Komu v Kariuki & another (Environment and Land Appeal E035 of 2021) [2023] KEELC 18591 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18591 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL E035 OF 2021

JO OLOLA, J

JULY 6, 2023

BETWEEN

ISAAC NDIRANGU KOMU ..... RESPONDENT

AND

ALPHAXARD JOHNSTONE KARIUKI ..... 1ST APPELLANT

MARY GATHIGIA KARIUKI ..... 2ND APPELLANT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable K. M. Njalale, Principal Magistrate delivered on September 8, 2021in Karatina PMELC Case No. 41 of 2018.

2. By a Plaint dated June 29, 2015as filed on July 7, 2015, Isaac Ndirangu Komu (the respondent herein) sought Judgment against Alphaxard Johnstone Kariuki and Mary Gathigia Kariuki (the appellants herein) for:

   (a) An order that thedefendants (who are the appellants herein) do transfer Land Parcel Nos. Kirimukuyu/Mbogoini/1089, 1090 and 1091 to the plaintiff failure to which the Executive Officer of thiscourt be authorised to sign and execute all requisite documents to facilitate the transfer thereof.

   (b) Costs of the suit plus interest at court rates; and

   (c) Any other, further, better or alternative relief as the court may deem fit and just to grant.

3. Those prayers arose from the respondent's contention that on diverse dates in the year 2014, he had entered into an agreement with the appellants to sell to him the three (3) parcels of land. It was the respondent's case that pursuant to the said agreement, he paid to the 1st appellant's office the sum of Kshs.550,000/- being the full purchase price for L.R No. Kirimukuyu/Mbogoini/1089 and Kshs.350,000/- being part payment for L.R No. Kirimukuyu/Mbogoini/1090 which was to be

sold for Kshs.450,000/-. The respondent further asserted that he paid Kshs.450,000/- being the full purchase price for L.R No. Kirimukuyu/Mbogoini/1091.

4. The respondent asserted that they did agree that the balance of Kshs.100,000/- towards the purchase of L.R No. Kirimukuyu/Mbogoini/1090 was to be paid immediately upon the appellants transferring the 3 parcels of land to himself. It was further therespondent's case that the 1st appellant charged him a sum of Kshs.30,000/- as professional fees and Kshs.350,000/- for conveyancing.

5. It was further the respondent's case that despite fulfilling his obligations, the appellants had jointly and unlawfully withheld the sale agreement and denied him access to the suit properties which they had also refused to transfer to himself.

6. But in their joint Statement ofdefence dated August 14, 2015as filed in court on August 21, 2015, the appellants denied knowledge of or the existence of any agreement for sale of the said properties. It was contended on behalf of the 2nd appellant that if there were any dealings between herself and the respondent, the same had been concluded as could be discerned from the title deed annexed to the respondent's list of documents.

7. The appellants further asserted that any claim by the respondent ought to be based on a written Memorandum of Agreement for sale in accordance with the *Law of Contract Act* and that in the absence of such the appellants were under no legal obligation to complete any transaction with the respondent.

8. In addition, the appellants asserted that the suit property was agricultural land and that in the absence of the Land Control Board consent the whole transaction was null and void for all purposes.

9. The suit initially filed at the Environment and Land Court at Nyeri was on May 31, 2018 transferred to Karatina Principal Magistrates Court for hearing and determination. Having heard the Parties herein and in her Judgment rendered on September 8, 2021, the Honourable K. M. Njalale, Principal Magistrate was satisfied that the respondent had proved his case to the required standard and proceeded to grant the prayers sought in the Plaint.

10. Aggrieved by the said determination, the appellants lodged the Memorandum of Appeal herein dated October 6, 2021urging the court to set aside the entire Judgment on the grounds that:

    1. The trial Magistrate erred in failing to take into account the defendants written submissions and in failing to make specific findings thereon;

    2. The trial Magistrate erred in failing and/or neglecting to take into account the mandatory requirements of section 3(3) of the *Law of Contract Act* which in effect denied the Court the jurisdiction to entertain suits for disposition of land unless the said mandatory provisions are fully complied with;

    3. The trial Magistrate erred in failing to take into account the mandatory provisions of section 6 and section 22 of the *Land Control Act* which declares such an alleged agreement for sale null and void for all purposes unless the said mandatory statutory provisions are complied with;

    4. The trial Magistrate erred in failing to take into account the mandatory provisions of section 22 of the *Land Control Act* which deals with acts in furtherance of void transactions declaring the same illegal and subjects the offenders to penal sanctions;

    5. The entire Judgment of the trial Magistrate is in error of facts and law, illegal and of no legal effect and consequently the orders made therein are of no legal effect;

    6. The entire Judgment is against the weight of evidence and accordingly of no legal effect; and

7. The trial Magistrate erred in making orders for execution of decree without taking into account that the Appeal therefrom lies as of right and that execution of decree in such manner in effect denies the defendants the right of appeal and is therefore unfair and unjust.

11. As the first appellate court, this court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and thereafter to arrive at its own independent Judgment on whether or not to allow the Appeal. As was stated in *Selle & another -vs- Associated Motor Boat Company Limited & others* (1968) EA 123, a first appellate court is empowered to subject the whole of the evidence adduced before the trial court to a fresh and exhaustive scrutiny and to make conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.

12. By his Plaint as filed in court on July 7, 2015, the respondent had sought an order of specific performance compelling the appellants to transfer three parcels of land being L.R Nos Kirimukuyu/Mbogoini/1089; 1090 and 1091 to himself. The basis of the respondent's claim was that he had acquired the three parcels of land by way of purchase from the appellants and that he had paid the agreed purchase price for the respective parcels of land save for a balance of Kshs.100,000/- which was to be paid upon transfer of the properties to himself.

13. On their part the appellants filed a joint Statement of Defence wherein they denied entering into any Sale Agreement with the respondent in respect of the said parcels of land. It was the appellants' case that in the absence of any memorandum of sale agreement as required under the *Law of Contract Act*, the suit filed by the respondent was unfounded and further that the transaction if any was null and void for lack of a Land Control Board Consent.

14. In support of his case, the respondent produced before the trial Court a number of receipts of payments made to the 1st appellant's Law Firm A. J. Kariuki and Company Advocates between May 22, 2014 and August 8, 2014. In addition, the respondent produced copies of Official Search Certificates for the 3 parcels of land as well as a copy of a past agreement dated December 20, 2011 between himself and the 2nd appellant.

15. Having considered the testimony of the witnesses and the evidence adduced at the trial, the Learned Trial Magistrate was persuaded that there was an agreement between the Parties and that the respondent had paid the agreed consideration of Kshs.1,350,000/- save for the balance of Kshs.100,000/- which was to be paid upon transfer of the properties to the respondent's name.

16. From the material placed before me, it was not in dispute that the three (3) parcels of land are registered in the name of the 2nd appellant. It was also not in dispute that the 2nd appellant is the spouse of the 1st appellant who trades in the name A. J. Kariuki & Company Advocates. In his short written Statement which he adopted as his evidence-in-chief, the 1st appellant told the Court he was a stranger to the suit as he is not the registered proprietor thereof. The 2nd appellant on the other hand denied any knowledge of the agreement for sale between herself and the respondent.

17. According to the respondent however, he had executed a Sale Agreement in the 1st appellant's office and it was pursuant to the said agreement that he commenced making payments at the 1st appellant's office. He told the court that the 1st appellant had withheld his copy of the Agreement and that since he had purchased another parcel of land before from the couple in a similar manner, he had gone ahead to make the payments.

18. While he claimed to be a stranger to the suit and denied the existence of any agreement between themselves and the respondent, the 1st appellant did not however deny receiving money from the

respondent. A perusal of some of those receipts produced by the respondent tell a different story from that stated by the appellants.

19. On May 22, 2014, the 1st appellant issued an official receipt of Kshs.30,000/- to the respondent. A copy of the said receipt at page 42 of the Record of Appeal reveals that it was received on account of "Professional Fees" and that the same was received as payment of "Professional fees Re: Sale of Kirimukyu/Mbogoini/1089 and 1091."

20. On June 19, 2014, the 1st appellant through his law firm again issued the respondent with a receipt for a sum received of Kshs.170,000/-. A perusal of the copy of the receipt at Page 43 of the Record of Appeal reveals that the sum was received on account of the 2nd appellant – Mary Gathigia Kariuki and the purpose thereof was "Part payment Re: Sale of Kirimukuyu/ Mbogoini/1090.

21. Some 6 days later on June 25, 2014another sum of Kshs.30,000/- was received by the 1st appellant's Law Firm on account of the 2nd appellant being again "Part payment towards sale of Kirimukuyu/ Mbogoini/1090. Another sum of Kshs.150,000/- was received for the same purpose on August 8, 2014. In total the respondent produced receipts and banking slips totaling Kshs.1,200,000/- paid on that account. There was a difference of Kshs.150,000/- from what he claims to have paid in full. He explained the short fall stating his shop had been broken into and a number of items had been stolen therefrom including computers and receipts.

22. Curiously, the 1st appellant who is a senior Advocate of this court did not in his written statement and testimony before the court deny receipt of those payments nor explain the purpose thereof. Those receipts and documents speak for themselves and they did loudly proclaim that the payments were made toward the sale of the suit properties herein.

23. That being the case, I was unable to find fault with the findings of the Learned Trial Magistrate that the Parties herein had entered into a sale agreement pursuant to which the 1st appellant received the sum of money on the account of his wife who is the 2nd appellant herein. As the Learned Trial Magistrate did correctly find, the burden on proof in civil cases is on a balance of probability.

24. Discussing what constitutes such a burden in *Miller v Minister of Pensions* (1947) 2 All ER 372, Lord Denning M. R observed as follows:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not,' the burden is discharged, but if the probabilities are equal, it is not.
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> Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

25. In the circumstances herein, I was equally persuaded that the respondent had discharged the burden. He had produced evidence indicating he was purchasing the suit properties. He had paid professional and conveyancing fees to the 1st appellant who as the Advocate was expected to prepare the Sale Agreement. Having received his fees to prepare the Agreement and the consideration agreed on which he acknowledged on the receipts was for the sale of the suit properties, the appellants cannot be heard now waving section 3 of the *Law of Contract Act* purporting that there was no Sale Agreement for their transaction.

26. It was also evident that having purchased the suit properties, the respondent had moved in and occupied a portion thereof. Asked in cross-examination how come the respondent was residing on her land if she had not received payments thereof the 2nd appellant feigned ignorance of that fact. Having come to the conclusion that the Defendant was on the suit land, it was apparent that compensation to the respondent in terms of damages would not be adequate as land is unique and not easily measurable in monetary terms. That being the case and in the circumstances herein, an order of specific performance as granted by the Court was the appropriate remedy to ensure that justice was done to the parties.

27. It follows that I did not find any basis to interfere with the Judgment of the Learned Trial Magistrate dated and delivered on September 8, 2021.

28. This Appeal therefore fails and is dismissed with costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 6TH DAY OF JULY, 2023.

In the presence of:

Mr. A. J. Kariuki for the appellant

Mr. Isaac Ndirangu Komu – the respondent in person

Court assistant – Kendi

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J. O. Olola

JUDGE