Kitale ELC No. 70 of 2014, Willy Kimutai Kitilit –vs- Michael Kibet Civil Appeal No. 51 of 2015.***

19. The appellant further submitted the trial court should have found that the respondents committed acts of fraud which he pleaded and proved hence the 2<sup>nd</sup> respondent had no clear title for he failed to undertake due diligence prior to the sale and that the 1<sup>st</sup> respondent had also failed to disclose prior transactions with him. Reliance was placed on ***Reliable Electronical Engineering Ltd -vs- Mantrac Kenya Ltd [2021] eKLR*** on specific performance.

20. As regards damages, the appellant submitted that as much as he had failed to uphold his part of the sale agreement, the 1<sup>st</sup> respondent had also breached the agreement by declining to receive the balance or visit the land control board and transfer him the land and by awarding the damages same would amount to unjust enrichment.

21. Lastly, the appellant submitted that he had adduced enough evidence to support his claim on constructive trust and proprietary estoppel which the trial court overlooked.

22. On the other hand, the respondents took the view the failure by the appellant to fulfill his end of the bargain, fell short of the threshold of constructive trust and proprietary estoppel.

23. Secondly, it is submitted the 1<sup>st</sup> respondent was justified in taking action of rescinding the contract.

24. Third, the respondents submitted the conduct of the appellant of appearing before the chief and agreeing to vacate the suit land barred the court from invoking the doctrine of constructive trust in his favour.

25. Fourth, the respondents submitted the case law cited by the appellant were distinguishable since the purchasers had paid the full purchase price, and had been put into possession unlike the present suit where he has failed to fully clear the balance. He was therefore approaching the court with unclean hands. Reliance was placed on *Macharia Mwangi & 87 Others –vs- Davidson Mwangi Kagiri [2014] eKLR.*

26. Fifth, the respondents submitted no fraud was proved given that the demand letter dated 3.3.2014 rescinded the sale agreement, parties had appeared before the chief and the appellant opted to vacate the land after two months and therefore could not amount to and allege fraud.

27. Lastly, the respondents submitted there was a clause in the sale agreement on the consequences of breach and the entitlement to the innocent party hence the court was justified in enforcing the contract as written by the parties.

28. This being a first appeal, the court's duty is to rehear and re-appraise itself with the lower court record and come up with its own independent findings and conclusion while aware also the trial court had occasion to hear the witnesses first hand. See *Seascapes Ltd –vs- Develoment Finance Co. of Kenya Ltd [2009] KLR 384.*

29. It is trite law parties are bound by their pleadings and issues flow from the pleadings. See *Stephen Mutinda Mule & 3 Others –vs- Independent Electoral and Boundaries Commission [2014] eKLR.*

#### **E. ISSUES FOR DETERMINATION**

30. Having gone through the pleadings, evidence tendered, the appeal and written submissions, the issues for determination are:

- i. Who between the appellant and the 1<sup>st</sup> respondent breached the sale agreement dated 4.12.2012.**
- ii. What were the implications of the breach.**
- iii. If the 1<sup>st</sup> respondent rescinded the sale agreement and lawfully exercised his rights in entering into a contract with the 2<sup>nd</sup> respondent.**
- iv. If the trial court was justified in dismissing the appellant's suit and allowing the counterclaim.**

31. The basis of the claim herein revolves entirely on the terms and conditions of the sale agreement dated 4.12.2012. There is no dispute **Kshs. 60,000/=** was paid on 4.12.2012 and the balance of **Kshs. 100,000/=** was to be paid on or before the end of February 2013 and **Kshs. 50,000/=** was to be paid to the vendor upon the signing of the transfer forms.

32. The agreement placed the burden of subdividing the mother title on the 1<sup>st</sup> respondent subsequent to which he was to sign and transfer the land to the appellant.

33. On the other hand, the burden of clearing the purchase price was placed on the appellant on its due date namely 28.2.2013 and at the signing of the transfer forms.

34. The appellant pleaded and testified that the 1<sup>st</sup> respondent handed him vacant possession after the signing of the sale agreement and proceeded to subdivide his parcel of land in the process of transferring him his portion.

35. The appellant did not plead and or testified whether he paid **Kshs. 50,000/=** by end of February 2013 which was the second step before the issue of transfer could arise.

36. The sale agreement had no timelines on the transfer but placed the burden on both parties to pay survey fees, stamp duty and all other incidental costs during the transfer in order to secure a title deed in favour of the appellant.

37. At paragraph 8 of the plaint, the appellant averred after the subdivision, the 1<sup>st</sup> respondent agreed to officially transfer **L.R No. Abothuguchi/Kijja/1459** to him.

38. Now the question is if the 1<sup>st</sup> respondent had taken all the necessary steps this far, could he be said to have breached the sale agreement, whereas the appellant had failed to pay **Kshs. 50,000/=** on its due date? The answer can only be no.

39. **P exh 2** clearly indicates that the mutation form was filled in 2014. By that time, the appellant had failed to honour his obligation by end of February 2013. He did not bring forth any evidence on the reasons why he failed to do so.

40. Further, the appellant had the equal duty to take steps towards implementing the sale agreement by booking the land control board meeting, seeking for the transfer form and taking the same to the 1<sup>st</sup> respondent together with the balance so as to claim that the 1<sup>st</sup> respondent was in breach.

41. The appellant was the one entitled to the title deed and hence ought to have shown the diligence to ensure he acquired the title deed.

Instead, it is apparent he waited until the demand letter was served upon him on 3.3.2014. Subsequently, he was taken before the chief on 18.9.2015. Even after the two interventions, the appellant did not give any justification why he did not pay the balance. Similarly, in court, the reason given is that the 1<sup>st</sup> respondent declined the balance.

42. The sale agreement was written and witnessed by the firm of Nyamweya Mosota & Co. Advocates. It is the same law firm which wrote the demand letter dated 3.3.2014. There is no indication that the appellant took the money to the said law firm in February 2013 as agreed or any other day prior to 3.3.2014 and the 1<sup>st</sup> respondent declined to take it.

43. In my considered view therefore, the appellant was the one who breached the sale agreement by failing to pay the balance on its due dates hence frustrating the sale agreement.

44. Coming to the issue of the implications of the breach, as stated above, the timelines for the transfer were not indicated in the sale agreement. The appellant continued with the occupation and developments on the suit parcel up to the filing of the suit. This was close to three years after the sale agreement was signed and almost a year after the subdivisions were undertaken by the 1<sup>st</sup> respondent.

45. The appellant did not plead and or testify on what prevented him from honouring his part of the agreement yet he continued to occupy the land.

46. Clearly, the 1<sup>st</sup> respondent had given the appellant reasonable period of time to comply with the sale agreement. After the notice to rescind the sale agreement was given, the appellant failed to either meet his obligations and or vacate the land.

47. The burden of proof that it was the 1<sup>st</sup> respondent who breached the agreement under **Sections 109 and 112 of the Evidence Act** rested with the appellant. He did not justify why he had failed to honour the terms by February 2013 and subsequently soon after the subdivisions were done.

48. The appellant was behind time in the transaction by 2014. Therefore he should naturally have expected pressure from the 1<sup>st</sup> respondent. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreements.

49. The court has no right or ability to substitute its judgment for that of the contracting parties. When a contract is clear and unambiguous, a court's role is to interpret it as written but cannot rewrite it. A contract of land can only be changed with the agreement of the parties and not unilaterally.

50. In my view, the appellant cannot, in good faith insist that he was not in breach or did not understand the nature of what he signed for on 4.12.2012. The demand letter dated 3.3.2014 and the meeting which took place at the chief's office were indicative of the change of status and the breach. He was put into notice that he had violated the sale agreement. That was in my view a clear repudiation of the sale agreement.

51. Time in my view was of essence in this agreement, both in terms of clause 1 (b) and 5 of the sale agreement. The appellant did not request for any time extension if at all he had difficulties in complying with the payment(s). The appellant's default was clearly pointed out to him in the three scenarios above and cannot therefore turn around and state that the 1<sup>st</sup> respondent was the one in breach and or was on the wrong in rescinding the agreement and entering into a sale agreement with the 2<sup>nd</sup> respondent.

52. In *Housing Company of East Africa Limited –vs- Board of Trustees, National Social Security Fund & 2 Other* [2018] eKLR, the Court of Appeal held, where a purchaser has dragged his feet and has been guilty of unnecessary delay, the vendor was perfectly entitled to serve upon the purchaser a notice upon whose expiry, the sale agreement is treated as rescinded.

53. In this case, it was unconscionable and objectionable that the appellant failed to pay the full purchase price yet he was in possession. He tried to take advantage of his wrong doing which this court should not allow. See *Nabro Properties Ltd –vs- Sky Structures Ltd & 2 Others* [2002] eKLR. Due to this, my finding is the 1<sup>st</sup> respondent was perfectly in order to rescind the sale agreement.

54. On the third issue, the 1<sup>st</sup> respondent did not plead any liquated damages in the counterclaim. The counterclaim also lacked a verifying affidavit. Special damages must not only be pleaded but must be proved. See *Zacharia Waweru Thumbi –vs- Samuel Njoroge Thuku* [2006] eKLR. In the *Syedna & Others –vs- Jamil's Engineering Co. Limited* [1973] 244, the court held the general principles would appear to be where a buyer had paid but was unable to complete a contract, the seller upon rescinding it could sue for damages but must return any money that may have been paid.

55. The appellant was seeking for a declaration of a constructive trust; specific performance; declaration that the subsequent sale to the 2<sup>nd</sup> respondent was subject to his overriding interests and for a permanent injunction restraining the respondent's from evicting him or interfering with his quiet possession.

56. Specific performance is based on an existence of a valid and enforceable contract and cannot be ordered where there was failure to comply making a contract invalid or unenforceable.

57. The appellant had not shown any willingness of being ready and able to complete the agreement leading to its repudiation. In *Gurdev Singh Birdi & Narinder Singh Gatora as Trustees of Ramgharia Institute of Mombasa –vs- Abubakar Madhbuti* [1997] eKLR, the court held; a court of equity would refuse to grant specific performance where the payment of the balance of purchase price had not been paid up to the conclusion of the proceedings.

58. The conduct of the appellant has been such as to render it inequitable for specific performance to be granted in this suit. There was no tender for the balance during the hearing and in this appeal. This by itself confirmed that the appellant has never been ready, able and willing to carry out his part of the sale agreement. He has been guilty of laches for close to ten years since the agreement was entered yet he has been utilizing the land.
59. In *Nabro Properties Ltd –vs- Sky Structures Ltd & 2 Others [2002] 2 KLR 299*, the court held a party seeking specific performance must show and satisfy the court it could comply with and was ready and able: A mere statement was not sufficient evidence to discharge the burden cast upon the appellant.
60. The appellant has contended that he did not pay the balance but at the same time he did not tender to pay. He wants the court to give him the land yet he does not say anything about the balance.
61. The 1<sup>st</sup> respondent on the other has offered to pay the refund of **Kshs. 60,000/=**. He was emphatic that he did not wish to revive the agreement since he sold the land to the 2<sup>nd</sup> respondent after rescinding the agreement subsequent to which the appellant allegedly opted to vacate the land.
62. The appellant stood by and let the 1<sup>st</sup> respondent contract with the 2<sup>nd</sup> respondent based on the fact that the agreement had been rescinded for non-compliance. He cannot therefore turn around and assert the agreement was still enforceable and that there was constructive trust.
63. The sale agreement is dead and buried out of the appellant's non-compliance and repudiation by the 1<sup>st</sup> respondent. See *Ngaira –vs- Cheng'oli (Civil Appeal 397 of 2017) [2022] KECA 80 (KLR) (Civ) (4 February 2022) (Judgment)*.
64. In *Willy Kimutai Kitilit –vs- Michael Kibet [2018] eKLR*, the court held the doctrine of constructive trust and proprietary estoppel was concerned on equity's intervention to provide a relief against unconscionable conduct. The appellant only paid **Kshs. 60,000/=** out of **Kshs. 210,000/=**. This cannot be substantial amount compared to the outstanding balance as submitted by the appellant.
65. Similarly, as indicated above, the conduct of the appellant for the last ten years has not shown willingness to pay the balance for this court to find merit in his appeal. See *Joel Mwangangi Kithure –vs- Priscah Mukorimburi [2022] eKLR*.
66. My finding therefore is, the appellant did not meet the threshold to be entitled to the relief on account of constructive trust and the doctrine of estoppel due to his breach, delay and the failure to tender to clear the balance.
67. Coming to the counterclaim, In *David Sironga Ole Tukai –vs- Francis Arap Muge & 2 Others [2014] eKLR*, the court held, it was an established principle in our jurisdiction that the court will not grant a remedy which has not been applied for and that it will not determine issues which the parties had not pleaded.
68. The respondents failed to plead liquidated damages in the counterclaim and or lead evidence why they were entitled to **Kshs. 420,000/=**. See *Jivanji –vs- Sanyo Electrical Co. Ltd. [2003] 11 E.A 98*. The justification of the same was not made either in the pleadings and or in the evidence. The claim for **Kshs. 420,000/=** as liquidated damage was also not paid for at the time of filing the counterclaim. See *Mithika M'Inoti –vs- Eusabia Nkuene Julius [2013] eKLR*.
69. In *Millicent Perpetua Atieno –vs- Louis Onyango Otieno [2013] eKLR*, the court held that where it was the vendor who wrongfully refused to complete the transaction, the measure of damages was the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor.
70. In this case the sale agreement had a default clause(s). In *Capital Fish Kenya Limited –vs- The Kenya Power & Lighting Company Limited [2016] eKLR*, the court held that whereas the general legal principle was that courts would not normally award damages for breach of contract, there were exceptions such as where the conduct of the respondent was oppressive, highhanded, outrageous, insolent and vindictive.
71. In *Richard Mugaa –vs- Cyrus Muthui Mwaura [2021] eKLR*, the court held it would be unjust and oppressive if a party was allowed to benefit from its own mischief and found general damages of **Kshs. 2,000,000/=** to be excessive.
72. The appellant herein has been in occupation of suit land for 10 years. The 1<sup>st</sup> respondent did not lead evidence on the nature of the benefits he had been denied by the appellant. He however, resold the land in 2015 to the 2<sup>nd</sup> respondent for **Kshs. 160,000/=**. I therefore find no justification for the award of liquidated damages as held by the trial court. The claim of liquidated damages is hereby set aside.
73. In the premises, the appeal succeeds only as regards the claim for liquidated damages.

## **F. FINAL ORDERS**

- a) The lower court finding on the appellant's suit is upheld.**
- b) The respondents' counterclaim is only allowed in terms of prayer 2 with costs.**
- c) The appellant is granted half of the costs to this appeal.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**

**THIS 9<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Mukanguru for appellant - present

Nelima for respondents – absent

Court Assistant - Kanana

**HON. C.K. NZILI**

**ELC JUDGE**