



**Soiya v Mabwai (Environment and Land Appeal 1 of 2021)
[2023] KEELC 16089 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 1 OF 2021
LA OMOLLO, J
MARCH 2, 2023**

BETWEEN

JUDY CHEPNGENO SOIYA APPELLANT

AND

JACQUILINE CHEPKOECH MABWAI RESPONDENT

(By a Memorandum of Appeal dated 11th December, 2020 the Appellant challenges the decision of Hon. Y. I Khatambi SRM in Nakuru CMCC ELC No. 280 of 2019, delivered on 9th December, 2020.)

JUDGMENT

Introduction.

1. By a Memorandum of Appeal dated 11th December, 2020 the Appellant challenges the decision of Hon. Y. I Khatambi SRM in Nakuru CMCC ELC No 280 of 2019, delivered on 9th December, 2020.

Factual Background.

2. The Appellant filed a plaint dated 14th October, 2019 against the Respondent seeking the following orders:
 - a) An order declaring the Plaintiff the legal owner of parcel land namely Njoro/Ngata Block 2/5673 (Kirobon) by purchase.
 - b) An order for specific performance of the contract dated 14th March 2019 directing the Defendant to sign all the conveyancing documents for transfer of parcel of land namely Njoro/Ngata Block 2/5673 (Kirobon) into the Plaintiff's name within thirty (30) days failure to which the Executive Officer to sign all the documents required for the consent and transfer of the property to the Plaintiff.



- c) Costs of this suit
 - d) Any other relief that this court may deem fit and just to grant.
3. The Respondent filed her Statement of Defence and Counterclaim dated 15th November, 2019 wherein she denied all the allegations in the Plaint. She sought the following orders in the Counterclaim:
- a) A declaration that the Plaintiff now Defendant is in breach of the agreement for sale dated 14th March, 2019.
 - b) A declaration that the Defendant now Plaintiff lawfully rescinded the agreement for sale dated 14th March, 2019.
 - c) An order compelling the Plaintiff now Defendant to lift the caution placed on parcel of land Njoro/Ngata Block 2/5673 (Kirobon)
 - d) Damages for breach of agreement for sale dated 14th March, 2019
 - e) Costs of this suit
 - f) Any other further order as the court may deem fit to grant.
4. The Trial Magistrate delivered her Judgment on 9th December, 2020 wherein she dismissed the Appellant's suit on the basis that she failed to prove her case on a balance of probabilities. The trial Magistrate found that the Respondent's Counterclaim partially succeeded and directed each party to bear own costs of the suit.
5. The Appellant being aggrieved by the said judgment approached this court by way of Appeal.

The Appeal

6. The grounds of Appeal are as follows:
- a. That the Learned Trial Magistrate erred in law and fact by failing to consider the evidence of the Plaintiff and critically analyze the same and accord it due weight to the extent that it was able to prove its case.
 - b. That the Learned Magistrate erred in law and in fact in holding that the Appellant had established a *prima facie* case based on the pleadings on record and evidence but failed to award as per the prayers sought.
7. The Appellant prays for orders that;
- The Judgment/decree of the Honourable Court dated 9th December, 2020 be reviewed and judgment be entered in favour of the Appellant against the Respondent.
8. On 27th July, 2022, the court directed that the appeal be disposed by way of written submissions. The Appellant and Respondent filed their submissions on 18th October, 2022 and 4th October, 2022 respectively.

Issues for Determination.

9. In support of the grounds of appeal, the Appellant submits that the suit was founded on the sale agreement dated 14th March, 2019. She submits that if she was to be found in breach of the sale



- agreement, the only penalty provided was to order her to pay the balance plus 10% of the purchase price and no more.
10. The Appellant relies on the case of *Attorney General of Belize Al v Belize Telecom Limited & another* [2009] I WLR 1980 and submits that paragraph 11 of the Sale Agreement provided for the remedies of the breach of contract. She further submits that the trial court failed to arrive at the correct interpretation of the Sale Agreement as provided for under paragraph 11 of the said agreement.
 11. On the second ground of Appeal, the Appellant submits that the proper remedies available to the parties had been provided in the agreement. She added that the court had no business in re-writing the same. She further submits that the trial court found that both parties were in breach of the agreement but failed to order the correct remedies as provided in the sale agreement.
 12. In conclusion, she urges the court to allow the Appeal with costs.
 13. The Respondent in opposition to the Appeal identified the following issues for determination;
 - a. Whether the trial magistrate erred in law and in fact by failing to consider the evidence of the Plaintiff and critically analyze the same and accord it due weight to the extent that it was able to prove its case.
 - b. Whether the learned Magistrate erred in law and in fact in holding that the appellant had established a *prima facie* case based on the pleadings on the record and evidence but failed to award as per the prayers sought.
 - c. Who is entitled to costs?
 14. On the first issue, the Respondent relied on the case of *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C 514 and submits that the Appellant does not dispute that in terms of clause 9 of the sale agreement she was required to pay the balance of Kshs 200,000 within 90 days from the date of the agreement.
 15. She argues that the Appellant only attempted to make payment after the Respondent had rescinded the contract and even refunded the deposit. The Respondent submits that the first ground of Appeal fails and urges this court to find so.
 16. On the second issue, the Respondent submits the negative and argues that it is evident that at no point did the trial Magistrate hold that the Appellant established a *prima facie* case. She relied on the case of *Thrift Homes Limited v Kays Investment Limited* [2015] eKLR and submits that the Appellant being in breach of the sale agreement, she was not entitled to an order of specific performance.
 17. In conclusion, she submits that the instant Appeal is unfounded, devoid of merit and should be dismissed with costs.

Analysis and Determination

18. The Appeal to this court is a first Appeal. It is settled that the role of this court, on a first Appeal is to evaluate the facts and the law. This is done by analysing the evidence on record and situating it in the law so as to reach its own conclusion.
19. I am constrained to point out the casual manner with which counsel for the Appellant drafted the prayers in the Memorandum of Appeal. Even with this glaring error I am able to logically deduce from the grounds of Appeal that the appellant is dissatisfied with the decision on the Learned Magistrate in Nakuru CMCC ELC No 280 of 2019 delivered on 9th December, 2020 and wants it to be set aside.



20. I invoke Article 159 (2) (d) of the Constitution of Kenya, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act and proceed with the Appeal in order to dispense substantive justice.
21. I appreciate that an Appellate Court will seldom interfere with findings of fact by a trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.
22. In China Zhingxing Construction Company Ltd v Ann Akuru Sophia [2020] eKLR it was stated as follows:
- “The appropriate standard of review established in these cases can be stated in three complementary principles:
- a) First, on first Appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b) In reconsidering and re-evaluating the evidence, the first Appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c) It is not open to the first Appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”
23. The High Court in the China Zhingxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424 where Sir Kenneth O’Connor stated as follows;
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An Appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the Appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484.”
24. From the foregoing, there is no doubt that the task for this court is cut out. It is to evaluate the factual details of the case as presented in the trial court, analyse them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.
25. I have considered the grounds of Appeal and the submissions filed in respect of this Appeal and what emerges is that the Appellant is aggrieved by the trial court’s finding that she is not entitled to an order declaring her as the owner of the suit property on account of her purchase and further aggrieved by the refusal by the trial court to issue orders of specific performance against the Defendant directing her to sign the conveyance documents in respect of the suit property.
26. The first ground of appeal relates to the trial Magistrates failure to consider the evidence of the Plaintiff and failing to critically analyse the same.
27. There are several factual matters that are common ground: that a sale agreement was entered into between the Appellant and Respondent on 14th March, 2019, that a sum of kshs. 850,000 was received



at the execution of the agreement, that a balance of Kshs, 200,000 was to be paid within 90 days, that the Appellant as at 14th June, 2019 had defaulted in payment of the kshs. 200,000 and that as at the judgment date, the Respondent had returned ksh 745,000 to the Appellant and kept Kshs 105,000 in respect of the penalty imposed by the default clause.

28. In my view, the main issue for determination in this Appeal is whether or not the rescission or repudiation of the agreement of sale by the Respondent was valid and the legal consequences arising therefrom.
29. The Appellant, in her evidence stated that she did not receive a letter from the Defendant stating the fact of default. She also stated that after the expiry of the 90 days period, she was in constant communication with the Respondent's mother and promised to pay the balance of kshs. 200,000 by 10th October, 2019 but on 1st October, 2019 the purchase price, less 10% for default, was refunded to her.
30. I have looked through the entire sale agreement dated 14th March, 2019 and clause 11 in particular. It is in the following terms;

The party that defaults will pay 10% of the purchase price to the aggrieved party in liquidated damages.

31. The Learned Magistrate rightly observed that the 90-day period for payment of the balance of Kshs 200,000 lapsed on 14th June, 2019. The Respondents confirms that after the lapse of 90 days, her mother was in communication with the Appellant as she was away working in Nairobi. She produced evidence of communication between the Appellant and her mother. The communication is a text message sent by the Appellant to the Respondent's phone. The message is dated 26th July, 2019 and in the message, the Appellant is seeking more time to complete the sale agreement.
32. The Judge in *Mercy Nkirote v Lawrence Ngaku Bundi & 2 others* [2022] eKLR cited with approval the decision in *J.T.M. Construction & Equipment Ltd v Circle B. Farms Ltd*, claim Number 2007 Hcr 05110, (*supra*) wherein it was held as follows;

“70. It is settled that ‘when time is of the essence there is no leeway for delay’. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission.

71. This principle was firmly established by the House of Lords in *Stickney v Keeble* (*supra*), where ... the House of Lords, having examined what was left to be done by the respondent as vendor, concluded that the time given (being fourteen days) was sufficient. The headnote, which is accepted as being reflective of their Lordship's decision, read:

‘Where in a contract for the sale of land, the time for completion is not made the essence of the contract but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting time at the expiration of which he will treat the contract as at an end. (Emphasis is mine) And in determining the reasonableness of the time so limited, the Court will consider not merely what remains to be done at the date of the notice but all the



circumstances of the case including the previous delay of the vendor and the attitude of the purchaser in relation thereof

33. As rightly observed by the Learned Magistrate in her judgment, time was not of the essence in this contract and as such, the Defendant did not have the right to automatically rescind the agreement. The Learned Magistrate goes on to state that there are procedures to be followed which include serving a completion notice upon the party in default. The Learned Magistrate also observed that the purported completion notice is dated 1st October, 2019 and on the same date, the Respondent transferred the purchase price back to the Appellant, essentially rescinding the contract of sale. From these set of facts, it is evident that the Appellant was not granted opportunity for completion.
34. In *Anne Murambi v John Munyao Nyamu & another* [2018] eKLR, the Learned Judge held as follows;
- Secondly, failure to complete the contract in 90 days did not terminate the contract because time was not expressed to be of essence in the material contract. Neither did the parties agree that the contract would stand terminated if there was no completion within 90 days. The court finding on this issue therefore is that the contract dated 14th July, 2004 was not in any way terminated or rescinded by any of the parties and the contract is enforceable by either party to it.
35. Following the same cue, the agreement entered into by the Appellant and the Respondent did not make time the essence of the contract and as such the Respondent ought to have served a completion notice upon the Appellant and set the time within which the Appellant ought to complete the contract failure of which, the agreement would stand rescinded. However, this was not done.
36. The Respondent produced a letter dated 1st October, 2019 which according to them, was supposed to serve as a completion notice. However, on the same day, the respondent banked an amount of money, less 10% to cover the default clause. As rightly observed by the Learned Magistrate, there was no intention by the Respondent to accord the Appellant an opportunity to complete the contract and this action by the Respondent had the effect of rescinding the contract.
37. Condition 3 (b) of *The Law Society Conditions of Sale 2015* provides as follows:
- These Conditions shall apply except as varied or excluded by the Agreement.
38. The importance of this provision is that the Law Society Conditions of Sale having not been expressly excluded in the agreement between the Appellant and the Respondent, they are applicable to the agreement entered into by them. Condition 13.4.1 of the *Law Society Conditions of Sale* states that if the Purchaser fails to complete in accordance with a Completion Notice the Vendor may rescind the Agreement.
39. It follows that a completion notice must be served before a party exercises their right to rescind a contract of sale in which time has not been expressed to be of the essence. The Respondent ought to have served a completion notice upon the Appellant. If the letter dated 1st October, 2019 was intended to serve as a completion notice, it did not accord sufficient opportunity or reasonable time for the Appellant to complete the contract. Therefore, the rescission was improper and cannot in law and equity be allowed to remain. This was also the finding by the Learned Magistrate but the Appellant's suit was dismissed nevertheless.



40. The second ground of appeal is that the Learned Magistrate erred in law and in fact in finding that Appellant had established a *prima facie* case but failed to grant the prayers sought. However, this is not correct. The Learned Magistrate states at page 10 of the judgment states as follows;

In summary I find that the Plaintiff has not proved her case on a balance of probabilities. The Plaintiff's case is hereby dismissed.

Disposition.

41. I find that the evidence on record supported the Appellants claim and the trial Magistrate in finding that the Plaintiff had not proved her case on a balance of probabilities and subsequently dismissing the suit was erroneous.

42. I also find that the Appellant proved her case on a balance of probabilities and therefore this Appeal succeeds. Consequently, I hereby set aside the judgment and decree in Nakuru CMCC ELC No 280 of 2019, delivered on 9th December, 2020 and substitute it with judgment in favour of the Appellant in the following terms:

- a. The Appellant shall within 60 days from the date hereof complete the agreement, dated 14th March, 2019, for the purchase of the parcel of land known as Njoro/Ngata Block 2/5673 (Kirobon).
- b. The Respondent shall within 30 days upon completion sign all the conveyance documents for transfer of the parcel of land known as Njoro/Ngata Block 2/5673 (Kirobon) to the Appellant failure to which the Deputy Registrar shall sign all documents necessary to effect the transfer.
- c. The Appellant shall bear stamp duty and registration fees on the transfer.
- d. The Respondent shall retain the amount of Kshs 105,000 as a penalty for the Appellant defaulting on the terms of the agreement.
- e. In the event of failure to comply with (a) above, the agreement dated 14th March, 2019 shall stand rescinded.
- f. The Appellant shall have the cost of this Appeal and costs of the suit.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Oumo for the Appellant.

Mr. Ouma for the Respondent.

Court Assistant; Ms. Monica Wanjohi.

