



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

Civi Appeal 140 of 2002

PETER N. MIGWI KANG'ETHEAPPELLANT

VERSUS

JOHN GITHUA WAHOMERESPONDENT

(From original Judgment in Civil Suit No.391 of 2000 of the Senior Principal Magistrate's Court at Murang'a by F.F. WANJIKU – SPM dated 13.8.2002)

J U D G M E N T

This is an appeal from the judgment of the senior Principal Magistrate's Court at Murang'a in Civil Case number 391 of 2000 in which the appellant was the defendant and the respondent was the plaintiff. In that suit the respondent has sued the appellant for specific performance of a contract for the sale of a portion of land parcel **LOC.11/MURAGI/1600** situated at Mukuyu market, general damages, in the alternative a refund of the purchase price and compensation to the respondent for all the developments undertaken by the respondent on the portion of the land and costs of the suit.

At the hearing of the suit only the parties testified and called no witnesses. At the end of it all, the court found for the respondent and entered judgment for specific performance with costs of the suit. Being aggrieved by the judgment, the appellant through **Messrs Waiganjo Gichuki & Co. Advocates** comes to this court by way of appeal. In an eight point memorandum of appeal, the appellant faults the judgment of the learned Magistrate on the grounds that:-

- 1. The learned Senior Principal Magistrate erred in awarding judgment for specific performance to the respondent after making an explicit finding that the appellant was not in breach of contract; after making the finding then the court had no alternative but to find that the suit was premature and to dismiss the plaintiff's suit in which the cause of action was alleged breach of contract.**
- 2. The learned Senior Principal Magistrate misconstrued the appellant's defence and submissions by making a finding that the appellant must have allowed the respondent to put up permanent structures on the suit land just because the appellant did not file suit while in fact the counterclaim was filed within the statutory period, i.e. the construction started in 1999 and the counterclaim was filed on 23.10.2000.**
- 3. The trial court erred in law in not finding that the parties were bound by the terms of their agreement and thereby erred in not finding that the plaintiff was the party in breach by taking unauthorized possession of the suit land.**

- 4. The trial court failed to base its judgment on the evidence on record regarding the issues of whether the plaintiff's entry in the suit land was unlawful and unreasonable and instead proceeded erroneously to speculate and reason that if the appellant had given verbal permission for the respondent to put up temporary structures on the suit land he must also have given verbal permission to the respondent to put up permanent structures.**
- 5. The learned Senior Principal Magistrate erred in law in trying the plaintiff's suit and awarding specific performance to the plaintiff after the plaintiff has shown on record that the value of the subject matter was more than Kshs.1.7 Million which was way above the court's jurisdiction of Kshs.500,000/=.**
- 6. The lower court erred in going beyond the terms of the contract which provided expressly for the remedies available to the parties under the terms of the contract.**
- 7. Once the appellant had agreed to the alternative prayer as set out in prayer (c) of the plaint the court ought to have awarded the respondent judgment based on that prayer as it is not expressed to be without prejudice to the other prayers.**
- 8. The learned Magistrate failed to give due weight to the appellant's case and instead wrongfully gave full credit to the insubstantial and unsupported evidence of the respondent and thereby arrived at a wrong decision.**

The facts of the case appear to be that on or about the 25th November, 1997, the respondent entered into a sale agreement with the appellant for the purchase of a portion comprising 0.0405 hectares (Approximately 0.1 acres) out of land parcel **LOC.11/MARAGI/1600** belonging to the appellant. The purchase price was agreed at Kshs.280,000/= out of which he paid a total Kshs.240,000/= leaving a balance of Kshs.40,000/= to be paid after the appellant had transferred the suit premises to the respondent. It was further agreed that the transaction was to be completed within a period not exceeding six months. However despite the foregoing the appellant became reluctant to go by the terms of the sale agreement and as at the time of the filing of the suit in the subordinate court, the appellant had yet to transfer to the respondent the portion he had sold. In the meantime, the appellant had verbally allowed the respondent to develop the portion by putting up temporary structures and later, permanent structures for his business. Whilst all this was going on, the appellant did not object or raise any eye brows as the respondent worked on the developments to the suit premises. The respondent therefore asked the court to order the appellant to give him the title to his portion. He claimed that he had been in possession of the suit premises since 1992. He said upon the transfer he was ready and willing to pay the balance of Ksh.40,000/=. He testified further that he was not ready to take a refund of the purchase price paid so far because of the developments he had undertaken on the suit premises, hence his prayer for specific performance.

In his defence, the appellant agreed that he entered into a sale agreement with the respondent pursuant to which he had been paid a total of Kshs.240,000/= leaving a balance of Kshs.40,000/=. He used the purchase price to clear a loan he had obtained from East African building society. The title to the suit premises had been charged to the said building society to secure the loan. He went on to testify that he had caused the title to be discharged and had taken various steps in a bid to comply with the terms of the sale agreement, mainly, to transfer the portion he sold to the respondent. That he had even shown the respondent the beacons of the portion he was buying and even allowed the respondent to put up temporary structures. However the respondent without his consent and or permission went on to put up permanent structures in November and December, 1999. In so doing therefore the respondent breached the sale agreement and hence his counterclaim that the respondent be ordered to vacate the suit premises as he had become a trespasser. The appellant also claimed that the respondent breached the contract by taking him to court. He offered to refund the respondent the purchase price paid to him in terms of the sale agreement and that the respondent be ordered to pull down the permanent structures. To wrap it up, the appellant stated that he was not responsible for the delay and that the suit was premature. Finally he prayed for general damages for trespass and costs of the counterclaim.

At the hearing of the appeal the parties agreed to have the appeal heard by way of written submissions. Pursuant to the agreement, parties filed their respective written submissions which I have carefully read and considered.

I am aware that as a first appellate court herein, I am required to subject the evidence tendered in the trial court to fresh evaluation and analysis so as to reach my own conclusions as to the correctness or otherwise of the learned magistrate's decision.

In finding for the respondent, the learned Magistrate held as follows:-

“.....the court then finds that the plaintiff is not to blame for the facts that have gone beyond the contract because they were allowed by the defendant. The defendant is to blame for the delay, not within six months but within reasonable time. That cannot his (sic) delay (sic) cannot be allowed to benefit him because it would lead to injustice. The court by ordering specific performance will beat (sic) the ends of justice because, the plaintiff is not to blame at all in the whole process, while the defendant is only guilty of delay which he caused himself but does not amount to a breach of contract that would make the court order him to refund purchase price and pay the penalty because to do that is punish the innocent party the plaintiff who not only paid most of the purchase price in 1998 Ksh.240,000/= but also incurred a lot of expenses to put up permanent structures on the plot with verbal permission of the defendant....”

One would have no quarrel with the learned Magistrate's reasoning up to the point when she talks about the plaintiff not being to blame for the delay. However from that point, onwards, the learned Magistrate's reasoning becomes a little bit warped. A court can only make an order of specific performance once it is satisfied that there has been a breach of contract. There can be no half measures. It was therefore erroneous on the part of the learned Magistrate to hold that she was ordering a specific performance on the basis that **“.....the defendant is only guilty of delay which he caused himself but does not amount to a breach of contract....”**

It is either there was a breach of contract or not. There are no two ways about it.

On my own consideration of the evidence on record, I have no doubt at all that there was a breach of contract of sale dated 25th November, 1997 entered into between the appellant and the respondent. The Agreement for sale was clear and specific. By clause 5, it was specifically provided;

“.....that the vendor shall take all the necessary steps to have subdivision and transfer effected within a period not exceeding six months. The agreement further provided that the purchaser would take vacant possession after transfer.”

Another important condition in the agreement was clause 7 which provided that;

“..... Should the vendor fail to honour this agreement he shall refund all money paid to him plus 50% interest thereon while the purchaser should receive his money without any interest in case he fails to raise and clear the above mentioned balance.”

It has been said and indeed it is trite law that courts do not make contract for parties but merely interpret them. In the circumstances of this case, it was explicitly agreed that the transaction must be completed within six months. With that clause it would appear that time was of essence. To my mind therefore once, the appellant was unable to abide by the terms of the sale agreement as aforesaid, he automatically breached the agreement. The respondent had no obligation under the agreement to do anything so as to advance and or move forward the agreement of sale other than to take possession of the suit premises following the transfer and pay the outstanding purchase price. If the appellant had

difficulties in honouring clause 5 of the agreement aforesaid, it was open to him to approach the respondent and inform him of the difficulties he was encountering in pursuing the terms of the agreement and perhaps seek a mutual extension of time within which the transaction should be concluded. He did not. It was not until 22nd October, 1999 while reacting to the demand letter by the respondent's counsel that for the first time he alluded to the difficulties was encountering in having the transfer registered. The learned Magistrate seem to have taken an erroneous view that because the respondent did not demand of the appellant to honour the agreement at the expiry of 6 months, the parties were no longer bound by that condition. Once the appellant breached the agreement, it did not matter at what time the respondent raised the issue. The story may perhaps have been different had the respondent made further payment towards the purchase price to the appellant after June, 1998. According to my calculation 6 months from the date when the agreement for sale was executed would have lapsed on 24th May, 1998. The last payment effected by the respondent towards the purchase price to the appellant was on 28th April, 1998 well within the time frame. To my mind therefore, the appellant was in breach of the agreement of sale. It was therefore erroneous for the trial court to have held that the defendant was not in breach of the contract and that he was only guilty of delay and that is why it would have been inappropriate to order him to refund the purchase price. The magistrate having so found, then on what basis could she have ordered specific performance? In my view the order that should have commended itself to her should have been dismissal of the suit for being premature.

However since on my own evaluation of the evidence I have come to the irresistible conclusion that indeed the appellant was in breach of the agreement, what remedy was available to the respondent. Clause 7 of the agreement has the remedy. The respondent was entitled to a refund of the purchase price so far paid plus 50% interest. Indeed the appellant in his own evidence said as much. He was willing to refund the respondent the purchase price so far paid plus interest making a total sum of Ksh.360,000/=. The respondent could hear nothing of the sort. Reason, he had developed the suit premises with the permission and or consent of the appellant. Clause 4 of the agreement of sale stipulated that the respondent would take possession of the portion he bought after the transfer had been effected. The court however found that by his subsequent conduct the appellant had waived and or compromised this condition. The appellant conceded that he had permitted the respondent to take possession of the portion and to put up some temporary structures. Indeed it would appear that the respondent was a tenant of the appellant in the suit premises long before the execution of the sale agreement, and even after the execution thereof, the appellant continued to remain in possession of the suit premises. The court found that in the agreement there was no mention of temporary structures. So that the agreement for temporary structures was verbal. Later on the respondent put up permanent structures. The court found that by the same token the agreement to put up the permanent structures was verbal and not covered by the agreement. The appellant did admit in evidence that though he saw the permanent structures coming up on the suit premises he did not bother to stop the respondent. According to the respondent the permanent structures were valued in excess of 1,700,000/=. In those circumstances would it have been fair and just for the appellant merely to be penalized by refunding the purchase price paid and the incidental interest? I do not think so. The appellant had even the audacity to prescribe that once he paid to the respondent what was due to him under the agreement, the respondent should be ordered to pull down the permanent structures.

The appellant having observed the respondent put up permanent structures on the suit premises without raising a red flag cannot be heard to say that by so doing he was in breach of the agreement. He allowed the respondent into possession of the suit premises despite what the agreement provided. He also allowed him to put up permanent structures thereon. This being the case the court was right in my view in holding that the appellant was estopped from invoking the provisions of clause 4 and alleging that the respondent was in breach of the agreement of sale on that ground. If indeed the court was to agree with the position taken by the appellant, the respondent would be the loser for no mistake of his.

I hear the appellant saying that in the light of the respondent's admission that the developments on the suit premises were in excess of Ksh.1,700,000/= the trial court had no jurisdiction to entertain the proceedings. However it would appear that this issue was not seriously pursued by the appellant. It has been said time and again that jurisdiction is everything. The appellant should but did not raise the issue as a preliminary point. Neither did he raise the issue in his defence and counterclaim. In fact in his

defence and counterclaim, the appellant admitted the jurisdiction of the court. The issue of jurisdiction only popped up in evidence. In fact the pecuniary jurisdiction of the presiding Magistrate was not sufficiently proved. A part from counsel for the appellant submitting that the pecuniary jurisdiction of the learned Magistrates was Ksh.500,000/= there was no empirical prove of that fact. To accept such submission the court would be acting on speculation and conjecture. Courts of law do not act that way.

The appellant in his counterclaim seeks the eviction of the respondent from the suit premises on the grounds that the respondent entered into the suit premises and developed the same without first obtaining his consent. In my view the trial court was right in rejecting the claim. There is abundant evidence on record that the entry of the respondent into the premises was with the express permission of the appellant. There is also evidence that the appellant allowed him also to put up temporary structures for the display of his goods. There is also evidence that the appellant saw permanent structures come up on the premises and raised no objection. There cannot therefore be trespass where the alleged offending party enters the suit premises with the permission of the registered owner as it happened in this case.

The appellant claims that he has refused to take any further action to actualize the transaction because he was taken to court by the appellant. This view has no basis in law or in fact. The agreement of sale did not provide that in the event that the respondent took the appellant to court, the agreement will stand frustrated and or rescinded.

At the end of it all, I have come to the conclusion that this appeal lacks merit. It is dismissed with costs.

Dated and delivered at Nyeri this 15th day of February, 2008.

M.S.A. MAKHANDIA

JUDGE