



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC APPEAL NO. 22 OF 2019**

**JAMES NDEGE OREGI.....APPELLANT**

**VERSUS**

**CHARLES KINGSLEY GORI.....RESPONDENT**

(Being an appeal from the judgment and decree of Hon. S.N Makila Senior Resident Magistrate

delivered on 2<sup>nd</sup> August 2019 in Kisii CMELC No. 166 of 2018)

**JUDGMENT**

**INTRODUCTION**

1. This is an appeal from the judgment of Hon. S.N. Makila - S.R.M delivered on the 2<sup>nd</sup> day of August 2019 in Kisii CMELC Case No. 166 of 2018. The Appellant who was the Plaintiff in the lower court filed suit against the Respondent (then defendant) vide a plaint dated 16<sup>th</sup> January 2016 which was subsequently amended on 15<sup>th</sup> March 2016. In the Amended Plaint, the Plaintiff sought the following reliefs:

- a. An order directing the Executive Officer to sign transfer documents in favour of the Plaintiff.
- b. An order directing the Land Registrar to cancel the name of the Defendant and replace it with the name of the Plaintiff or on the alternative, a refund of the purchase price plus interest from the time the agreement was executed.
- c. General damages.
- d. Costs of this suit.
- e. Any other remedy that the court may deem fit to grant.

2. The Respondent filed a Defence dated 29<sup>th</sup> February 2016 denying the Plaintiff's claim. He stated that the balance of Kshs. 150,000 was to be paid on 30<sup>th</sup> August 2015 but the Plaintiff had breached his part of the agreement by failing to pay the balance and he could therefore not be granted the orders he had prayed for.

3. In a brief rejoinder to the Defence, the Plaintiff claimed that he had not neglected to pay the balance of the purchase price and blamed the Defendant for failing to execute the relevant transfer documents.

4. The suit was set down for hearing and the Plaintiff adopted his witness statement and produced the documents in his list and bundle of documents. He told the court that he entered into a sale agreement with the Defendant whereby the Defendant agreed to sell him land parcel no. BASSI/BOGETAORIO/4459 at an agreed purchase price of Kshs. 600,000. He paid a total of Kshs. 500,000 leaving a balance of Kshs. 100,000. The purchaser then allowed him to take possession of the suit property. It was his evidence that the sale agreement was subject to the Law Society Conditions of sale of land, 1999. He told the court that the Respondent failed to obtain the consent of the Land Control Board and sign the necessary transfer documents as agreed. He however admitted that he had not paid the balance of Kshs. 100,000. With that evidence, the Plaintiff closed his case.

5. The Respondent did not tender any evidence though his counsel cross-examined the Plaintiff. Thereafter, the parties filed their written submissions. The court then proceeded to deliver its judgment in which it noted that both parties had failed to fulfil their obligations under the contract. The trial magistrate thus held that the Plaintiff had failed to prove his case on a balance of probabilities and advised the parties

to re-negotiate the contract as she noted that the Plaintiff had paid a substantial part of the purchase price. She then dismissed the suit with costs to the Defendant.

6. Aggrieved by the said judgment, the Appellant filed this appeal citing several Grounds of Appeal. The appeal was canvassed by way of written submission and both parties filed their submissions which I have carefully considered. This being a first appeal, this court is enjoined to revisit the evidence that was tendered before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See *Selle vs. Associated Motor Boat Company (1968) EA 123*.

#### **ISSUES FOR DETERMINATION**

7. Having considered the pleadings, evidence on record, Grounds of Appeal and rival submissions, the following issues fall for determination:

i. Whether the trial magistrate erred in failing to consider the Appellant's claim for a refund of the purchase price as per the Amended Plaintiff.

ii. Whether the trial magistrate erred in dismissing the Appellant's case in its entirety.

iii. Whether the judgment of the lower court ought to be set aside.

8. One of the Grounds of Appeal is that the learned trial magistrate erred in law and in fact in failing to provide any remedy to the Plaintiff even after admitting that the Plaintiff had already paid a substantial portion of the contractual amount to the Defendant, hence prejudicing his chances of getting his money back.

9. In his submissions, learned counsel for the Appellant contended that the learned trial magistrate did not place reliance on the Amended Plaintiff, bundle of documents produced during the trial and the Plaintiff's submissions. He faulted the trial magistrate for making a finding on the prayer for Specific Performance yet the Appellant had amended his Plaintiff and removed the prayer for Specific Performance and substituted it with a prayer that the Executive Officer be directed to sign the transfer documents in favour of the Appellant. In my considered view, this prayer in the Amended Plaintiff did not take away the intention of the Appellant to achieve the aim of Specific Performance by having the suit property transferred to him. What changed was merely the terminology.

10. Having said that, I agree with the Appellant that the court appears to have missed the alternative prayer for a refund of the purchase price which was introduced in the Amended Plaintiff as the same was not addressed in the judgment. I note that at the time the Amended Plaintiff was filed, the claim for a refund was not time-barred and since the Appellant proved that he had paid the sum of Kshs. 450,000, it is in the interest of justice that he gets a refund of the said amount as losing both the land and purchase price would amount to double jeopardy.

11. My finding on the question of the refund of the purchase price takes care of the second and third issues for determination. Consequently, the appeal succeeds and I set aside the judgment of the lower court and substitute the same with the following orders:

a. Judgment is entered for the Appellant in the sum of Kshs. 450,000/= together with interest at court rates from the time of filing suit until payment in full.

b. The costs of this appeal shall be borne by the Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 22<sup>ND</sup> DAY OF JULY, 2021**

**J.M ONYANGO**

**JUDGE**