REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 292 of 1997

BENARD MBUGUA KINYANJUI

NAOMI GATHONI MBUGUA…….. APPELLANT

VERSUS

RAPHAEL KARIUKI NJOROGE ..……...……..RESPONDENT

J U D G M E N T

The respondent sued the appellants in the lower court vide Nairobi CMCC 6750 OF 1993. The averments are that the first defendant is the registered proprietor of all that piece of parcel of land known as land reference Number Dagoretti/Kinoo/1069 situated in Kinoo within the said Republic of Kenya

agreement dated 30th April 1990 and made between the plaintiff of the one part and the 1st defendant of the other part, the first defendant agreed to sell and the plaintiff agreed to purchase the said piece of land for the sum of Ksh.142,500/-. At the time of the said sale agreement the parcel was subject to a charge to Business Finance company Ltd to the tune of Ksh.70000.00. The respondent/plaintiff had paid Ksh.12000/- as deposit upon execution of the sale agreement in the presence of Ann Mwaura Advocates, an agent of the first defendant. The balance of the purchase price was to be utilized to off set the 1st appellant/defendants indebtedness to the Business Finance company Ltd and the residual to be paid over to the 1st defendant/appellant upon transfer. The respondent/plaintiff complied with the first two pre-requisites consent was given on 21.5.1990 and transfer documents signed by the plaintiff and the first defendant/appellant. Before registration could be effected the respondent learned from the Ministry of Lands that vide a letter dated 12th August 1991 that the wife of the 1st appellant who is the second appellant/defendant had lodged a caution and so it was not possible to effect transfer. That by reason of the aforesaid matters the respondent/plaintiff had been put to considerable trouble inconvenience and delay and has been deprived of the use of the said piece of land and has suffered loss and damage and will continue to do so unless the first defendant and the second defendant are ordered by this court to effect the transfer of the said piece of land to the plaintiff who reserved his right to sue for damages.

Inconsequence thereof the respondent /plaintiff sought orders for:-

(a) special performance

(b) directing transfer of the said piece of land to the plaintiff

(c) general damages

(d) Costs of the suit together with interest thereon at court rates until payment in full.

(e) Any other relief.

In response to the plaint the 1st defendant filed an affidavit the salient features of the same are that indeed the subject land was charged to Business Finance Ltd and on 30th March 1990 the first defendant decided to sell the land and this led to an agreement between the appellant and 1st respondent which was to be completed within 60 days for each party to complete his part to complete the sale. He agreed he received the deposit of 12,000/-, signed the transfer and application for transfer. Area chief and financial institution gave no objection to the transfer. What remained was to pay the money to the finance institution and the balance and when it was not forthcoming on 3rd November 1990 the first appellant gave the respondent notice to complete payment within 21 days, which letter was handed to his advocates. The first appellant then informed the Financial Institution that he was looking for another buyer. The plot was advertised for sale but it was not sold. Thereafter there was exchange of numerous correspondences on the subject between the parties and their advocates with the respondent not bothering to up-date the first appellant of the correct position on the matter but the respondent failed to respond and he was surprised at the false accusation. He was willing, however to negotiate and if he wishes to do the door was still open for him. He maintained that at no time did the respondent inform him that he had paid money to the finance institution. Neither has he told him that the balance of his money was readily available.

The matter was heard inter for parties and judgment given. The findings of the lower court are:-

1) There was a valid agreement of sale between the plaintiff and the first defendant.

2) That the agreement was not wholly complied with.

3) Despite non-compliance the intention to sell by the first defendant subsisted so much that even by 2.11.90 when he wrote a letter DW 3 exhibit 3 to the plaintiff giving him 21 days notice to complete, which time he anticipated the agreement to be fulfilled, this was after he received some money less the debt to the bank (finance company.)

4) The 1st defendant purported to cancel the agreement vide a letter dated 26.11.90 directed to his advocates.

5) The appellant plaintiff stated that he did not know that the agreement had been cancelled by the time he later paid the balance to the bank.

6) By the defendant receiving money, when he should not have received it, and by the plaintiff paying money to the finance Company shows that the agreement was still subsisting.

7) By the time the second defendant/appellant put a caution on the land, the plaintiff had paid the full sum to the first defendant and he had all the documentation to enable him to transfer the land to his name duly signed but could not do so.

8) That there is a controversy whether the 2nd defendant knew all along that the first defendant intended to sell the property but the lower court after due consideration of evidence of both sides, made findings that the defence evidence in that regard was in fact an after thought after a change of mind. Considering that approval by the land control board went through the chief and the land board could not give approval until the family gave them.

9) Though the first defendant said that he had repaid some money to the plaintiff, there was no proof for the same.

10) The first defendant had said that he was ready to repay the plaintiff his money but he had not

ventured to refund it to him or to deposit it in court as a sign of a good will towards that end.

On the basis of the foregoing reasoning the lower court found that the plaintiff had proved his case on a balance of probability and made orders for:-

(a) Specific performance of the agreement of sale.

(b) Transfer of the land in dispute to the plaintiff.

(c) Costs of the suit plus interest on the same at court rates to be paid to the plaintiff.

The appellant became aggrieved by those orders and he has appealed to this court citing 3 grounds of appeal namely:-

(1) The learned Senior Resident Magistrate properly observed that the terms of the agreement were not adhered to but then went ahead and gave specific performance of the same in favour of the plaintiff.

(2) The learned magistrate failed to appreciate that after the Respondent failed to honour his part of the agreement the first petitioner was entitled to cancel the agreement.

(3) The learned magistrate's judgment lacks in reasoning and is against the weight of evidence. On that account the appellant urged the court to allow the appeal, set aside the lower court's judgment and that the appellant be allowed costs both on appeal and the lower court.

In his oral submissions, Counsel for the appellant reiterated the grounds of appeal and stressed the following points.

(1) That it is correct that there was an agreement of sale and entered into on 30.4.90 which was to be completed within 60 days, which 60 days fell at end of June.

(2) That when the Respondent failed to complete, the appellant gave notice that the agreement had been cancelled.

(3) The balance of the purchase price paid in 1991 a year and a half later after.

(4) The amount to be paid to the bank was only Kshs 48,277.00 but amount paid to the bank after the agreement was Kshs 75,000.00.

(5) The Respondent agrees that he was in breach as he admits to have paid the balance after the agreement had been cancelled.

(6) The lower court having found that the Respondent was in breach should not have gone ahead and ordered specific performance.

(7) Further the appellant received less than what he was supposed to have received under the agreement.

In response Counsel for the appellant opposed the appeal on the following grounds.

(1) It is correctly observed in the judgment by the learned trial magistrate that the terms of the original agreement were not adhered to, but the first appellant continued receiving money.

(2) Although the completion of the sale agreement was not altered by another agreement, parties by their conduct altered that completion date by transacting outside it as the last batch of the money was received in may 1991 which money was paid to the first appellant advocate Mwaura and Mwaura advocate, who forwarded the money to the bank. By virtue of that, that agreement was extended to that date.

(3) The first appellant received some money in August, 1990 beyond June 1990 and so he cannot insist on the validity of the completion date more so when he never suffered any loss.

(4) They maintain that the learned trial magistrate was right as he was satisfied that there was no cancellation of the agreement, more so when no evidence was adduced to show that the cancellation notice was issued. Doubt of cancellation of the agreement is shown by the fact that the first appellant could not cancel the agreement and then his advocate continue to receive money on account of the same agreement.

(5) They maintain that the proper procedure was followed to discharge the property and obtain the necessary consent for transfer.

(6) The second appellant cannot be heard to say that she was not aware of the sale when she has stated in her testimony that the respondent used to frequent their home with an intention of buying their land.

(7) That objection to transfer was done after documents were released to the respondent to effect the transfer.

(8) That judgment in the lower court was on 31.10.96 where as the appeal was filed in October 1997. The same is incompetent as there is no proof that leave was obtained to file the same out of time. On that account the appeal has no merit and it ought either to be struck out or to be dismissed with costs to the respondent.

In response to the respondent's submissions counsel for the appellant added that the 58,000/- alleged to have been paid in august 1990was in fact paid on 13.6.90 before the expiry date of 30th June 1990.

2. That there is no agreement by conduct as the first appellant never received money after the expiry of the completion period.

3. They still maintain that since the learned trial magistrate found that there was breach, orders for specific performance should not have issued.

4. Lastly that the sale agreement is in the lower court file and the court can peruse the same.

On the courts assessment of the facts here in, it is clear that the respondent's counsel has raised to issues that the appeal has to pass if it is to survive. The first one is the technical one which concerns the competence of the appeal. The second one deals, with the merits on the competence. The respondents counsel raised the issue of the appeal having been filed out of time without leave. The appellants counsel did not respond to this in his reply. It is not in dispute that the judgment in the lower court was delivered on 31.10.96. The memorandum of appeal is dated 28th October 1997 and filed on 29 October 1997 almost a year later. Section 79G of the civil procedure Act provides specifically that an appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of the decree, or order, appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time. Thirty days from 31.10.96 would take the appellant to about 31st November, and if the 31st day falls on a weekend or holiday that would push the date for filing to either 1st or 2nd December 1996.

Any period beyond that falls within the provisal whereby the appellant has to show sufficient cause for filing the same out of time. The recognized mode of showing, is through an application for leave to file an appeal out of time and appropriate orders obtained to that effect. It is only after requisite leave to file an appeal out of time has been granted that an appeal can be filed. In the absence of such procedural steps being taken no valid appeal can be validity filed. Where leave has been granted, the memo of appeal would indicate so. Herein a perusal of the memo of appeal indicates clearly that the appeal was

filed in pursuance to leave granted on 23.10.97 by Mr. Justice Githinji in Misc. Application No. 19 of 1997. If the Respondent had any doubt of such leave having been obtained, then he should have raised a preliminary objection or put in an application to strike out the appeal on the ground that leave does not exist. In the absence of such a step being taken there is no way this court can fault that leave. It is therefore the finding of this court that necessary leave was obtained and so the appeal is properly before this court.

On the merits of the appeal, it is clear that the proceedings in the lower court was commenced by a plaint. The response there to is expected to be a defence. Order VIII rule 1(2) provides, "where a defendant has been served with a summons to appear, he shall unless some other or further order be made by the court, file his defence within fifteen days after he has entered an appearance in the suit and serve it on the plaintiff within seven days from the date of the filing of the defence." The command to the defendant is that "the enters appearance, and files a defence, unless if the court orders otherwise". The pleading that the appellant defendant filed in the lower court was an affidavit to respond to the plaintiff. A perusal of the lower court record does not reveal anywhere where an entry was made by the court authorizing the defendant to file an affidavit instead of a defence. It fallows that since the appellant/defendant did not comply with Order VIII rule 1 (2) Civil Procedure Rules, there is no valid defence on the record and in the absence of a valid defence on the record, there is no basis upon which the defence evidence could be received. The same was received in error and is therefore of no consequence. It is therefore the finding of this court that the piece of papers found at pages 5 – 9 of the record are not a defence and are of no consequence in the proceedings. They should have been struck out in the lower court and then matter should have proceeded by way of formal proof.

Entry of appearance in the lower court is also called into question. The same is found at page 4 of the record of appeal. It is indicated that it was being entered on behalf of Bernard Mbugua Kinyanjui and Naomi G. Mbugua. It is observed that it has only one signature. It therefore means that appearance was entered jointly. Order 9 rule 5 Civil Procedure Rule states. "If two or more defendants appear in the same suit by the same advocate, and at the same time, the names of all the defendants so appearing shall be inserted in the same memorandum of appearance". By implication it means that joint appearance is only allowed where the same is being entered on behalf of the defendants by an advocate. It means therefore that where parties are entering appearance in person, each has to sign and enter appearance separately. It therefore follows that the joint appearance is defective and cannot hold. This faulting of the appearance also faults the affidavit that was filed after it. It means that the plaintiff's claim is un defended as there are no valid papers in opposition.

The faulting of the affidavit in opposition of the claim and the appearance is sufficient to dispose off the appeal herein but since the evidence was touched on in the argument, there is no harm in assessing it so that all the issues are considered and finally determined by this court. The undisputed evidence is that there was:-

(1) an agreement of sale of land between the first appellant and the respondent.

(2) It was part of the agreement of sale, that part of the money be paid to the first appellant and part of it be paid to the bank where the property subject of the sale was mortgaged.

(3) It is apparent that the first appellant received part of this money while part of it went to discharge the property. The details of the payments are set out in the judgment but no exhibits were included in the record. It is however, clear that neither party seems to be in opposition to the findings of the figures on what was paid by the Respondent.

(4) It is apparent also that after payment was made to the bank the title documents were released to the Respondent who went to the land control board and consent was given and when the Respondent moved to have the suit land registered in his name is when he discovered that the second appellant had placed a caution.

(5) It is on record that when the suit was filed is when the first appellant put in a non-committal

affidavit a process not provided for in law. These papers were filed in person and since the first appellant was not an advocate it was imperative for the second appellant to file own pleadings in opposition to the claim. None was filed and this being the case it means that she has no opposition to the Respondent/Plaintiff's claim and her evidence if any has no business being on record as it has no basis on which to stand.

(6) It is on record that the appellant's main objection to the plaintiffs claim is that the sale was not completed in time and so the agreement stood cancelled. Indeed the learned trial magistrate found as a fact that some transaction seem to have been done outside the completion time. Counsel for the appellant has used this to urge the court to find that on this account specific performance should not have been issued. Indeed the learned trial magistrate found that rescinding of the agreement was a possibility. But then looked at the Respondent/Plaintiff being left remediless because the appellant had not tendered the purchase price in court and neither was he offering refund of the same. The appellant could not benefit from the purchase price, discharge of title from the bank, and then hide under cancellation of the agreement to the detriment of the Respondent.

The lower court was entitled to consider the interests of both parties as being paramount and then fail to rule in favour of the defaulting party.

Further the flawed pleading of the appellant had not sought a declaration that the court do declare the agreement to have been rescinded and that the Respondent be ordered to take back money paid by tendering it in court. In the absence of such a pleading and action, there is no basis upon which the learned trial magistrate could have arrived at a contrary finding.

The up short of the foregoing assessment of the facts and the conclusion of this court is that the appeal has no merit and the same is bound to fail for the following reasons.

(1) In law a plaint is supposed to be defended by a defence. Herein the Respondent's claim in the lower court was defended by an affidavit in opposition a pleading not known in law. Since the affidavit is found to be an incompetent pleading in law, the respondent's claim is to be taken to be undefended.

(2) Since the said affidavit was filed in person by the first appellant who was not an advocate, it cannot be taken to be operating for the 2nd appellant as well.

(3) It has been noted that the appearance filed herein is a joint one. It bears the names of both appellants but it has only one signature. Since the same was not filed by an advocate the joint appearance is defective and its faulting as well as that of the affidavit leaves the respondent's claim to be undefended.

(4) On the merits of the evidence, the evidence of the second appellant has no basis being on record due to the faulting of the affidavit in opposition of the respondents claim as it was incapable of being treated as that based on a pleading to which she is a party. Save that her evidence could only be used as that of a witness to that of the first appellant. She was also incapable of being treated as a party due to the faulting of the appearance filed herein.

(5) Even if the affidavit in opposition were to be taken as a pleading, it cannot be used to fault the lower courts judgment. What was required was a counter claim by the appellant seeking a declaration that the sale agreement be declared to have been rescinded. In the absence of such a pleading being put in place, the appellants counsels submissions that the agreement should have been treated as having been rescinded holds no water. The learned trial magistrate could only act on the basis of a request to that effect in a duly filed pleading.

(6) Having found that money changed hands and appellant having benefited, it was necessary for him to seek an order in a counter claim that he be allowed to refund the same and then go ahead to tender the same in court. In the absence of such a pleading and tender the learned trial magistrate was entitled to rule as he did because justice demanded that the 1st appellant could not benefit from the respondents money, keep the same as well as the land. Failure to plead rescission of the contract, failure to tender the

money in court disentitled the first appellant to the relief being agitated on appeal.

The appeal stands dismissed for reasons given with costs to the Respondent both on appeal and the lower court.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER DAY OF SEPTEMBER 2007.

R. NAMBUYE

JUDGE