



Chokwe v Vipingo Trading Company Limited & another (Environment and Land Appeal 30 of 2022) [2023] KEELC 18596 (KLR) (12 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 30 OF 2022**

**SM KIBUNJA, J
JULY 12, 2023**

BETWEEN

PAULINE WANGARI CHOKWE APPELLANT

AND

VIPINGO TRADING COMPANY LIMITED 1ST RESPONDENT

**NYAMETA CLEOPHAS BICHINGA T/A NYAMETA MOGAKA MAGIYA & CO
ADVOCATES 2ND RESPONDENT**

*(Being an appeal from the Judgement of Hon. M.W. Mutuku, Chief
Magistrate, delivered on 29th July 2022 in Mombasa CMCC 223 of 2022
Vipingo Trading Company Limited v Pauline Wangari Chokwe & Another)*

JUDGMENT

1. This appeal was commenced through the Memorandum of Appeal dated 5th August 2022 in which the appellant raised ten (10) grounds. The appellant subsequently filed the Record of Appeal dated 18th January 2023. The appellant inter alia seeks to set aside the judgement dated 5th August 2022 and for her counterclaim to be allowed with costs. The suit at the magistrate court was filed vide a plaint dated 20th February 2020, by the 1st respondent as the plaintiff seeking Kshs 1,315,000/= together with costs and interest from the appellant as the defendant. It was the 1st respondent's case that they were the bonafide purchasers of a quarter acre that was to be hived from Land Parcel No. CR 71602 registered in the appellant's name vide an agreement of sale dated 8th February 2019 for Kshs 5,000,000/=. The 1st respondent claimed that on 8th February 2019, they paid Kshs 1,000,000/= as a deposit and the balance was to be paid upon the submission of the competition documents, by the appellant. The 1st respondent also maintained that on diverse dates between the 20th February 2019 and 14th March 2019, they paid Kshs 180,000/= as surveyors' fees to facilitate the subdivision of the suit land, and a further Kshs 100,000/= as the legal fees paid to the 2nd respondent who was the advocate acting for both



parties. It was the 1st respondent's case that the appellant failed to complete the transaction as per the terms of the agreement of sale by failing to issue the advocate with the competition documents. This prompted the 1st respondent, through the firm of Nyameta, Mogaka Magiya advocates to write to the appellant, first on 13th August 2019 demanding the completion documents to enable the conclusion of the transaction; and secondly on 3rd September 2019, cancelling the transaction for breach of contract, and demanded for refund of Kshs 1,280,000/= from the appellant.

2. The appellant filed a defence and a counterclaim to the 1st respondent's case, and later sought out third-party proceedings against the 2nd respondent. It was the appellants' case that the 1st respondent breached the agreement of sale and was entitled to a refund of the deposit paid. The appellant acknowledged that the 1st respondent had paid Kshs 1,000,000/= as a deposit and a further Kshs 180,000/= as surveyor fees, less Kshs 60,000/= since the full amount due to the surveyor was Kshs 240,000/=. It was the appellant's case that at the expiry of the 90 days on 4th May 2019, the 1st respondent revealed to her that it did not have funds to pay the balance of Kshs 4,000,000/=: and that constituted a breach of contract. The appellant prayed for the judgement to be entered against the respondent, and for the forfeiture of the deposit of the purchase price, refund of the surveyor's and advocates' fees as well as costs and interest of the suit for breach of contract.
3. The appellant mounted third-party proceedings against Nyameta Cleophas Bichinga t/a Nyameta Mogaka Magiya & Co Advocates, counsel who acted for both parties in the sale transaction in question. The appellant claimed that the counsel failed to offer sound legal advice and, for failing to issue the required notices, and by issuing a termination notice on behalf of the respondent to the detriment of the appellant. The appellant sought indemnity from the counsel for any costs and interest that could be awarded to the plaintiff and the costs that she would incur defending the suit. The counsel (2nd respondent herein) filed a defence to the third party notice on 5th October 2020 and maintained that the obligation of the appellant was clearly stated in the agreement of sale. It was claimed that the appellant was obligated to submit the completion documents before the expiry of the 90 days, but that she did not do so despite the 1st respondent having paid the deposit. The 2nd respondent contended that he only sent out the letter on August 13, 2019 to the appellant, months after the completion date of May 8, 2019. The letters were sent as a reminder to the appellant of her obligation under the agreement and in no way did the firm act in a way that was detrimental to the appellant. The 2nd respondent argued that the third party notice was brought out of malice after the counsel failed to intercede for the appellant against the 1st respondent not to bring this suit. The 2nd respondent further argued that he advised and acted as per the agreement and he performed his duties as expected and did not in any way grossly misconduct himself, and urged the court to dismiss the third party notice against him.
4. On June 29, 2022, the lower court delivered its judgement and held that the 1st respondent/plaintiff had demonstrated willingness and readiness to complete the contract, but the appellant/defendant had failed to deliver the completion documents. The court found that the reason advanced by the appellant/defendant for failing to deliver the completion documents, could not hold water since there was no evidence to prove that the 1st respondent/plaintiff did not have enough funds to pay the balance of the purchase price. The court concluded that the appellant/defendant breached the contract for failing to provide the completion documents or communicating with the 1st respondent/plaintiff for a possible extension of time. On whether the 3rd party had breached the duty of care to the appellant/defendant, the court held that the 3rd party owed a duty of care to both the appellant and the respondent since they relied on his professional knowledge in the transaction. The court qualified the duty and held that the 3rd party was not on retainer and only owed the duty of care up to the extent to which he was instructed. The court found that the duty towards the appellant/defendant was diligently discharged as per the agreement signed by the appellant and 1st respondent, and no breach of such duty



was demonstrated. The court found that the 1st respondent/plaintiff had proved his case on a balance of probabilities and entered judgement in its favour for Kshs 1,315,000 together with interest. The appellant/defendant's suit against the 3rd party was dismissed with costs.

5. Pursuant to the directions issued on the 1st February 2023, the learned counsel for the Appellant filed their submissions dated the 10th February 2023 which the court has given due considerations.
6. The issues for the court's consideration are as follows:
 - a. Whether the agreement of sale dated 8th February 2019 was breached by either party, and if so who.
 - b. Whether the 2nd respondent breached his duty of care to the appellant.
 - c. Who pays the costs.
7. I have considered the grounds of appeal, submissions filed by the learned counsel, the superior courts decisions cited and come to the following determinations;
 - a. This being a first appeal, the court is invited to revisit the evidence adduced before the trial court afresh, analyze and evaluate it and come to its own independent conclusion, bearing in mind that unlike the trial court, it did not have the benefit of seeing the witnesses, hearing them and observing them as they testified.
 - b. It has not been disputed by the parties that on 8th February 2019 Pauline Wangari Chokwe and Vipingo Trading Company Limited, who are the appellant and 1st respondent respectively, entered into an agreement of sale over the suit land, under which the former agreed to sell to the latter a quarter of an acre that was to be hived off from Land Parcel Cr No 71602 for Kshs 5,000,000/=. The 1st respondent paid the appellant a deposit of Kshs 1,000,000/=. Clause 3 of the agreement provided that the balance, which was Kshs 4,000,000/=: was to be paid by the purchaser to the vendor upon completion of the transfer, and clause 8 stipulated that, the vendor shall deliver the completion documents to the advocate handling the transaction within 90 days.
 - c. The 1st respondent produced a funds transfer form dated 8th February 2019 to demonstrate that he paid Kshs 1,000,000/= as a deposit to the appellant. Further, the 1st respondent demonstrated that on 20th February 2019, he issued cheque No. FTN20190220ACDM and No. FN20190220ACDM totalling Kshs 220,000/= and on 14th March 2019 issued cheque No. FTN2019034ACIYW for Kshs 60,000/=: which was the surveyor's fees of Kshs 180,000/= and legal fees of Kshs 100,000/=. In the trial court, PW1 Wallace Njenga, the 1st respondent's director, testified that other than paying a deposit of Kshs 1,000,000/= he paid a further Kshs 180,000/= as survey fee to the appellant and remained Kshs 60,000/= which he was to pay after the issuance of the title documents. He contended that despite receiving the monies, the appellant refused to avail the completion documents on the completion date which prompted him to write to the appellant on 13th August 2019 demanding to be availed the completion documents in order to complete the transaction. When the said letter went unanswered, the respondent wrote another letter on 3rd September 2019 cancelling the transaction and demanding a refund of Kshs 1,180,000/=:
 - d. The court's duty is to give effect the contract between parties as it is, where there is no ambiguity, like in this instant one. The sale agreement was clear, the respondent was to pay a deposit of Kshs 1,000,000/= and the balance upon completion of the transfer, which was to



be availed by the appellant within or after 90 days. The same was never done, as the appellant never submitted any completion documents to the respondent to facilitate the completion of the transaction. The Court of Appeal in the case of *Housing Company of East Africa v Board of Trustees National Social Security Fund & 2 others* (2018) eKLR, held that;

“It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreements, and that when parties do contract, the court does not have the right or ability to substitute its judgements for that of the parties. Indeed, when a contract is clear and unambiguous a court’s role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge’s ultimate findings cannot by any stretch of imagination be faulted.”

- e. When giving evidence, the appellant maintained that the 1st respondent did not pay the balance of the purchase price, and had disclosed to her that he was waiting for funds to be approved. She then approached another buyer who was willing to buy the adjacent plot and received Kshs 60,000/= which was a balance of the survey fee from the potential buyer in order to subdivide the plot. She also confirmed receiving the two letters from the advocate, but chose not to respond to them. She also admitted that she got the completion documents but did not take them to the advocate. The appellant did not produce any evidence to support her allegations that the 1st respondent lacked funds to pay the balance of the purchase price. It was her duty to avail such evidence to support her allegation for the court to find in her favour, but did not discharge it. If anything she admitted that despite having the completion documents she did not present them to the advocate who was acting for both parties, contrary to the term of their contract.
- f. The contract was clear, and time was of essence. The appellant was expected to present the completion documents to the advocate in 90 days from the date of executing the agreement. There was no extension of time and there was no completion of the transaction, due to the unavailability of the completion documents. The appellant did not hold her end of the bargain. She did not take any further step to comply with the contract save for executing it. Unlike her, the 1st respondent went over and above by paying the survey fees of Kshs 220,000/= despite that being the appellant’s obligation as per clause 13 of the sale agreement, which stated that each party would bear the costs of their own legal fees, while the vendor would incur the costs of completing the process of subdivision. The purchaser was then to pay for stamp duty and registration fee for transfer. The appellant had no reasonable excuse to fail to present the completion documents to the advocate as stipulated in the agreement. She even admitted to receiving the demand letter of August 13, 2019 and that of September 3, 2019 and still chose to do nothing to complete the transaction. In view of the foregoing, the court finds that the trial court did not err in law or in fact in finding that the appellant breached the agreement of sale dated 8th February 2019.
- g. On the issue of the liability of Mr Nyameta, the 2nd respondent/3rd party, that he breached his duty of care to the appellant, the appellant argued that despite Mr. Nyameta acting for both parties, he never took her concerns on the delay of payment by the 1st respondent/ plaintiff. Instead, he waited for seven months after the completion date, to write a letter on behalf of the 1st respondent demanding the documents and later cancelling the agreement.



The appellant submitted that the advocate was extremely negligent, and failed to undertake his duties and obligations under the transaction. Generally, an advocate acting for both parties in a conveyancing or commercial transaction is said to be potentially in a conflict of interest. The reason is, he attempts to serve two or more interests which are possibly non-compatible and at some point may be seen to serve one interest more than the other and thereby fails to observe the fiduciary duty owed to clients and to former clients. In this case, Mr Nyameta testified that after the 90 days the appellant/defendant did not supply his firm with the completion documents, and on August 13, 2019 he wrote to the appellant requesting for the documents and later on September 3, 2019 to cancel the transaction. He argued that the appellant never instructed him to write any letter, but the respondent did. He therefore did not fail to issue notices or carry out any of his obligations in the transaction as alleged by the appellant. The appellant contended that the advocate acted in favour of the respondent and to her detriment. However, she did not lead any evidence to prove her allegation. Instead, she confirmed receiving the letter from the advocate dated August 13, 2019 demanding the completion documents and chose not to respond to the same. If indeed the appellant needed any notice written to the respondent by the advocate, she ought to have requested for the same or better still respond to the letter requesting her for the completion documents.

- h. Further to that, an advocate acting for both parties is not only obligated to draft and facilitate the execution of the sale agreement, but to also draft and enable the execution of the transfer. In this case, the appellant has not demonstrated through evidence that she requested the advocate to prepare the transfer or that she paid any legal fees for that matter to the firm of Nyameta Advocates. In the premises, I do find that the 2nd respondent was not in breach of any professional and/or fiduciary duty or obligation that he can be held liable to the Appellant/plaintiff in damages.
 - i. Consequently, I find that the learned trial magistrate did not err in finding that the appellant was in breach of the agreement of sale and in dismissing her counterclaim. I do concur with the learned trial magistrate finding that the 1st respondent had proved its case on a balance of probabilities and is entitled to the prayers granted. This appeal is therefore without merit.
 - j. That as under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya costs follow the event unless where for good cause the court finds otherwise, the appellant will pay the respondent's and third party's costs in this appeal.
8. Flowing from the determinations above, the court finds and orders as follows;
- a. That the appeal has no merit and is hereby dismissed.
 - b. The trial court's judgement of July 29, 2022 is hereby affirmed.
 - c. The appellant will pay the respondent's and Third party's costs in the trial court and this appeal.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 12th DAY OF JULY 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPELLANT : Mr Ambwere Advocate



RESPONDENT : Mr Gathu Advocate
THIRD PARTY : Mr Gisemba Advocate
WILSON – COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA.

