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Eastern Bypass Estate Limited v Muturi & another (Environment and Land Appeal E86 of 2022) [2024] KEELC 1788 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1788 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E86 OF 2022

JG KEMEI, J

APRIL 9, 2024

BETWEEN

EASTERN BYPASS ESTATE LIMITED .... APPELLANT

AND

RISPER NJAMBI MUTURI .... 1ST RESPONDENT

MARY WAMBUI MURAGU .... 2ND RESPONDENT

(Being an Appeal against the Judgment of Hon J. A. Agonda, PM delivered in SPM ELC NO. E124 of 2021 at Ruiru on the 8/9/2022)

JUDGMENT

1. Aggrieved by the Judgment of the trial Court in SPM ELC No. 124 of 2021 the Appellant filed this Appeal on the grounds set out:-

   a. Thatthe Learned Magistrate erred in fact and in law by finding that the agreement relied on by the Plaintiff had the 2nd Defendant's letter head and that this made the said agreement meet the requirements of Section 3(3) of the *Law of Contract Act*.

   b. Thatthe Learned Magistrate erred in law and fact by finding that the Sale Agreement was a valid agreement capable of being enforced by the parties while it was an agreement only between the Plaintiff and the 1st Defendant.

   c. Thatthe Learned Magistrate erred in law and fact by finding that because the Sale Agreements were executed in the offices of the 2nd Defendant it should be held liable.

   d. Thatthe Learned Magistrate erred in law and fact by finding that no requisite land documents were availed to the Honourable Court while the 2nd Defendant had produced copies of Title

Deeds for parcels of land known as Title Numbers L. R. No. 30393/1404 and L.R. No. 30393/568, which properties had been listed by the Plaintiff in her Plaint.

e. Thatthe Learned Magistrate erred in law and fact by finding that the Plaintiff wrote to the 2nd Defendant on the Completion Date when no mention of the Completion Date was made in the pleadings filed or even in the evidence produced before the Court.

f. Thatthe Learned Magistrate erred in law and fact by finding that the 1st Defendant was the legal owner of the suit property, despite lack of proof by the Plaintiff that the 1st Defendant had indeed purchased the suit property from the 2nd Defendant.

g. Thatthe Learned Magistrate erred in law and fact by finding that the Plaintiff did not have to follow the 1st Defendant for proof of ownership despite the 2nd Defendant having requested for the same.

h. Thatthe Learned Magistrate erred in law and fact by finding that the 1st Defendant was the legal owner of the suit property when no evidence was produced to that effect.

i. Thatthe Learned Magistrate erred in law and fact by finding that there was a completion date of 90 days and that the Plaintiff's Advocates had written to the 2nd Defendant requesting for completion of the transaction, when no evidence was produced to this effect.

j. Thatthe Learned Magistrate erred in law and fact by finding that the 2nd Defendant is bound by a contract it has denounced as fraudulent and one it was not a party to.

k. Thatthe Learned Magistrate erred in law and fact by finding that the Plaintiff was in possession of the suit property since March 2015 to date, when this was not pleaded or testified to during the trial.

l. Thatthe Learned Magistrate erred in law and fact by finding that the 2nd Defendant should be compelled to surrender the suit property's completion documents to the Plaintiff, since the Plaintiff had paid transfer fees to it.

m. Thatthe Learned Magistrate erred in law and fact by finding that the Plaintiff had proven specific performance in a contract the 2nd Defendant was not a party to.

n. Thatthe Learned Magistrate erred in law and fact by failing to consider the 2nd Defendant's pleadings and evidence in its entirety.

o. Thatthe Learned Magistrate erred in law and fact by failing to find the 1st Defendant having been paid by the Plaintiff should have been held liable for specific performance of the agreement between her and the Plaintiff.

p. Thatthe Learned Magistrate was wrong in finding and entering Judgment for the Plaintiff as against the 2nd Defendant.

2. The Appellant sought reliefs as follows:-

a. Thatthis Appeal be allowed with costs.

b. Thatthe Judgment and Decree made on 8th September 2022 be set aside and there be substituted an order entering Judgment for the Appellant dismissing with costs the 1st Respondent's case in the Subordinate Court.

c. Thatthe Respondents do pay the Appellant's costs of this Appeal and the costs of the suit in the Subordinate Court.

3. In the trial Court the Plaintiff filed suit against the Defendants seeking the following orders:-

a. A declaration that the Plaintiff is the rightful owner of Plot No. 686 previously owned by Eastern By-Pass Estate Limited.

b. An order compelling the 2nd Defendant Eastern By-Pass Limited to surrender to the Plaintiff Plot No. 686 and all documents pertaining to the said property.

c. In the alternative to pray 1 and 2 above the 1st and 2nd Defendant do compensate the Plaintiff with the equivalent of the current market value of Plot No. 686.

d. Costs of the suit as well as interest.

4. It was the Plaintiff's case that at all material times the 2nd Defendant owned parcel Nos. L. R. Nos. 30393/1404 and L.R. 30393/568 situate along Eastern Bypass Kiambu County. That the 2nd Defendant subdivided the lands into plots and offered them to members of public for sale. In March 2015 the Plaintiff applied for a plot from the 2nd Defendant and was informed that the plots available were those that previous buyers were reselling and therefore the 2nd Defendant introduced the Plaintiff to the 1st Defendant who was the initial purchaser of Plot 686. That thereafter the parties met in the 2nd Defendant's offices leading to the execution of the agreement on 11/3/2015 upon which the Plaintiff paid the sum of Kshs. 850,000/- being the purchase price to the 1st Defendant. Further that the Plaintiff paid the 2nd Defendant a transfer fee of Kshs. 50,000/- which was receipted on 13/3/2015. Thereafter she was issued with an Allotment Letter by the 2nd Defendant.

5. At the point that titles were being processed, the 2nd Defendant refused to process a title for the Plaintiff indicating that there was a problem with the allotment. Despite several demands for title, the 2nd Defendant has adamantly failed to release the title to her.

6. The 1st Defendant though served did not enter appearance nor file defence.

7. The 2nd Defendant filed its statement of defence dated 5/11/2021 where it denied the Plaintiff's claim. It admitted being the owner of parcel L.R Nos. 30393/1404 and 30393/568. Interalia the 2nd Defendant stated that: no subdivisions of the 2 parcels were done as claimed by the Plaintiff; never sold any parcel of land to the Plaintiff; never received any money from the Plaintiff; never issued an Allotment Letter to the Plaintiff; no records in support of 1st Defendant ever purchasing land from the 2nd Defendant; no evidence that Plot No. 686 belongs to the 2nd Defendant.

8. At the trial the Plaintiff testified and adopted her witness statement dated 3/9/2021 and 7/9/2021 as her evidence in chief. She also produced documentary evidence marked as PEX No. 1-12. That she visited the offices of 2nd Defendant whereupon she met the staff, one being Winnie Maina who introduced her to Mary Wambui Muragu whom she entered into an Agreement of Sale for the purchase of Parcel 686 at the sum of Kshs. 850,000/-. The agreement was witnessed by Ms. Winnie Maina and a Ms. Diana, being staff of 2nd Defendant. That she also paid Kshs. 50,000/- to the 2nd Defendant as transfer fees. She averred that upon payment she was given an Allotment Letter by Mary W. Muragu. That she also was given a deed plan for Plot No. 686. That later she was informed that her allotment had a problem. She called Mary who asked her to deal with Winnie but by then Winnie was no longer working with the 2nd Defendant.

9. In re-examination she confirmed that she did not purchase the land directly from the 2nd Defendant but Mary Wambui Muragu.

10. DW1 – Muthumbi Waweru testified on behalf of the 2nd Defendant and informed the Court that he is a Director of the 2nd Defendant. The witness informed the Court that the 2nd Defendant purchased a large parcel of land, subdivided and sold to third parties. That it was a requirement to pay Kshs. 1,000/- for application. That he did not find any documents in his office that show that the 1st Defendant purchased land from the 2nd Defendant. That he does not know the 1st Defendant nor received any money from the Plaintiff.

11. On the 8/9/2022 the Court delivered its Judgment and granted the following orders:-

    a. A declaration that the Plaintiff is the rightful owner of Plot 686 previously owned by Eastern By-Pass Estate Limited.

    b. An order compelling 2nd Defendant to surrender to the Plaintiff Plot 686 and all documents pertaining to the suit properties.

    c. The 2nd Defendant is condemned to pay the costs of the suit to the Plaintiff.

12. It is this Judgment that has triggered the Appeal.

13. On 18/10/2023 parties elected to file written submissions which I have read and considered.

14. The Appellant submitted that in support of grounds 1, 2, 3, 10, 12 of the Sale Agreement was only enforceable between the 1st and 2nd Respondents. The Appellant is not a party to the Agreement. That the fact of the Agreement of Sale having been signed in their offices or allegedly witnessed by their employees does not make the Appellant liable. That in any event the employees had no authority to witness the agreements on its behalf. That the Appellant has denied knowledge of the transaction and therefore the doctrine of estoppel does not apply.

15. Relying on the decision of Savings & Loan (K) Ltd Vs. Kanyenje Karangaita Gakombe & Another (2015)eKLR the Appellant submitted that there was no privity of contract between it and the 1st Respondent.

16. As to whether there was a valid contract between the Appellant and the 2nd Respondent, the Appellant submitted in the negative. That there was no evidence led to show that the 2nd Respondent was a member of the Appellant; no existence of an agreement between the Appellant and the 2nd Respondent; no proof of payment to the Appellant for the purchase of a plot. She relied on a plot Allotment Letter whose authenticity was put to question.

17. On grounds 5, 9 and 11 the Appellant submitted that the Court referred to facts not contained in the pleadings such as determining that the 1st Respondent was the lawful owner of Plot 686; 90 day completion date and the issue of possession. That these facts were neither raised in pleadings nor evidence and the Court was faulted on that ground.

18. It was submitted that there were no subdivisions of L.R. No. 30393/1404 and L.R. 30393/568 to create Plot No. 686 because the two plots were too small in size to allow for further subdivisions. The 1st Respondent failed to produce a title for 686 in the name of the Appellant save for a deed plan which she admitted in evidence as incorrect, and a Letter of Allotment which did not specify where Plot 686 originated from.

19. Lastly the Appellant submitted that the Appeal is not meritorious and the Court was urged to dismiss it.

20. The Respondents failed to file written submissions.

21. The key issue is whether the Appeal is merited.

22. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first Appellate Court which is to:

> "... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions."

23. Besides, that duty has been affirmed in numerous decisions of the superior courts. Notably in the case of Selle & Another Vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was pronounced thus:

> "... this court is not bound necessarily to accept the findings of fact by the court below. An Appeal to this court ... is by way of retrial and the principles upon which this court acts in such an Appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

24. The onus of proof rests on the person who asserts. Section 107 - 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya state as follows:-

> " 107. Burden of proof
>
> (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

25. It was the Plaintiff's case that she purchased land Plot No. 686 from Mary W. Muragu and paid her Kshs. 850,000/-. That later she was issued with a Letter of Allotment that was witnessed by certain employees of the Appellant. That the said employees together with the seller showed her the land.

When it came to documents she was shown Plot Nos. L.R. No. 30393/1404 and 30393/568 which she states were subdivided to create Plot No. 686. That the closest document she had was a deed plan for Plot No. 686 which she admitted was a wrong document. At no time did she table a copy of title in the name of the Appellant with respect to Plot No. 686. The 1st Respondent placed reliance on the place of signing of the agreement and that employees of the Appellant witnessed the agreement. I have considered the Sale Agreement dated 11/3/2015 and note that it was between the 1st and 2nd Respondents. The Appellant was not a party to the agreement. Further the payment was made to Mary W. Muragu. The 1st Respondent failed to carry out proper due diligence on the land she was buying and she cannot turn around and blame the Appellant. Even if the agreement was signed in the offices of the Appellant it is not enough to place liability on the shoulders of the Appellant.

26. In the case of Savings & Loan (K) Limited Vs. Kanyenye Karangaita Gakombe & Anor [2015]eKLR the Court of Appeal held that:-

> "... the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract."

27. In this case the Court finds that the Appellant was not a party to the contract. The Court also finds that there are no exceptions to the doctrine of privity of contract that may be applicable to this case.

28. The Court has seen an Agreement of Sale between the Appellant and the 1st Respondent but it is not executed. This goes further to support the Appellant's averment that it was not a party to the agreement.

29. In addition the 1st Respondent has not created a nexus between the Appellant and the Plot No. 686. It was her duty to show that the Appellant owned the land. It is not expected that the Appellant would sell a plot it did not have. Equally having paid a colossal sum of money it is expected that she ought to have satisfied herself that the purported seller had an interest in the land.

30. In the end I find that the trial Hon. Magistrate erred in fact and in law in reaching the decision she did.

31. The Appeal succeeds as follows;

    a. That this Appeal be and is hereby allowed with costs.

    b. That the Judgment and Decree made on 8/9/2022 be set aside and be substituted with an order dismissing with costs the 1st Respondent's case in the Subordinate Court.

    c. Costs shall be in favour of the Appellant both in the trial Court and on Appeal.

32. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 9TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kabuthu for the Appellant

Ms. Waitere for 1st Respondent

2nd Respondent - Absent

Court Assistants – Phyllis/Oliver