



REPUBLIC OF KENYA



KENYA LAW
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**Githugu & another v Pieroni & another (Environment & Land Case
4 of 2022) [2022] KEELC 2802 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 4 OF 2022
EK WABWOTO, J
JUNE 30, 2022**

BETWEEN

GODFREY MACHARIA GITHUGU 1ST APPELLANT

NANCY WANJIRU GITHUGU 2ND APPELLANT

AND

MAURIZIO PIERONI 1ST RESPONDENT

DORCAS KARANJA PIERONI 2ND RESPONDENT

JUDGMENT

1. This is an interlocutory appeal which traces its roots to notice of motion application dated February 25, 2019, an application which the respondents filed in the subordinate court.
2. The following orders were sought in the application: -
 - i. That this application is certified urgent and heard exparte in the first instance.
 - ii. That an injunction do issue against the defendants/respondents through themselves, their servants or agents directing them to allow the application through their servants or agents access to the rooftop of Navilla Apartments situated on LR Number 1870/V/213 on Church Road Westlands for purposes of setting up their satellite dish for cable television pending the hearing and determination of the application.
 - iii. That an injunction do issue against the defendants/respondents through themselves their servants or agents directing them to allow the Applicants through their servants or agents access to the rooftop of Navilla Apartments situated on LR Number 1870/V/213 on Church Road Westlands for



purposes of setting up their satellite dish for cable television pending the hearing and determination of this suit.

- iv. That a temporary injunction do issue restraining the defendants/respondents through themselves their servants or agents from in any way interfering with the applicants' quiet possession of all that apartment A6 Navilla Apartments on LR Number 1870/V/213 pending the hearing and determination of this suit.
- v. The costs of this application be provided for.

3. Upon hearing the application, Hon P N Gesora, Chief Magistrate, delivered a ruling on October 7, 2019 and allowed the application in terms of prayers (3) and (4) together with costs. Dissatisfied with the outcome, the appellants filed this appeal through memorandum of appeal dated November 5, 2019. The following are the grounds of appeal as listed on the face of the memorandum of appeal: -

1. That the Learned Trial Magistrate erred in law and fact by allowing the respondents to install a separate satellite dish for cable television at the rooftop of the Navilla Apartments situated in LR No 1870/V/213 on church road Westlands.
2. That the Learned Trial Magistrate erred both in law and fact by failing to consider the fact that the said apartment had been fitted with a central cable TV connection and satellite dish for use in the whole apartment by the house owners.
3. That the learned trial magistrate erred both in law and in fact by failing to appreciate the law on *Sectional Properties Act* on ownership and acquisition of units.
4. That the learned trial magistrate erred both in law and in fact by failing to consider the fact that the respondents had not completely acquired ownership of the said unit as per the agreement and therefore could not be allowed to erect or set up a satellite dish at the rooftop of the said house which will significantly change and interfere with the architectural and structural plan and outlook of the apartment to the detriment of the appellants and other house owners within the apartment.
5. That the learned trial magistrate erred in both law and in fact by failing to interpret and appreciated clauses B, 3 & 7 of the sale agreement dated July 2, 2018 thereby arriving at a wrong decision.
6. That the trial magistrate erred both in law and fact by failing to consider the appellants' submission thereby arriving at the impugned ruling.
7. That the learned magistrate erred both in law and in fact in failing to find that the respondents had written letters to commence arbitration proceedings over the dispute herein and therefore ousted the court of jurisdiction to entertain the said application thereby arriving at a wrong decision.



4. On the basis of those grounds, the appellants sought the following orders: -
 - a) An order do issue quashing and setting aside the ruling and/or order of the court made on October 7, 2019 and substitute with an order dismissing the respondent's application dated February 25, 2019 before the trial court.
 - b) That costs of this appeal and that of the application dated February 25, 2019 be provided for.

5. The appeal was canvassed through written submissions. The appellants relied on their written submissions dated September 6, 2021 which were filed by Ayieko Kangethe & Company Advocates. Counsel outlined three issues for determination by this court while canvassing their appeal. The outlined issues were as follows: -
 - a) Whether or not the trial court had jurisdiction in view of the arbitration clause?
 - b) Whether or not the orders ought to have been issued.
 - c) Whether or not the trial court erred in law and fact by permitting the respondents to install a separate satellite dish in the premises.

6. On the issue of trial court having jurisdiction in view of the arbitration clause, counsel submitted that clause 7.4.4 of the Sale agreement provided that disputes arising out of the agreement were to be referred to arbitration. Counsel also referred to article 159(2) (c) of the *Constitution* and the case of *Pius Kimaiyo Langat V Cooperative Bank of Kenya Ltd* [2017]. *Yes Housing Co-operative Society Limited V Kenneth Onsare Maina* [2020] eKLR and *Kenya Pipeline Company Limited V Datalogix Limited and Another* (2008) EA 193 in support of the said position.

7. On whether or not the orders ought to have been issued directing the appellants to allow the respondents to access to the rooftop of Navilla Apartments, counsel submitted that the same ought not to have been issued because the respondent had not demonstrated any special circumstances as was held in the case of *Nation Media Group & 2 others V John Harun Mwan* [2014] eKLR, *Robani Kadili Agufa & Another V Kenya Power & Lighting Company Ltd* [2015] eKLR, *Giella V Cassman Brown & Company Limited* (1973) EA 358 and *Pius Kichichir Kogo V Frank Kimeli Tenai* [2018] eKLR.

8. Finally, on whether or not the trial court erred in law and fact by permitting the respondents to install separate dish in the premises, counsel argued that respondents had not acquired absolute ownership rights over the property since they had not paid the full purchase price and transfer had not been effected to them at the time of commencement of the suit. They concluded their submissions by praying that the appeal be allowed with costs.

9. The respondents filed their written submissions dated October 27, 2021 through Virginia Shaw and Company Advocates. Counsel outlined four issues for determination by the court. This included the following: -
 - a) Whether the arbitration clause in the sale agreement ousted the lower court's jurisdiction over this matter.
 - b) Whether the appellants introduced a new term to the sale agreement dated July 2, 2018.



- c) Whether the respondents acquired ownership rights to apartment No A6 Navilla Apartments.
 - d) Whether the Learned Magistrate erred in granting injunction orders sought by the respondents.
10. Counsel argued that clause 7.4.4 of the sale agreement dated July 2, 2018 is clear on what specific matters would be referred to arbitration and that the subject matter of this dispute being access to DSTV connection, was not provided for under the subject agreement for sale. Counsel made reference to the cases of *Kenya Tea Development Agency Ltd V Savings Tea Brokers Limited* [2015] eKLR and *Mary Waithera Gikima & Another V Kariuki Wairagu & 3 others* [2019] eKLR in support of the said position.
11. On their second issue, it was submitted that the appellants imposed a special condition which is not in the sale agreement dated July 2, 2018. It was argued that the condition of use of a commercial satellite dish was not incorporated into the sale agreement or any addendum thereof and must therefore be deemed to have been rejected.
12. Counsel added that parties are bound by the terms of their agreement and in the instant case, in the absence of any particular regulation, terms and conditions to the contrary, the respondents have a right to full, free and uninterrupted access and use of common property alongside other apartment owners.
13. On whether the respondents acquired ownership rights to Apartment No A6 Navilla Apartments, counsel stated that the respondents acquired the ownership rights to the suit property upon payment of a deposit of Kshs 20,900,000/- and were granted possession of the apartment and they subsequently settled the balance. As such, counsel argued that the respondents were entitled to quiet and peaceful possession.
14. On the orders of injunction that were issued by the trial court, counsel submitted that pursuant to article 40 of the *Constitution*, and section 65(1) of the *Land Act* that the respondents were entitled to the injunction orders granted by the trial court.
15. It was also the respondents contention that no prejudice will be suffered by the respondents if owing to the injunction orders granted.
16. Counsel added that the appellants had already allowed the respondents to install their satellite dish for cable television and no inconvenience had been caused to the appellants or the other apartment owners.
17. I have considered the entire record of the trial court, including the impugned ruling. I have also considered the parties respective submissions in this appeal. The appellants itemized seven grounds of appeal. Their advocate condensed the seven grounds into three issues while the respondent submitted on four issues.
18. In determining the issues raised in the appeal, this court is cognizant of its duty on a first appeal as set out in the case of *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR.
19. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion.
20. In my humble view, the following issues stand out as key issues for determination which can dispose the appeal. These are: -
 - i) Whether the trial court had jurisdiction in view of the arbitration clause?



- ii) Whether the respondents acquired ownership rights to apartment no A6 Navilla Apartments?
- iii) Whether the trial court erred in granting the orders sought?

Issue No. 1

Whether the trial court had jurisdiction in view of the arbitration clause?

21. In buttressing ground 7 of the memorandum of appeal, counsel for the appellants submitted that clause 7.4.4 of the sale agreement dated July 2, 2018 provided that the disputes would be referred to arbitration. Counsel also made reference to article 159(2) (c) of the *constitution* of Kenya and a number of authorities which included the following: - *Pius Kimaiyo Langat V Cooperative Bank of Kenya Ltd* [2017] eKLR, *Yes Housing Co-operative Society Limited V Kenneth Onsare Maina* [2020] eKLR and *Kenya Pipeline Company Limited V Patalogix Limited and Another* [2008] 2EA 193
22. The respondents counsel submitted that clause 7.4.4 was clear on the specific matters that could be referred to arbitration and the issue of access to DSTV connection was not one that could be referred to arbitration. Counsel further submitted that the appellants having failed to make an application for reference to arbitration and instead entered appearance and filed a defence could not again raise the issue that the court lacked jurisdiction in view of the arbitration clause. Counsel relied on the case of *Mary Waitthera Gikima & Another V Kariuki Wairagu & 3 others* [2019] eKLR in support of this position.
23. It is observed from the record of appeal that these proceedings were initiated vide a plaint dated February 25, 2019. Simultaneously to the filing of the plaint, the plaintiffs (now respondents) filed an application dated February 25, 2019. The defendants (now appellants) upon being served filed a replying affidavit and statement of defence. The record does not show whether the defendants moved the trial court with a view of staying the proceedings and referring the matter to arbitration.
24. In the case of *Adrec Limited V Nation Media Group* [2017] eKLR, the court stated that:-

“ Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration”

Further in the case of *Lofty – Bedouin Enterprises Ltd* EALR (2005) 2 EA pages 122-127, which is considered as the leading authority on the issue of stay of proceedings pending determination of arbitration proceedings, the court of Appeal Judge stated that courts will reject an application for stay of proceedings and referral of the matter to arbitration if the application to do so is not made at the time of entering an appearance. Being guided by the above authorities, it is my finding that the trial court was not moved appropriately with an application for reference referring the matter to arbitration and hence the court was properly seized with jurisdiction when it proceeded to hear and determine the application dated February 28, 2019 which is the basis of the appeal.

Issue No. II

Whether the Respondents acquired ownership rights to Apartment No. A6 Navilla Apartments.

25. From the record of appeal, in the plaint dated February 28, 2018, the plaintiffs pleaded at paragraph 6 and 7 that, they purchased Apartment no A6 Navilla Springs Apartment vide a sale agreement dated July 2, 2018 for a consideration of Kshs 22 million. It was also pleaded that it was a term of the said



- agreement that the plaintiff would take possession upon payment of Kshs 20,900,000/- which was paid and the plaintiffs took possession in July 2018.
26. The appellants on the other hand maintained that the respondents had not acquired ownership rights of the subject property and hence had no right to put any fixtures and install their own satellite dish at the roof top of the said apartment since the balance of the purchase price had not been paid by the agreed date which was to be 30 days from the July 2, 2018.
27. I have perused the sale agreement dated July 2, 2018 and I have noted that clause 6 of the said agreement addressed the issue of possession. It stipulated as follows:-
- “The purchasers shall be entitled to possession upon payment of the deposit to the vendors advocates funds”
28. It is trite law that in deciding disputes regarding agreements, it is the courts duty to give effect to the intention of the parties that is discernible from the documents and conduct of the parties. However complicated or vague an agreement may be, the courts duty is to give effect to it. In the case of *Smith –V Gok* (1891) AC 297 at 303, the court held
- “The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would, therefore be contrary to the intention of the parties as appearing upon the face of the deed”
29. This is a position that was held by the Court of Appeal in *National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd & Another* [2001] eKLR where the court stated that: -
- “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”
30. In the instant case, the respondents having paid a deposit of Kshs 20,900,000/- was entitled to take possession and which they did pursuant to clause 6 of the sale agreement dated July 2, 2018. The appellants never rescinded the said agreement when the remaining balance was not paid within the 30 days period. As such, the respondents were equally entitled to acquire ownership rights over the said apartment and the respondents cannot now turn their back and say that the appellants had not acquired any ownership rights and hence could not install or fix any satellite dish over the said apartment.
31. In the premises, it is the finding of this court that the Respondents having paid the substantial deposit to the tune of Kshs 20,900,000/- and having subsequently taken possession of the same and further the appellants having failed to rescind the sale agreement, the respondents were properly deemed to have acquired ownership rights to Apartment no A6 Navilla Apartments. To be precise, the Respondents were entitled to quiet possession and enjoyment of the apartment including mounting the satellite dish that is compatible with the decoder.

Issue No. III

Whether the trial court erred in granting the orders sought?

32. Having found that the trial court had jurisdiction to hear the respondents case and further that the respondents had acquired ownership rights over the apartment purchased vide the sale agreement dated July 2, 2018, it is the finding of this court, that the respondents were entitled to the orders sought



which were issued pursuant to the ruling delivered by the learned magistrate on October 7, 2019 and it is therefore not open for this court to interfere with the same.

33. On the issue of costs, by dint of the provisions of section 27 of the *Civil Procedure Act*, Costs are at the discretion of the court. Nevertheless, costs do follow the event unless there is good cause to deprive the successful party of such costs. I do not see any reason to depart from the same. In respect to the subject matter, the order that commands itself to me to grant is that the appellants shall bear the costs of this appeal.

Final orders

34. I am satisfied that the Learned Magistrate addressed himself properly on the law and took into account all relevant factors in arriving at his decision. Having addressed all the issues that were synchronized herein above, I now conclude as hereunder: -

- i. The appeal is devoid of merit and is dismissed.
- ii. Costs of this appeal are awarded to the respondents.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2022.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Kamindo holding brief for Mr. Ayieko for the Appellants.

Ms. Wangui Shaw for the Respondents.

Court Assistant-Caroline Nafuna.

E. K. WABWOTO

JUDGE

