REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 1 OF 2018

JOAN NAMAROME NYONGESA...APPELLANT

VERSUS

EDDAH NABAYI ECHALO...RESPONDENT

J U D G M E N T

(Being an appeal arising from the Judgment of HON. J KING'ORI – CHIEF MAGISTRATE delivered on 5th December 2017 in BUNGOMA CHIEF MAGISTRATE CIVIL CASE No 71 of 2011)

1. **JOAN NAMAROME NYONGESA** (the Appellant) and **EDDAH NABAYI ECHALO** (the Respondent) entered into a land sale agreement on 27th January 2010 with respect to the land parcel **NO EAST BUKUSU/NORTH KANDUYI/4775** (the suit land) then registered in the names of the Respondent and whose title deed gave the approximate area as 0.59 Hectares (1.45 acres). The Respondent was the Vendor and the Appellant the Purchaser and the subject matter was described as follows: -

> ***SUBJECT MATTER: Sale of 0.59 Ha (1½ acres) be transferred from land parcel E. BUKUSU.N. KANDUYI/4775."***

The total purchase price was Kshs. 910,000/= of which a sum of Kshs. 845,000/= was paid in instalments leaving a balance of Kshs. 65,000/=. However, when surveyors went to survey the suit land, it turned out that it measured 0.47 Hectares (1.16 acres) and not 0.59 Hectares (1.45 acres). It was the Appellant's case therefore that the Respondent was aware that the suit land was 0.47 Hectares and not 0.59 Hectares in size. After several meetings aimed at amicably resolving the issue, the Appellant filed a suit in the **CHIEF MAGISTRATE'S COURT BUNGOMA** seeking two main remedies being: -

> **1. A declaration that she was not entitled to pay the balance of the purchase price being Kshs. 65,000/=.**
>
> **2. That the Respondent should reimburse her the sum of Kshs. 121,000/= being the equivalent of the 0.12 Hectares (¼ acre) by which the suit land was less.**

The Respondent filed a defence and Counter – Claim in which she denied owing the Appellant any money adding that when she bought the suit land on 27th February 1994, it was 1¼ acres which she then sold as a whole to the Appellant on 27th January 2010. That it was the Appellant who refused to return the sale agreement to be rectified to read 1¼ acres. That the Appellant paid Kshs. 845,000/= out of the

purchase price of Kshs. 910,000/= leaving a balance of Kshs. 65,000/= which the Respondent Counter – Claimed for together with costs and interest.

2. The matter was heard by two Magistrates. **HON A. AGUTU (RESIDENT MAGISTRATE)** heard the Appellant and her witnesses while **HON. J. KING'ORI (CHIEF MAGISTRATE)** heard the Respondent and her witnesses.

3. In a Judgment delivered on 5th December 2017, **HON J. KING'ORI** found that the Appellant was not entitled to the declaratory order sought nor to a refund of the Kshs. 121,000/=. He dismissed her case and entered Judgment for the Respondent as sought in her Counter – Claim.

4. That Judgment provoked this appeal in which the Appellant seeks to have the same set aside and replaced with an order allowing her suit in the lower Court.

The Appellant has proffered nine (9) grounds of appeal being: -

1. That the learned trial Magistrate erred in law and in fact in dismissing the Appellant's claim before the Court in the face of clear – cut evidence that the subject matter of the dispute L.R NO EAST BUKUSU/NORTH KANDUYI/4775 was not 0.59 Hectares as intimated at the time of executing the agreement.

2. That the learned trial Magistrate erred in law and in fact in dismissing the Appellant's claim before the Court when it was clear that the parties were not at "*CONSENSUS AD IDEM*" at the time of execution of the agreement and hence his Judgment is insupportable in law.

3. That having found that any mistake, if at all, to the acreage of the parcel of land was not attributable to the parties, the learned trial Magistrate erred in law and in fact in dismissing the Appellant's claim before the Court and allowing the Respondent's Counter – Claim.

4. That having found as a fact that the parcel of land transferred to the Appellant was less than 0.59 Hectares and was only in fact 0.47 Hectares, the learned trial Magistrate erred in law in ordering the Appellant to pay the balance of the purchase price of land measuring 1½ acres.

5. That the learned trial Magistrate misapprehended the Appellant's evidence and her witnesses in totality in holding that the Appellant proceeded to register the land in her names upon discovering that the land was less in size than anticipated.

6. That the learned trial Magistrate erred in law and in fact by holding that upon registration as owner of the subject parcel of land, she was estopped from complaining about it's size.

7. That having found as a fact that the parcel of land sold was less and that the land was actually only 0.47 Hectares, which fact must have been within the knowledge of the Respondent, the learned trial Magistrate erred in law and in fact in holding that the Appellant was not entitled to any refund from the Respondent.

8. That the learned trial Magistrate erred in law and in fact in giving Judgment in favour of the Respondent on the Counter – Claim against the weight of the evidence tendered on record.

9. That having found as a fact that the mistake with regards to description of the parcel size was attributable to the Lands Office which was a material fact, the learned trial Magistrate erred in law and in fact in condemning the Appellant to pay costs of the proceedings to the Respondent.

The appeal was canvassed by way of written submissions. These have been filed both by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the Appellant and by **MR KUNDU** instructed by the firm of **SITUMA & COMPANY ADVOCATES** for the Respondent.

5. I have considered the record of appeal and the submissions by Counsel.

6. What runs through the submissions by Counsel for the Appellant is that the parties were not at **consensus ad idem** as to the exact acreage of the suit land when they executed the sale agreement dated 27th January 2010. This is because, among the terms of the agreement was that the suit land was 0.59 Hectares in size yet it was infact only 0.47 Hectares. Therefore, the Appellant should not be made liable to pay the balance of the purchase price being Kshs. 65,000/= and infact she should be refunded the extra Kshs. 121,000/=. Further, that the Respondent knew that what she was selling was land measuring 1¼ acres and not 1½ acres.

7. The Respondent's Counsel has however submitted that the parties' agreement was governed by the Law Society of Kenya Conditions of sale and therefore the Appellant had the duty of inspecting the suit land and the rule of **caveat emptor** applies. That the Appellant proceeded to register the suit land in her names and she is therefore estopped from claiming any breach.

8. As a first appellate Court, my duty includes reconsidering and re – evaluating the evidence that was adduced in the trial Court and drawing my own conclusions in deciding whether the impugned Judgment should be up – held or set aside. I must also bear in mind that I neither heard nor saw the witnesses when they testified and should make due allowance in that respect. However, this Court is not bound to necessarily follow the trial Court's findings of fact if it is clear that the trial Magistrate failed to take account of particular circumstances or probabilities material to the evidence – See **SELLE & ANOTHER .V. ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS 1968 E.A 123, PETERS .V. SUNDAY POST LTD 1958 E.A 424** and also **OKENU .V. R 1972 E.A 32** among others.

9. It is common ground that on 27th January 2010, the parties entered into an agreement whereby the Appellant was purchasing land which was described, as I pointed out at the commencement of this Judgment but which merits repeating: -

"Sale of 0.59 Ha (1 ½ acres) be transferred from land parcel E. BUKUSU/KANDUYI/4775."

The parties were acting in person when they drafted the said agreement. It was therefore a ***"home made agreement"*** and the parties, being lay persons, obviously have never heard of the animal known as Law Society Conditions of sale. It cannot be correct for Counsel for the Respondent to submit, as he has done, that those conditions applied to the agreement in this case.

10. Counsel for the Respondent has also submitted, citing the **caveat emptor** rule, that the Respondent ***"had seen the parcel and having been shown it's beacons, was satisfied by the same"*** and the Appellant cannot now allege a breach of contract having elected not to rescind it. The term **caveat emptor** is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as follows: -

"[Latin 'let the buyer beware']. A doctrine holding that a purchaser buys at his or her own risk."

No doubt the rule of **caveat emptor** applies in agreements for the sale of land just as in other properties. Therefore, where the purchaser relies on his own skills and the land purchased turns out not to be what he bargained for, he cannot later complain. However, where the land, as in this case, was sold by description then there was an implied condition that the land complied with that description.

11. Counsel for the Respondent has also suggested that the Appellant is estopped from claiming a breach of the agreement. The trial Magistrate took a similar view because at page 101 of the typed Judgment, he states that: -

> ***"The defendant on her part has urged me to find that the agreement was drafted by a layman who did not appreciate the arears in hectarage and acreage. He urges further that the buyer was deemed to have effected (sic)the actual size of the land in question and that the land was sold on "as is" basis and further since the plaintiff did not rescind the agreement but went ahead to register the transaction and obtain a title deed, the plaintiff is estopped from claiming a breach of the agreement."***

That cannot be correct because at no time did the Appellant agree to accept a smaller acreage of land than what she paid for. Estoppel is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

> ***"A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. A bar that prevents the relitigation of issues. An affirmative defence alleging good faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance."***

Neither of the above happened in this case. At no time did the Appellant accept a smaller size of land than what she had purchased. If anything, it is the Respondent who is estopped from denying that she sold the Appellant 0.47 Hectares rather than 0.59 Hectares as per their agreement. Indeed, among the documents produced by the Appellant during the trial is a letter dated 23rd November 2010 (ten (10) months after the agreement dated 27th January 2010) and in which the Appellant was complaining that although she had purchased a parcel of land measuring 1½ acres, she had discovered that it was infact 1¼ acres. She therefore sought a refund of the over – payment of Kshs. 121,000/=.

12. In grounds 1, 2, 4 and 5, the trial Magistrate is assailed for dismissing the Appellant's case in the face of clear – cut evidence that the suit land was not 0.59 Hectares and when it was also clear that the parties were not **<u>consensus ad idem</u>** and further ordering her to pay the balance price on the basis that she was estopped from complaining.

13. As I have already indicated above, estoppel could not be invoked to defeat the Appellant's claim. When she purchased the suit land, it was described as 0.59 Hectares and not 0.47 Hectares and after the anomaly was discovered, she made a complaint to the Respondent seeking a refund. She did not acquiesce to the smaller acreage.

14. The parties were similarly not at **<u>consensus ad idem</u>** which is defined in **BLACK'S LAW DICTIONARY** as: -

> ***"An agreement of parties to the same thing; a meeting of minds"***

Such a meeting of minds is really the basis of any agreement or contract. Indeed, the terms agreement and contract are defined in the same dictionary – An Agreement is: -

> ***"<u>A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances</u>; a manifestation of mutual assent by two or more persons. The parties actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade and of course performance."***

And **<u>contract</u>** is: -

> ***"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law – a binding – contract. The writing that sets forth such an agreement ………"***

I have already elsewhere in this Judgment set out what was clearly the substratum of the parties' agreement as reduced in writing on 27th January 2010. The Appellant was purchasing from the Respondent 0.59 Hectares (1½ acres) but not 0.47 Hectares. However, the Appellant ended up with a title

deed dated 13th October 2010 which describes the suit land as measuring 0.47 Hectares which is 0.12 Hectares than she had purchased.

15. I have agonized on whether this was fraud on the part of the Respondent or only a mistake. On re – evaluation of the Respondent's evidence, I am persuaded that she knew that the suit land measured 1¼ acres and not 1½ acres as described in the sale agreement. When she testified before the trial Magistrate, she admitted that she knew that the suit land, which was a gift from her husband, measures 1¼ acres. This is what she said in her evidence in chief: -

> ***"The land was mine. It was a gift from my husband. He had bought it VINCENT NAMASAKA. This is a copy of the agreement of sale dated 7.2.94 (Dex 7). My husband was buying 1¼ acres of land."***

And when she was cross – examined by Counsel for the Appellant, she said: -

> ***"The land I was selling was 1¼ acres. It was indicated to be 0.59 hectares. I don't know whether she found the land to be 0.47 hectares. I have seen a copy of the title of 0.47 ha. I gave the whole land that I had in my name. I had not surveyed my land to ascertain the size. I am surprised JOAN got 0.47 and not 0.59. I had a title for 0.59 hectares."***

It is not in dispute that the Respondent's husband had himself purchased the suit land from one **VINCENT WASIKE NAMASAKA** on 27th February 1994 vide a sale agreement which though not translated from **SWAHILI** to **ENGLISH** described the suit land as measuring as ***"ekari moja na robo (1¼)"*** which translates to one and a half acre. However, when she sold the same land to the Appellant, she described it as ***"0.59 Ha (1½ acre)."*** If the Respondent had only described the land as measuring 0.59 Hectares in the sale agreement without adding 1½ acres, then I would have been prepared to conclude that it was only a case of mistake. However, by describing it as ***"0.59 Hectares (1½ acre)"*** when she knew that her husband had only purchased 1¼ acre, that was clearly a case of fraudulent misrepresentation which is defined in the same **BLACK'S LAW DICTIONARY** as: -

> ***"A false statement that is known to be false or is made recklessly – without knowing or caring whether it is true or false – and that is intended to induce a party to detrimentally rely on it."***

16. In dismissing the Appellant's case, the trial Magistrate stated as follows at page 102 of the impugned Judgment: -

> ***"It follows that the balance she acknowledges and which is claimed by the defendant as owing is indeed owing. The defendant had nothing to do with the description of the size of the land. The area indicated on the title as approximately 0.59 hectares is attributable to the lands office."***

While the Respondent was not responsible for the description of the suit land on the title deed, an error which the trial Magistrate rightly attributed to the Lands Office, the Respondent was however responsible for describing the suit land in the agreement as both 0.59 Hectares and 1½ acres. That misrepresentation vitiated the agreement and made it voidable at least in part. By Counter – Claiming for the sum of Kshs. 65,000/= being the balance of the purchase price, the Respondent was seeking to enforce the agreement dated 27th January 2010. The remedy of specific performance of an agreement is essentially an equitable relief which, in the circumstances, is not available to the Respondent. In this case of **GURDEV SINGH BIRDI & ANOTHER .V. ABUBAKAR MADHUBUTI C.A CIVIL APPEAL No 166 of 1996, the Court, citing HALSBURY'S LAWS OF ENGLAND VOL 44** paragraph 487 said that a party seeking the remedy of specific performance of a contract: -

> ***"……. must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The Court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non – essential or unimportant term, although in***

such cases, it may grant compensation. Where a condition or essential term ought by have been performed by the plaintiff at the date of the write, the Court does not accept his undertaking to perform in lieu of performance but dismisses the claim."

The trial Magistrate therefore erred both in law and in fact when he ordered the Appellant to pay the Respondent the balance of Kshs. 65,000/= as sought in the Counter – Claim when an essential part of the sale agreement, to wit, the transfer of 0.59 Hectares (1½ acres) of land had not been performed. By the same token, the trial Magistrate erred both in law and in fact when he dismissed the Appellant's claim in which he sought a declaratory order that he was not entitled to pay the balance of Kshs. 65,000/= being the balance of the purchase price.

17. What about the Appellant's claim to a refund of Kshs. 121,000/= being the alleged value of ¼ deficit? This is how the Appellant pleaded for that sum in paragraph 8 of her plaint.

8 "The plaintiff's claim against the defendant for a declaratory order that the plaintiff is not entitled to pay the balance of Kshs. 65,000/= at all and that the defendant ought to reimburse the plaintiff the monetary equivalent of the said quarter acre that was missing, reckoned at Kshs. 121,000/=."

The claim for Kshs. 121,000/= as the monetary equivalent of the said quarter acre was obviously a special damages claim which must not only be specifically pleaded but also strictly proved – **HAHN .V. SINGH 1985 KLR 716**. No doubt the sum of Kshs. 121,000/= was pleaded as the value of the ¼ acre. However, it is not clear how the Appellant arrived at that figure. The suit land was being purchased wholesome as 0.59 Hectares or 1½ acres. It was a composite purchase. It would be interesting to know how the Appellant arrived at the figure of Kshs. 121,000/=. The land was not being purchased in pieces. This figure of Kshs. 121,000/= is an estimate. That explains why the Appellant used the word ***"reckoning"*** which is defined in **CONCISE OXFORD ENGLISH DICTIONARY** as: -

"1. the action of calculating.

2. an opinion or Judgment

3. a bill of or account or it's settlement

4. an instance of working out consequences or retribution for one's action."

Having said so, however, there is no doubt that the Appellant paid for more than she received. However, as to what amounts to strict proof of a claim of special damages will depend on the circumstances of each case. In **RATCLIFF .V. EVANS 1892 2 QB 524, BOWEN LJ** stated thus: -

"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old age intelligible principles. To insist upon more would be the vainest pedantry."

That proposition with regard to strict proof of special damages has been followed in this country. See for instance **NIZAR VIRANI t/a KISUMU BEACH RESORT .V. PHOENIX OF EAST AFRICA 2004 2 KLR [2004eKLR] and also GULHAMID MOHAMEDALI JIVANJI .V. SANYO ELECTRICITY COMPANY C.A CIVIL APPEAL No 225 OF 2001 [2003 eKLR]**. Taking into account all the circumstances of this case, I am satisfied that the sum of Kshs. 60,000/= will be a sufficient amount to award the Appellant for the ¼ acre of land which she lost. This Court, as provided in **Section 78** of the **Civil Procedure Act**, has the same powers as those of the trial Court to determine a case finally. The trial Court should have considered all the circumstances in this case and, guided by the above precedents made a reasonable award in that regard because the Appellant certainly incurred a loss. This Court must

therefore interfere with the trial Court's Judgment in that regard. The trial Magistrate addressed that issue as follows: -

> ***"Respecting the claim of refund of Kshs. 121,000/= as the land is actually only 0.47 acres, his (sic) loss is not attributable to the defendant. It is the lands office that misdirected the size holding out land that is only 0.47 Ha as 0.59 at any rate, the land he bought was the land he was shown by the defendant and which land had boundaries. I do not find that he is entitled to any refund by the plaintiff."***

It is clear from the Appellant's testimony during the trial that she did not ascertain the measurements of the land and only found out the correct acreage later. That was when she refused to pay the balance of Kshs. 65,000/=. In her evidence in chief, she said: -

> ***"I was buying the whole parcel which states 0.59 Ha in the title deed. I never paid the balance of Kshs. 65,000/= as it did not measure 0.59 Ha."***

When she was cross – examined by **MR SITUMA**, she said: -

> ***"I am a retired teacher. I was shown the title deed. I was physically shown the boundaries."***

Therefore, although the Appellant was shown the boundaries, the land was not measured and the exact acreage only became evident after the transaction in which the land was described both as 0.59 Ha or 1½ acres. That was not considered by the trial Magistrate and if he had, he would have arrived at the decision that there was a latent misrepresentation on the part of the Respondent in describing the land as 1½ acres when she knew that what she and her husband had previously purchased from **VINCENT WASIKE NAMASAKA** in 1994 was only 1¼ acres.

18. Having considered all the evidence herein, I am persuaded that this appeal partly succeeds and is allowed in the following terms: -

1. **The Appellant is not entitled to pay the balance of Kshs. 65,000/=.**

2. **The Respondent shall only reimburse the Appellant the sum of Kshs. 60,000/=.**

3. **The Appellant having only partly succeeded is entitled to only half the costs both in this and the trial Court.**

Boaz N. Olao.

J U D G E

9th March 2022.

Judgment dated, signed and delivered at **BUNGOMA** on this 9th day of March 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines and with notice to the parties.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

9th March 2022.