Karanu v Muiruri (Environment and Land Appeal E015 of 2021) [2022] KEELC 2267 (KLR) (5 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2267 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E015 OF 2021

MN GICHERU, J

MAY 5, 2022

BETWEEN

PETER IRUNGU KARANU .... APPELLANT

AND

ALICE WACHEKE MUIRURI .... RESPONDENT

(being an Appeal against the entire judgment of Hon. S.M. Shitubi (CM) delivered virtually on 22nd April, 2021 at Kajiado Magistrate's Court in CM ELC NO. 140 OF 2018)

JUDGMENT

1. This Appeal arises from the Judgment and Decree of Honourable S.M. Shitubi, Chief Magistrate, dated 22/4/2021 in CMELC Case Number 140 of 2018.

   In the said Judgment the Learned Magistrate found as follows;

   (a) The Defendant is in breach of the Sale Agreement dated 5th January 2017 and terms of Law Society of Kenya conditions of Sale, 1989.

   (b) The Plaintiff be paid special damages being the refund of purchase price so far paid with interest at Court rates from the date of rescission of the Sale Agreement, the 21st of March, 2018.

   (c) Costs of this suit plus interest at Court rates from the date of this Judgment.

2. Aggrieved by the above orders, Peter Irungu Karanu, the Appellant filed this Appeal vide a Memorandum of Appeal dated 7th May, 2021 and raised the following grounds;

   (i) The Learned Trial Magistrate erred in law and in fact in finding the Appellant in breach of the Agreement for sale dated 5th January, 2017 contrary to the evidence adduced.

(ii) The Learned Trial Magistrate erred in law and in fact in finding that the completion notice period issued by the Appellant prior to the rescission was unreasonable without any legal basis.

(iii) That the Learned Trial Magistrate erred in law and in fact in entering judgement against the Appellant for alleged breach of agreement for sale dated 5th January, 2017 whilst she had earlier in the same found that it was in fact the Respondent who was in breach.

(iv) That the Learned Trial Magistrate erred in law and in fact in directing immediate refund of the purchase price with interest from the date of the alleged rescission yet the Appellant was not in breach of the agreement for sale.

The Appellant therefore prays as follows;

(i) This Appeal be allowed and the entire judgement and decree of the trial Magistrate made on 22nd April, 2021 be set aside or vacated.

(ii) Costs of this Appeal and of the suit in the Lower Court be awarded to the Appellant.

(iii) Any other relief that this Court may deem fit and equitable to grant.

3. Counsel for the parties filed written submissions on 14th September, 2021 and 12th November, 2021 respectively.

The issues raised in the submissions by the Appellant's Counsel are as follows;

(i) Whether Kajiado ELC 401/2017 had anything to do with the suit property.

(ii) Whether the completion notice issued by the Appellant was valid and proper.

(iii) Whether there was variance between the ruling dated 24th January, 2019 and the final judgement dated 22/4/2021.

(iv) Whether the order for immediate refund and penalty for payment of interest on refund amount is fair.

(v) Whether the Appellant should be condemned to pay the costs of the suit.

Counsel for the Respondent urges that we must confine ourselves to the four grounds of Appeal. He cited Order 42 Rule 4 *Civil Procedure Rules* as his authority for submitting so.

4. I have carefully considered the record of appeal, the submissions by the learned counsel for the parties as well as the grounds of Appeal and I agree with the Respondent's counsel that the Court should confine itself to the four grounds because the decision that I will make will rest on the four grounds only.

This being a first appeal, it is the duty of the Court to review the evidence adduced before the Lower Court and satisfy itself that the decision was well-founded.

In *Selle and another v Associated Motor Boat Co. Limited and others* (1968) EA 123, this principle was enunciated 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"...

5. I find that the trial Magistrate wrote a fairly concise judgment as required by Order 21 Rule 4 *Civil Procedure Rules*.

On the first ground of Appeal, I find that the trial Magistrate did not err in law or fact in finding that the Appellant was in breach of the Agreement for sale of land dated 5th January, 2017.

Having accepted payments from the Respondent outside the period of the 90 days as per the agreement, the Appellant cannot be heard to say that the timelines set in the agreement held any longer.

There is evidence of the Appellant accepting payments of Kshs. 500,000/= on 29/6/2017 and again on 15/7/2017. Then on 4th August 2017 and 29/9/2017 he received Kshs. 300,000/= on each occasion. The trial Magistrate was right to find that after such acceptance of late payment, the Defendant could only impose new time limits upon issuing a reasonable notice.

He could not unilaterally impose his own timelines and therefore the 14 days he gave the Respondent was not reasonable at all. The case law that the trial Magistrate cited was good law.

This finding has already covered the second ground of Appeal.

On the third ground, I find that the trial Magistrate did not err in Judgement to the effect that the Appellant gets a refund of the purchase price with interest at Court rates from the date of the rescission.

I think that the use of the words "special damages" is superfluous because in my understanding all that she ordered was for the refund of the purchase price and interest at Court rates. This was very fair to the Appellant because the payment of interest should have been backdated to the dates that each of the installments was paid to the Appellant.

Finally, on the fourth ground of Appeal, I find that the trial Magistrate did not err in law or in fact by directing immediate refund. The Respondent never got the land that she was to buy. She was thus entitled to a refund of the entire purchase price immediately. The agreement of 5th January, 2017 was no longer applicable the moment the Appellant accepted payment by installments outside the 90 day period.

It is unconscionable for the Appellant to keep the Respondent's money when she is not expecting any land from him. Immediate payment of the purchase price is the only thing to follow.

For the above stated reasons, I find no merit in the Appeal dated 7th May, 2021 and I dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF MAY, 2022.

M.N. GICHERU

JUDGE