



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 143 of 2010

MITHIKA M'INOTI.....APPELLANT

VERSUS

EUSABIA NKUENE JULIUS.....RESPONDENT

### J U D G M E N T

The appellant was the defendant at the lower court. The respondent had sued the appellant through a plaint dated 10<sup>th</sup> May, 2006 seeking inter alia specific performance of the agreement dated 10<sup>th</sup> April, 2005 or refund of the agreed liquidated damages. The trial court after hearing the suit delivered judgment on 8<sup>th</sup> December, 2010, in favour of the respondent and ordered the appellant to pay to the respondent Kshs.360,000/= as liquidated damages with costs and interest from the date of judgment. The appellant being aggrieved by the trial court's judgment preferred this appeal setting out 8 grounds of appeal as follows:-

***1.The learned Magistrate erred on a point of law and fact in making finding that the agreement dated 10<sup>th</sup> April, 2005 was a valid agreement and was binding to the parties.***

***2.The learned Magistrate erred on a point of law and fact in making finding that the plaintiff was entitled to Kshs.360,000/- being the liquidated damages set in the agreement dated 10<sup>th</sup> April, 2005 when the plaintiff had not specifically pleaded the said sum nor had she proved that she was entitled to the said damages.***

***3.The learned Magistrate erred on a point of law in making a finding that the defendant had admitted part of the agreement and had received Kshs.63,200 and a further sum of Kshs.20,000/- as part of the consideration when there was contrary evidence to the effect that the said sum was advanced to the defendant by the plaintiff for a different purpose.***

***4.The learned Magistrate erred on point of law and fact in failing to take into account that the plaintiff was not entitled to liquidated damages Kshs.360,000/- since she had made a demand of Kshs.90,000/-.***

***5.The learned Magistrate erred on a point of law and fact in enforcing an agreement for sale of land when no Land Board Consent had been obtained within the required period and the sale agreement in issue had not provided for period within which such consent was to be obtained.***

**6. The learned Magistrate erred on a point of law and fact in making a finding that the plaintiff had been ready and willing to perform the obligations set out in the sale agreement and that the defendant was in breach of a sale agreement.**

**7. The learned Magistrate erred on a point of law and fact in disregarding the defendant's evidence that the plaintiff misled and misrepresented the facts in regard to the nature of the agreement that was to be entered into between the parties.**

**8. The learned Magistrate erred on a point of law and fact in failing of deal and determine the issue as to whether there was the "meeting of the minds" or consensus between the parties before the drawing and execution of the sale agreement.**

When the appeal came up for hearing both Counsel consented to have the appeal determined by way of written submissions. The counsel for the appellant Mrs. J. K. Ntarangwi, learned advocate filed her submissions supported by attached authorities on 20/11/2012 and counsel for the respondent Mr. Nyamweya Mosota, learned Advocate filed his submissions on 13<sup>th</sup> February, 2013 supported by list of authorities. The court has considered the said written submissions, authorities in support, pleadings, proceedings, the lower court judgment and grounds of appeal. It has also considered the opposing positions of both parties and relevant provisions of law.

The appellant's grounds No.1, 3 and 7 deal with validity of the contract and I intend to deal with the same altogether. The sale agreement dated 10<sup>th</sup> April, 2005 fulfill all requirements as set out under Section 3(3) of the Contract Act(Cap.23) which provides:-

**"(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-**

**(a) The contract upon which the suit is founded-**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

**Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust."**

The contract was in writing and was signed by all parties in presence of their witnesses. On issues as to whether or not the amount of Kshs.83,200/- was for a different purpose other than that in the agreement, the same is an afterthought as the appellant did not substantiate his allegation during the trial. The respondent submitted that it is trite law that when a contract is required by law to be reduced into writing and is executed, no parole evidence is permissible to contradict the terms of the contract and that by the appellant claiming that Kshs.83,200/- was for a different purpose other than that set out in the contract is trying to introduce a parole evidence to contradict the terms of the contract and I disregard such argument(See case of Rajdip Housing Development Ltd. -V-Wambugu(1999) 2 EA 279 in which Court of Appeal held:-

**"Under the law of evidence, when a contract required by law to be reduced to writing is executed, no parole evidence is admissible to contradict the terms of the contract, save in specific limited exceptions."**

The appellant's contention that court ought not to have allowed PW2 to testify and his evidence was prejudicial to the appellant that the issue ought to have been taken at the lower court. The appellant's

counsel did not raise the issue at the trial court and it is now too late to raise the same. PW2 is an advocate who drew the sale agreement, his evidence was limited to the nature of transaction undertaken by the parties. He was the maker of the document and the rules of evidence demands that a document be produced by its maker and as such there was no prejudice to the appellant by PW2 giving evidence.

The appellant contended the sale agreement subject of this suit was not his own and relied on doctrine of *non est factum*. The respondent on the other hand contended that the doctrine of *non est factum* does not apply as the same only applies to those who are unable through no fault of their own to have without explanation any real understanding of the purpose of a particular document and that further the appellant as at the time of writing the agreement was in an advocates office, accompanied by witnesses whose purpose was to assist him understand the terms of agreement. PW2 and PW1 in their evidence averred that the appellant was explained the nature of the transaction through the assistance of his witnesses in a language that he understood as the appellant was illiterate. I find that the appellant though illiterate, he was fully explained the nature of the transaction and that he had gone to the advocates offices for that purpose on his own will and did freely execute the sale agreement. I find his argument that he did not know what he was signing to be without any basis.

The appellant's counsel relied on case of STEPHEN I'IKIAO M'ITANI M'THANKARI HCCC No.240 of 1992(Meru) in support of *NON EST FACTUM*. I have perused the said judgment and do not find it relevant to this case because the circumstances were quite different from the present case. In the cited case the agreement had been drawn by the parties themselves but in the instant appeal the agreement was drawn by an Advocate who testified and stated that the agreement was fully explained to the parties. I hold that the doctrine applies in cases where no explanation is given to the parties to the agreement. In this case explanation was not only given to the appellant but the contents of the agreement were translated to the parties by their witnesses. The appellant is recorded in cross-examination as saying and I quote:-

***"I was selling No. 251. I have never complained anywhere that I was conned."***

Furthermore for the plea of *non est factum* to succeed the appellant must show that there is as regards the transaction, a radical or fundamental distinction between what he was signing and what he thought he was signing. I find the appellant cannot succeed on this plea because he had acknowledged part of the agreement but now attempts to disown part of it particularly the parcel of land that was to be sold whether No.251 or 240. On issue of misrepresentation the trial court in its judgment held that the appellant having expressed his intention to sell the land as well as receiving Kshs.20,000/- on top of Kshs.63,200/- he had received earlier on 10/4/2005 he cannot now be allowed to plead misrepresentation on some of the clauses in the agreement that he admitted. Further under Order 2 Rule 10(1) (2) of Civil Procedure Rules it is provided as follows:-

***"10. (1) Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—***

***(a) particulars of any misrepresentation, fraud, breach of trust ,willful default or undue influence on which the party pleading relies; and***

***(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.***

***(2) The court may order a party to serve on any other party***

***particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just."***

The appellant having in his defence not pleaded and given particulars of the misrepresentation the same cannot be raised in an appeal.

In view of the foregoing I find not merits in grounds No.1, 3 and 7 of the Memorandum of Appeal and the same are dismissed.

On grounds No's 2 and 4 I have considered both arguments by both sides. The appellant position is that the claim for liquidated damages of Kshs.360,000/- was not specifically pleaded as the same does not appear in the relief column and because filing fees for the said sum was not paid for. The respondent on his part argued that the claim for liquidated damages of Kshs.360,000/- was specifically pleaded in paragraph 6 of the amended plaint dated 19<sup>th</sup> July, 2007 and in prayer 1 of the relief sought where the respondent prayed for specific performance on payment of the agreed liquidated damages. The respondent referred me to the case of **JIVANJI –V-SANYO ELECTRICAL CO.LTD(2003) 1 E.A. 98** at Page. 103 where court of Appeal stated:-

***“It is now trite law that special damages must first be pleaded and then strictly proved.....”***

***.....It has time and again been held by the Courts of Kenya that claims for each particular types of special damages must be pleaded.....”***

Having gone through paragraph 6 of the amended plaint which provides as follows:-

***“It was agreed in one of the clauses of the agreement that any party who breached any duties and obligations in the said agreement shall pay the innocent party a sum of Kshs.360,000/- as liquidated damages.”***

I therefore find that the respondent had specifically pleaded special damages. The next issue is whether the specifically pleaded specials were proved. The respondent produced the sale agreement as exhibit No.PEXG1 through PW2 Charles Mokuia in which agreement clause No.6 of the plaint is contained as Clause No. 8 of the Sale Agreement.

The respondent Counsel referred me to the case of **MAWJI –V-KADERDINA HAJEE ESSAK LTD Ltd(1992) KLR 429** in which Wambilianga, J as he then was stated:-

- 1. Liquidated damages may be a genuine pre-estimate of the loss that will be caused to one party if a contract is broken by the other.***
- 2. Liquidated damages mean that it shall be taken as the sum which the parties have by a contract assessed as the damage to be paid whatever may be actual damage.”***

The authority relied upon is of High Court, which is not binding upon me but I find it to be good law and I agree with the said decision that liquidated damages agreed upon by parties can be taken as sum which parties have voluntarily agreed to use in assessing damages to be paid irrespective of what may be actual damage and court has no business in considering whether the amount is reasonable or conscionable or not.

On issue of unpaid court fees there is always a process to ensure before execution of the court's decree a party who had not paid full court fees does so and as such I feel this is not an issue for this appeal as it shall be sorted out by registry at any time by demanding unpaid court fees to be cleared by the party in default.

I therefore do not find any merits in grounds No. 2 and 4 of the appeal and the same are dismissed. The appellant under grounds Nos. 5 and 6 of Memorandum of appeal faulted the trial court for enforcing an agreement for sale of land which had become null and void for want of consent of the Land Control Board. The law provides for the period under which a consent of the Land Control board should be applied and obtained whether set in the sale agreement or not. The period is six(6) months from the date of the agreement. Section 6(1),(a), of the Land Control Act provides:-

6. (1) Each of the following transactions -

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b).....

(c).....

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 8(1) of the Land .....Act provides:-

**8. (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:**

***Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.***

Where the Contract becomes null and void for want of consent the purchaser is only entitled to recover the consideration sum only. No general damage or special damages are recoverable.

Section 7 of the Land Control Act provides:-

***“7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”***

The appellant referred me to the case of **KAHIA –V- NG’ANG’A(2004) E.A. 75** in which Court of Appeal held:-

***“The land transaction in this case required Land Control Board consent and became void for all purposes in the absence of that consent. Any money or consideration paid in the course of the transaction became recoverable as a debt by the person to whom it was paid. However, no general or special damages save for the purchase price were recoverable(Kariuki v Kariuki(1983) KLR 225 followed.”***

The contract in this case had by 10<sup>th</sup> October, 2005 become null and void through the operation of law and the trial court was in error in failing to find and hold that as of 10<sup>th</sup> October, 2005 there was no valid contract that could be enforced by virtue of the agreement having become null and void for want of consent of the Land Control Board.

In view of the foregoing I find and hold whatever reason that made the parties in this appeal not to apply and obtain consent of the Land Control Board within six(6) months from the date of the contract, before the same became null and void could not be used as a basis to enforce a contract that has become null and void.

The parties cannot enforce any term which is contrary to the provisions of the Land Control Act. The Act is very specific as to what relief a purchaser is entitled to as he cannot be heard to seek more than what the Act of Parliament has provided for by virtue of relying on the term of the contract which has since become null and void. My understanding of Section 7 of the Act is that a purchaser can only recover the purchase price or the consideration paid as debt and no more but without prejudice to Section 22 of the

Land control Act which provides:-

“22. Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person -

(a)pays or receives any money; or

(b)enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.”

In the instant appeal the sale agreement and evidence on record clearly indicate that the sum paid and received or acknowledged by the appellant is Kshs.83,200/-. The appellant is supposed to refund to the respondent the said Kshs.83,200/- and not kshs.360,000/- for breach of contract. I did not as I have indicated find any party to blame for failure to obtain consent of the Land Control Board within time as their was no evidence from the respondent to show that she had indeed pursued the obtaining of the consent before the contract became null and void. None of the parties bothered to tender evidence on why consent of the Land Control Board was not applied and obtained within 6 months. The sale agreement is equally silent on issue of the consent of the Land Control Board.

In view of the foregoing I find grounds Nos.5 and 6 of the Memorandum of appeal to be merited and the same are allowed.

The appellant in ground No.8 of the Memorandum of Appeal faulted the trial magistrate in law and fact in failing to deal and determine the issues as to whether there was the “*meeting of the minds*” or consensus between the parties before the drawing and the execution of the sale agreement. The appellant referred me to the case of MICHIRA –V-GESIMA POWER MILLS LTD(2004)2 ER 166 in which case Court of Appeal held:-

***“there was no meeting of the minds of the contracting parties thereby making the contract incapable of performance. The agreement did not provide for the time within which the balance of purchase price would be payable or secure the payment. The fact that the agreement was uncertain on the fundamental term on the payment of the purchase price made the entire agreement void for uncertainty. Further, the agreement was capable of being construed as providing for two different dates for giving vacant possession by the respondent and this was evidence of uncertainty. Neither party could be held to be in breach of the uncertain agreement or be entitled to any damages from the abortive agreement.”***

I have carefully looked and perused the agreement between the appellant and the respondent. The agreement between the parties is clear and unambiguous on fundamental terms of the contract, that is to say on price, time of payment and mode of deliveries. The agreement is not uncertain nor is there ambiguity in the sale agreement and as such I find no issue of there being no meeting of the minds of the contracting parties and thereby making the contract incapable of performance.

In the circumstances of having found grounds No.5 of appeal merited and the contract having become null and void for want of consent of the Land Control Board, the appeal is allowed and I proceed to make the following orders:-

1. ***The judgment of trial Magistrate dated 8<sup>th</sup> December, 2010 be and is hereby set aside.***

2. *The Land Transaction between appellant and respondent having become null and void for want of consent of the Land Control Board the trial Magistrate's judgment is substituted with an order for refund of purchase price of Kshs.83,200/- or consideration paid in the course of the transaction which had become recoverable as debt, however no general or special damages or liquidated damages are payable or recoverable.*

3. *The appellant out of eight(8) grounds of appeal succeeds on one ground only and shall get ½ costs of the appeal.*

4. *The respondent shall be paid Kshs.83,200/- with costs and interest of the lower court.*

**DATED, SIGNED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF MARCH, 2013.**

**J. A. MAKAU  
JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

1. Mrs. Ntarangwi for the appellant
2. Mr. Omari h/b for Mr. Mosota for the respondent.

**J. A. MAKAU  
JUDGE**