



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 33 OF 2019**

**RICHARD MUGAA.....APPELLANT**

**VERSUS**

**CYRUS MUTHUI MWAURA.....RESPONDENT**

*(Being an appeal from the Judgment/Decree and Orders of HON. G.N WAKAHIU*

*Chief Magistrate delivered on 31/12/2018 in MAUA CMCC No. 186 of 2004)*

**JUDGMENT**

1. The appellant being the defendant in the trial court was sued by the respondent vide a plaint dated 20/12/2004 and amended on 24/10/2014 seeking a declaration that the appellant do forthwith transfer LR. No. ITHIMA/NTUNENE/2697 to the respondent and acknowledge the balance thereof or in the alternative, there be a refund of the purchase price and pay the respondent liquidated damages for breach of the sale agreement, general damages for breach of contract and costs of the suit.

2. It was the respondents' case that on 9.8.2004, the parties entered into a sale agreement for land title no. LR. No. ITHIMA/NTUNENE/2697 measuring 0.10 acres for a consideration of **(Kshs. 90,000)**, where the respondent paid **Kshs. 50,000** leaving a balance of **(Kshs. 40,000)** which the appellant refused to receive and also refused to transfer the suit land.

3. The Appellant filed his draft statement of defence dated 25/07/2005 denying having entered into any legally binding sale agreement with the respondent and if there was such an agreement, then it was the respondent who breached the contract by failing to pay the purchase price.

4. At some point an interested party identified as DAVID MUNGANIA KIMBA emerged to claim that the appellant sold to him the suit parcel for **Kshs. 130,000**, which he paid in full and was given the original title deed by the respondent. This was after the respondent urged him to buy the parcel of land so that the appellant could refund him the initial deposit paid. The interested party actively participated in some proceedings before the magistrate's court particularly the prosecution of his application dated 6.11.2015 to have injunctive orders of 2.11.2015 issued in favour of the respondent discharged. He also participated in the cross examination of the respondent during the hearing. However, there are no records to show whether or how he was enjoined in the suit. He also did not file any pleadings and he did not testify.

5. The matter proceeded for hearing, the respondent gave his evidence but the appellant and David Mungania did not. The court finally set the matter for judgment after allowing the appellant to use his draft defence as his defence.

6. On 31/12/2018 the trial court entered judgment in favour of the respondent as follows:

**1. A refund of the payments made by the plaintiff to the defendant being (Kshs. 50,000), and the agreed liquidated damages of Kshs. 180,000 all totaling to Kshs. 230,000.**

**2. Interests on (a) above until payment in full.**

**3. General damages for breach of contract in the sum of Kshs. 2,000,000.**

**4. Costs of the suit**

7. The appellant being aggrieved by the decision filed his memorandum of appeal dated 4/2/2019 basing his appeal on six (6) grounds as follows:-

i. That the learned Chief Magistrate erred in law and facts by failing to adhere to the provisions of Section 6 and 7 of the Land Control Act among other laws and therefore his finding was wrong on the principals of law.

ii. That the learned Chief Magistrate erred in law and facts by failing to properly interpret the sale of land agreement and understand its very clear terms which showed the respondent was in breach of contract.

iii. That the learned Chief Magistrate erred in law and facts by ignoring the provisions of the applicable law in a controlled sale of land agreement which becomes null and void for all purposes after expiry of six months in absence of the land control board consent.

iv. That the learned Chief Magistrate erred in law and facts by awarding general damages of 2,000,000 to the respondent for the breach of contract and against all facts as tendered and the law applicable.

v. That the learned Chief Magistrate erred in law and facts by failing to give the defendant an opportunity to tender evidence in presence of his advocates and proceeded to hear the matter which denied the defendant the right to be heard against the principles of natural justice.

vi. That the learned Chief Magistrate erred in law and facts and his judgment and decree is against the law and oppressive to the appellant.

8. The appeal was canvassed by way of written submissions. The Appellant submitted that a controlled transaction becomes null and void unless the land control board consent is obtained within six months which was not the case here and thus the only remedy available to the respondent was to pursue the consideration paid to the vendor. It was stated that the trial court did not have any basis in fact or law of awarding general damages of Kshs.2,000,000 in a controlled transaction.

9. The appellant further submitted that it was erroneous for the trial court to give the award of sh.50 000 and sh. 180 000 yet it is the respondent who was in breach of the agreement. He contended that since the consent of the land control board was not obtained, the only remedy available to the respondent was pursuing the consideration.

10. The appellant relied on the following cases; **Kariuki V Kariuki [1983] KLR 225, Margaret Njeri Muiruri v Bank of Baroda Ltd [2014] eKLR, Kahia vs. Nganga (2004) 1EA 75 and Hiran Ngaithe Githire vs. Wanjiku Munge 1976-80 1KLR PG 1132.**

11. The respondent submitted that it was the appellant who breached the contract by his actions; receiving part of the purchase price, refusing to accept the balance, failure to obtain land control board consent and failing to transfer the Suit Land. Thus the actions of the appellant were geared towards frustrating the transaction and in the circumstances, general damages were tenable as it was only just and fair that the respondent be compensated by way of damages.

12. The respondent further submitted that it is trite law that courts do not rewrite contracts as the parties are bound by the terms of the contract. It was an express written condition of the contract that in case of breach, the innocent party shall be paid Kshs.180,000 as liquidated damages and other costs incurred therefrom. It was his submission that this appeal lacks merits and should be dismissed. He relied on the following cases; **Capital Fish Kenya Limited v Kenya power & Lighting Company Limited [2016] eKLR, Delilah Kerubo Otiso V Ramesh Chander Ndingra [2018]eKLR, Standard Chartered Bank Limited V Intercom Service Ltd & Others NRB-Civil Appeal No. 37 of 2003 (2004) eKLR and Margaret Njeri Muiruri V Bank Of Baroda (Kenya) Limited [2014]eKLR**

### **Analysis and determination**

13. As the first appellate court, the duty thereof is to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.** where it was observed thus:-

***“An appeal to this Court from a trial by the High 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”***

14. **Pw1** Cyrus Muthui Mwaura testified and also adopted his statement dated 14/10/2015 as his evidence. He averred that vide the agreement dated 9.8.2004, the appellant sold to him the suit land at a purchase price of Kshs. 90,000 to which he paid a deposit of Kshs.50,000. The balance thereof was to be paid on monthly instalment of Ksh. 10,000 as from 30.8.2004. That the appellant refused to receive the balance of the money, and he was later ordered to vacate the land which he had been in possession of since 2004-2016, yet he had developed the same.

15. In cross-examination, **PW1** stated that he had been given possession of the title deed by the appellant to show his willingness to sell the land to him, but the same was grabbed from him a month later. He never defaulted on his payments as it was the appellant who refused to receive payments and he was never refunded his money. He is aware of a court ruling of 26.1.2016 where it was stated that the interested party is in possession of the suit land. He contends that he suffered loss and damages as he was not utilizing the land and the interested party was using his crops which he had planted.

16. In support of his case, PW 1 had produced as his exhibits, the sale agreement, an acknowledgment receipt and a demand notice.

17. From the memorandum of appeal, the record of appeal and the submissions filed thereof, I frame the issues for determination as follows;

**Whether the appellant was denied an opportunity to be heard and to tender evidence; Whether there was breach of contract entered between the parties; Whether the Trial Magistrate misconstrued the provisions of the Land Control Act, Cap 302 and the regulations made thereunder and whether the award of general damages for breach of contract of Kshs. 2,000,000 was deserving;**

18. On the issue as to whether appellant was given an opportunity to be heard, I find that the trial court gave due consideration on the consequences of failure to adduce evidence. The evidence on record shows that the appellant never filed a formal statement of defence. Nevertheless, on 27.12.2018, which was the date for defence hearing, the court allowed the appellant to use his draft defence filed on 25.5.2005. Apparently, the appellant declined to tender any evidence as his advocate was absent.

19. Noting that the appellant never filed his statement of defence and/or his witness statements and list of documents, the trial court made reference to the case of **Motex Knitwear Limited V Gopitex Knitwear Mills Limited** where it was stated that;

***“Although the defendant has denied liability in an amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated.”***

The trial court also relied on the cases of **Trust Bank Limited v Paramount Universal Bank Limited & 2 others and Interchemie EA Limited v Nakuru Veterinary Centre Limited**, which echoed the sentiments expressed in **Motex Knitwear Limited V Gopitex Knitwear Mills Limited (supra)**. The trial court in its determination observed that defendant was in court but he failed to adduce evidence, hence the court went ahead to analyze respondent’s case based on the evidence adduced.

20. It is therefore clear that the appellant was given an opportunity to tender his defence using his draft defence as the pleading, but he failed to seize the moment.

21. It is not lost to this court that at some point, (precisely on 7.6.2012), the trial court exempted the parties from complying with order 11, all in an effort to expedite the trial. However, the issue of compliance with order 11 of the Civil Procedure Rules was revisited later on 7.9.2015, when parties were directed to comply. Three years later when the defence was denied the adjournment on 27.12.2018, the appellant had filed NOTHING!

22. The courts have an overriding objective under the Civil Procedure Act and Rules to facilitate the just, expeditious, proportionate and affordable resolution of the disputes governed by the Act. **Section 1A (3)** thereof provides that:

***“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.***

23. The appellant cannot blame the trial court for his missteps. The records are clear that the appellant was given ample opportunity to comply with courts directions geared towards the prosecution of the suit, but he miserably failed in such endeavours for the 13 or so years the matter marked time in the magistrate’s court. I find that the trial court did not err in proceeding to determine respondent’s case on the weight and strength of his evidence without reference to the appellant’s case.

24. The facts of the suit are fairly straightforward and undisputed. The parties executed a sale agreement for the sale of the suit land at a purchase price of Kshs. 90,000. The respondent paid the appellant Kshs. 50,000 being deposit on account of the purchase price. The agreement also contained a clause to the effect that;

***“Any party in breach of clause or condition of this agreement shall pay the innocent party Kshs. 180,000/- as liquidated damages and other costs incurred therefrom.”***

25. The appellant never procured the Land Control Board Consent and later sold the suit land to another party. In his draft defence statement, he put the respondent to strict proof in regard to whether an agreement was ever entered into. The respondent produced the sale agreement as well as the acknowledgment receipt as prove of his claim.

26. The appellant did not dispute his non-performance or frustration of the contract nor did he dispute that he was to furnish and obtain the necessary documents to complete the transaction or that he failed to produce the same. The respondent demonstrated attempts he made to complete the transaction by paying the deposit of the purchase price. In the circumstances, I find that the appellant is the one who was in breach of the contract.

27. It is trite law that a court of law should not rewrite a contract between two parties. Having found that the appellant was in breach of the contract, the parties themselves expressly provide for liquidated damages in case of breach. I therefore find that the trial court properly determined the issue of enforcement of consequences of breach.

28. The appellant has challenged the trial magistrate’s interpretation of the provision of **section 6 & 7 of the Land Control Act**, which provides as follows;-

**“6. (1) Each of the following transactions that is to say—**

**(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.**

**7. Recovery of consideration; 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 .....**

29. The trial magistrate was right in his conclusion that the agreement between the two parties became null and void for all purposes in accordance with the provisions of Section 7 of the Land Control Act. It is also clear from the magistrate’s determination that he awarded general damages as compensation for breach of contract and not under the provisions of the Land Control Act. The appellant committed himself in their agreement to perform certain obligations towards the respondent, in return for considerations. The law of contract requires the appellant to make good the loss which he had occasioned to the respondent and I opine that the appellant must make recompense in form of damages.

30. In **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited (2016) eKLR**, quoted in **Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR** the Court of Appeal remarked as follows;

**“On the second issue the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive.....**

31. The appellate court in **Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR (supra)**, went on to hold that;

**“In our view, the appellant’s conduct was oppressive, highhanded, outrageous, callous and underhanded, to say the least. We could go further and suggest that what he was engaged in, bordered a fraud. The appellant from the word go never had the slightest intention of honouring the agreement. ....He engaged in a disappearing act whenever it suited him only to re-appear and invoke section 7 of the Act and proclaim that the transaction was void.... In the circumstances, general damages would be tenable in our view. Given the foregoing, how can the judge be faulted for invoking the general principles of contract law as opposed to the provisions of sections 6 and 7 of the Act so as to annul the sale agreement? Had the judge taken that route the result would have been unjust and oppressive to the appellant. The court would have sanctioned the unacceptable conduct of the appellant and allowed him to benefit from his own mischief.”**

32. I wish to echo the sentiments of the Court of Appeal, that the appellant had a duty towards the respondent which he reneged on. It would therefore be unjust and oppressive to the respondent if the appellant is allowed to benefit from his own mischief.

33. However, I do find that the award of general damages of Kshs. 2,000,000 to be excessive. To this end, I have taken into account that the subject matter was a rather small piece of land, just 10 points of an acre and that the monies paid to the respondent was also not colossal, the same being Ksh.50 000 only. I have also taken into account that the respondent had not developed the suit premises contrary to the holding of the trial magistrate that the respondent had done developments from 2004-2016. In his own words in the recorded statement, the respondent stated that he was denied a chance to utilize the suit premises. All in all, I find that **an award of Ksh.300 000 is fair and reasonable** considering that the appellant would still shoulder the burden on costs.

34. It is the view of this court that this is a case where the parties could have immensely benefited from exploration of Alternative Dispute Resolution Mechanism (ADR) to avoid the rigours of litigation and ensuing costs. Sadly, this never came to be.

35. In the final analysis, I opine that the appeal only partially succeeds on the reduction of the award of general damages. **Thus the judgment of the trial court is upheld with variation that the general damages for breach of contract are awarded in the sum of Ksh. 300 000. The appellant is condemned to pay half costs in the appeal. The award of sh. 230 000 plus interests thereon as well as on costs given before the trial court is maintained.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF MARCH, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 18.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**