THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 57 OF 2019

KESSEL HOMES LIMITED.....APPELLANT

=VERSUS=

JOHN KIMOTHO NGINGA .....1ST RESPONDENT

SUSAN WAMBERE MBATIA .....2ND RESPONDENT

(Being an Appeal arising from the Judgment and Decree of the Chief Magistrate Court

at Nairobi by Hon P N Gesora, Chief Magistrate, delivered on 7/8/2019 in CMCC No 5528 of 2018.)

JUDGMENT

1. In June 2017, the respondents in this appeal, **John Kimotho Nginga** and **Susan Wambere Mbatia,** filed **Nairobi ELC Case No 372 of 2017.** The suit was subsequently transferred to Milimani Chief Magistrate Court where it was registered as **Nairobi CMCC No 5528 of 2018.** The respondents sought against the appellant a sum of Kshs 1,800,000, being the deposit which they had paid to the appellant pursuant to a letter of offer relating to Maisonnette No 5 on Title No **Kabete/Karura/2741 (the suit property).**

2. The case of the appellants was that on or about 28/1/2016, they declared their intention to enter into an agreement with the defendant, pursuant to which the defendant was to sell to them the suit property at Kshs 18,000,000. The said intention was reduced into a letter of offer dated 28/1/2016. The said letter of offer was made subject to a contract by way of a formal agreement for sale, to be prepared by the appellant's advocates, based on the terms and conditions stated in the letter of offer. Under the letter of offer, the respondents were expected to pay, and did pay, 10% of the agreed purchase price [Kshs 1,800,000] to the defendant. Parties were subsequently unable to agree on the terms of the formal agreement for sale, specifically the clause on forfeiture of deposit in the event of non-performance by the respondent. Consequently, the anticipated formal agreement for sale never crystallized and was never executed. Instead of the appellant addressing the respondents' concerns regarding the terms of the intended formal agreement for sale, they purported to rescind the letter of offer and purported to retain the deposit of Kshs 1,800,000, contending that the deposit had been forfeited in terms of the provisions of the letter of offer. Aggrieved, the respondents sought the above relief.

3. The appellant filed a statement of defence dated 20/6/2017 in which they stated that the letter of offer was issued by the appellant and subsequently signed by the respondent after over five (5) months. They added that the letter of offer provided for forfeiture of the 10% deposit hence the sum had been lawfully forfeited as per clause 10 of the letter of offer.

4. Upon conclusion of trial, Hon P N Gesora, CM, rendered a judgment dated 7/8/2019, in which he found that the respondents were entitled to a refund of the sum of Kshs 1,800,000 and awarded them the said sum together with costs of the suit and interest at court rate from the time the suit was filed in court.

5. Aggrieved by the judgement and the award, the appellant brought this appeal, challenging the findings and award of the Chief Magistrate Court on the following verbatim grounds:

> ***1) That the learned trial magistrate of the subordinate court erred in fact and law in finding that the respondents were entitled to a refund of the sum of Kshs 1,800,000 being 10% deposit that they paid upon signing a letter of offer relating to the purchase of maisonette No 5 on title No Kabete/ Karura/2741.***
>
> ***2) That the learned trial magistrate of the subordinate court erred in law and infact and made a fundamental mistake in making a final finding that the contract between the parties was frustrated from the onset notwithstanding that neither of the parties pleaded frustration.***
>
> ***3) That the learned trial magistrate of the subordinate court erred in law and in fact by holding that the respondents were entitled***

to a refund of the deposit for reason that they delayed in paying the deposit and as such the contract was frustrated.

4) That the learned trial magistrate of the subordinate court failed to apply his mind to the appellant's submissions and ignored material evidence adduced by the appellant during the hearing.

5) That on the whole, the learned trial magistrate of the subordinate court failed to apply his mind properly to the fact before him and failed to hold the scales of justice evenly in the circumstances.

6. The appeal was canvassed through written submissions dated 2/3/2021, filed by the firm of *Wasonga B O & Associates*. Counsel for the appellant condensed the above five grounds of appeal into the following two thematic issues: *(i) Whether the trial court erred in fact and in law in holding that the respondents were entitled to a refund of the deposit they paid towards the purchase price of the property;* and *(ii) Whether the trial court made a fundamental mistake in holding that the contract between the parties herein was frustrated yet frustration was not pleaded.*

7. On whether the trial court erred in holding that the respondents were entitled to a refund of the deposit, counsel for the appellant submitted that there was an error because clause 9 of the letter of offer provided that the letter of offer was binding until the agreement would be signed. Relying on the High Court decision in **Hassan Abdul Hafedh Zubeidi v Edermann Property Limited & 2 others [2013] eKLR,** counsel argued that the respondents having freely executed the letter of offer, they were bound by the terms thereof. Counsel added that clause 10 of the letter of offer provided that the 10% deposit would be forfeited in the event that the contract was frustrated due to failure by the respondent to perform the contract.

8. On whether the trial court made a fundamental mistake in holding that the contract was frustrated yet frustration was not pleaded, counsel for the appellant submitted that neither the respondents nor the appellant pleaded frustration. Counsel added that the parties were bound by their pleadings and that the court had no basis for introducing the doctrine of frustration yet it was never pleaded by the parties to the suit. Relying on, interalia, the decision in **Oluoch Okuu Orinda v Ayub Muthee M'Igweta & 2 others [2017] eKLR,** counsel urged the court to find that the trial court erred. Counsel urged this court to allow the appeal and set aside the award of the trial court.

9. The respondents filed written submissions dated 21/5/2021, through the firm of *Wanyonyi & Muhia Advocates.* Counsel for the respondent submitted on the following two thematic issues: *(i) Whether the learned trial magistrate erred in finding that the respondents were entitled to a refund of a sum of Kshs 1,800,000; (ii) Whether the trial court held that the contract between the parties was frustrated.*

10. On whether the trial court erred in finding that the respondents were entitled to a refund of the deposit of Kshs 1,800,000, counsel for the respondents submitted that the letter of offer and acceptance was expressly indicated to be "subject to contract by way of a formal agreement for sale." Counsel added that there could not be said to have been a formal agreement between the parties as long as the only document executed was the letter of offer signed subject to contract. Relying on the ruling of Gicheru JA in **East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investment Limited [1994] eKLR** counsel contended that where a party accepts an offer subject to contract, it means that the transaction remains in negotiation until a formal contract is settled and the formal contract is executed. It was counsel's position that until the contract is executed, there is no agreement between the parties. Counsel contended that the correspondence exchanged between the parties did not amount to a meeting of the minds because the parties never agreed on the terms of the contract. Counsel argued that the trial court properly observed that there was no *consensus ad idem*. Counsel for the respondents added that it was only after the parties were satisfied on all the contents of the intended formal contract and *consensus ad idem* reached that there would be a contract to be executed, and upon execution, the contract would come into effect. Counsel argued that the parties having failed to reach the required consensus to execute the formal contract, there was no valid agreement breached by the respondents to warrant restoration to the *status quo ante.*

11. On whether the trial court held that the contract between the parties was frustrated, counsel submitted that the appellant's contention that the trial court made a finding that the contract between the parties was frustrated was not warranted because the trial court merely remarked that the appellant should have informed the respondents that the contract was frustrated upon the lapse of the seven days period within which the respondents were expected to pay the deposit. Counsel contended that the observation was a remark made *obiter dictum* as opposed to the *ratio decidendi* of the case. Relying on the decision in **R v the Chief Magistrate Court, Nairobi & another exparte Hinesh K Chudasama [2007] eKLR,** counsel submitted that the comment made by the trial court touching on "frustration" was not the determining factor in the trial court's finding. Counsel urged the court to dismiss the appeal.

12. I have perused the record of appeal in its entirety and considered the five grounds of appeal. I have also considered the parties' respective submissions; the relevant legal framework; and the applicable jurisprudence. The key issue to be determined in this appeal is whether the trial magistrate erred in finding that the respondents were entitled to a refund of the sum of Kshs 1,800,000 paid to the appellant at the time of signing the letter of offer, together with costs and interest from the date of filing the suit.

13. As a general principle, the jurisdiction of the first appellate court is to re-evaluate and re-assess the entire evidence with a view to arriving at proper inferences of fact and independent conclusions. See the decisions in: **(i) Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & company Advocates [2013] eKLR;** and **(ii) Mwana Sokoni v Kenya Bus Services Limited [1985].**

14. There was common ground that the letter of offer was duly executed by the parties. The case of the appellant was that clause 9 of the letter of offer provided that the letter of offer was going to be binding until a formal contract by way of an agreement for sale would be signed. They further contended that clause 10 of the letter of offer provided that the 10% deposit [Kshs 1,800,000] would be forfeited in the event that the contract was frustrated due to the failure by the respondent to perform it. It was the position of the appellant that the sum of

Kshs 1,800,000 stood forfeited due to the breach of contract by the respondents, notwithstanding that the anticipated formal contract by way of an agreement for sale was never executed.

15. The case of the respondents was that because the letter of offer expressly provided that it was subject to contract by way of a formal agreement for sale and the parties to the letter of offer were subsequently unable to agree on the terms of the formal agreement for sale, there was no binding and enforceable contract pursuant to which they were liable to forfeit the sum of Kshs 1,800,000 which they had paid to the appellant upon signing the letter of offer.

16. Land sale contracts are subject to the formal statutory requirements set out in **Section 3(3)** of the Law of Contract Act which provides as follows:-

> ***"3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—***
>
> ***(a) the contract upon which the suit is founded—***
>
> ***(i) is in writing;***
>
> ***(ii) is signed by all the parties thereto; and***
>
> ***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***
>
> ***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust."***

17. The key question in this appeal revolves around the legal tenor of a letter of offer which is formally expressed to be subject to an anticipated formal contract that never crystallizes. This question was the focal question of consideration by the Court of Appeal [Gicheru JA, Kwach JA, and Muli JA] in **East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited [1994] eKLR.** Expressing himself on this question, Gicheru JA adopted the following words of Lord Westbury LC in **Chinnock v The Marchioness of Ely 4 DE G J&S** 638 at 646:

> ***"As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."***

18. Gicheru JA further adopted the following words of Jessel, MR in **Winn v Bull [1877]7 Ch D 29** at pages 31 and 32:

> ***"Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."***

19. Lastly, Gicheru JA adopted the following words of Sir Raymond Evershed MR in **Bennet, Walden & Co v Wood [1950] 2 All ER 134** at page 137:

> ***"Parties contracting in particular words must be assumed to intend the ordinary meaning of those words. Applying the proper test of construction, viz, what is the ordinary, straightforward, meaning of the language, it seems to me reasonably clear that the answer here is that by "offer" is meant a firm offer. In the ordinary sense of the term in business matters an offer is something which by acceptance creates a bargain. An offer subject to contract lacks that essential characteristic, for its acceptance does not create a contract."***

20. On his part, Kwach JA rendered himself on this question in the following words:

> ***"The sale was by its express terms subject to contract and until that contract had been executed there was no contract between the parties which could be enforced by an order of specific performance or mandatory injunction."***

21. Kwach JA adopted the following principle outlined by Banker LJ in **Keppel v Wheeler & another [1927] 1 KB 577:**

> ***" I pause here to state plainly what is now well established that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged."***

22. In the present appeal, the letter of offer dated 28/1/2016 reads as follows in the relevant part:

"Dear Madam

RE: LETTER OF OFFER FOR SALE OF MAISONETTEE NO 5 (KESSEL HOMES KITISURU TYPE B ON LR NO KABETE/KARURA/2741 KITISURU

Thankyou for showing interest in our development above and subsequent application to purchase one unit thereof being unit No. 5.

We are now pleased to confirm our willingness to sell the above mentioned property to you subject to contract by way of formal Agreement for Sale, to be prepared by our advocates based on the following terms and conditions …"

23. Clause 9 which the appellant relied on in urging this court to find that there was a binding contract pursuant to which the respondent were liable to forfeit the sum of Kshs 1,800,000 provides as follows:-

"Agreement for sale: The agreement for sale will be a standard form applicable to purchasers of other masionettes on the development and it will be prepared by the Vendors Advocates and the Purchaser agrees to execute the same within fourteen (14) days of presentation. The same once executed shall supersede the provisions of this Letter of Offer. Until such time the terms of this Letter of Offer are binding once executed by both parties."

24. Clause 10 which the appellant similarly placed reliance on provided as follows:-

"Cancellation Costs: In the event that this transaction shall be frustrated due to failure to perform on the part of the purchaser after the deposit has been paid by the purchaser, the purchaser shall automatically forfeit to the Vendor ten percent (10%) of the purchase price indicated in (5) above."

25. From the above excerpts, it is clear that the letter of offer dated 28/10/2016 was issued by the appellant and executed by the respondents subject to a formal contract by way of an agreement for sale. The anticipated formal contract by way of an agreement for sale never crystalized because parties were not able to mutually agree on the terms of the formal contract. The prevailing jurisprudence on the tenor of a letter of offer of this nature is that there is no binding contract in the absence of the anticipated formal contract by way of agreement for sale. The prevailing law is that parties to the letter of offer remained in negotiations pending settlement of terms and execution of the formal contract by way of an agreement for sale.

26. Besides, the letter of offer did not have any framework on the mode of completion. The respondent would, in the circumstances, not be said to have been in breach of contract in the sense of failure to perform the contract in the absence of any agreed framework on completion. My interpretation of clause 10 of the letter of offer therefore is that, parties anticipated to set out a clear completion framework in the formal agreement for sale, outlining the parties' respective obligations and covenants. It is only upon failure to perform in terms of the agreed and clearly stipulated completion framework that the respondent would be deemed to be in breach and would be liable to lose their Kshs 1,800,000.

27. I think I have said enough to demonstrate that the letter of offer did not constitute a binding and enforceable land sale contract pursuant to which the respondents were liable to forfeit the sum of Kshs 1,800,000.

28. Counsel for the appellant placed reliance on High Court decisions on the above key issue. I do not think it would be appropriate for this court to place reliance on pronouncements by the High Court on a legal question on which the Court of Appeal has spoken unequivocally. I will not say more on this point.

29. The appellant submitted at length on the trial magistrate's remark to the effect that the appellant should have been the first one to raise a red flag and inform the plaintiff that the contract had been frustrated. In my view, the remark, though unnecessary, did not change the status of the relationship of the parties in the absence of the anticipated formal contract.

30. Consequently, my finding on the single issue in this appeal is that the trial court did not err in finding that the respondents were entitled to a refund of the sum of Kshs 1,800,000 paid to the appellant at the time of signing the letter of offer, together with costs of the suit and interest from the time of filing the suit. Consequently, the appeal herein is dismissed for lack of merit. The respondents shall have costs of the appeal, to be borne by the appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 2ND DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Ms Wanyonyi for the Respondents

Court Assistant: Dominic Waweru

NOTE:

This suit was heard and a Judgment date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the Judgment virtually at Thika.

B M EBOSO

JUDGE