Mburo v Owuor (Civil Appeal E181 of 2023)
[2024] KEHC 6440 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6440 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E181 OF 2023

RE ABURILI, J

MAY 14, 2024

BETWEEN

POLYCARP AGWINGI MBURO ..... APPELLANT

AND

JAMES OBANDE OWUOR ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable L.N. Kiniale in the Senior Principle Magistrate's Court at Nyando delivered on the 5th October 2023 in Nyando SPMCC No. E003 of 2022)

JUDGMENT

Introduction

1. The plaintiff/appellant herein Polycarp Agwingi Mburo filed suit vide a plaint dated 18th June 2022 seeking a refund of Kshs. 250,000 from the defendant/ respondent herein James Obande Owuor, being the purchase price, 30% of the purchase price amounting to Kshs. 587,500 being general damages for breach of contract as well as costs of the suit.

2. It was the plaintiff's case that he entered into an agreement dated 23rd August 2018 with the respondent for the purchase of 0.65ha out of land known as Kabondo/Kodhoch/328 measuring 10.4ha from the respondent. In his testimony, the appellant stated that he specifically entered into an agreement over parcel No. 328 for a consideration of Kshs. 1,125,000. That as per the sale agreement, he paid the respondent of Kshs. 250,000 being deposit however in his testimony, the appellant pleaded that he paid cash of Kshs. 300,000 and by cheque of Kshs. 250,000 and that the respondent was to grant him vacant possession. The appellant testified that the respondent was in breach and as such he was liable to pay him a refund at 30% interest as agreed in the agreement for sale.

3. In response, the respondent filed a statement of defence dated 15th September 2022 in which he denied the appellant's averments. The respondent pleaded that the appellant ought to "clear the remaining

balance in current market price before he transfers the purchased portion of the suit property to the plaintiff's name."

4. The respondent further relied on a statement in which he stated that the appellant had only paid a deposit and not completed the balance and that he wanted the court to ask the appellant to give him all his money with interest before he could transfer the portion sold to him.

5. In his judgement, the trial magistrate after considering the totality of the evidence found that the respondent's failure to comply with the agreement was due to intervening circumstances which rendered the continued sustenance of the said contract as initially executed between the parties impossible.

6. The trial court went on to hold that the agreement between the parties was frustrated by circumstances that rendered it unenforceable and as such there was no breach occasioned by the respondent and further that there was nothing to confirm payment and thus the appellant had failed to prove his case on a balance of probabilities.

7. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 27th October 2023 raising the following grounds of appeal:

    i. The learned magistrate erred in law and fact by dismissing the plaintiff's suit.

    ii. The learned magistrate erred and acted on the wrong principles and misdirected herself in considering irrelevant issues while arriving at her finding.

    iii. The learned magistrate erred in failing to evaluate the entire evidence on record thereby arriving at wrong findings.

    iv. That learned trial magistrate's judgement was based on no evidence.

    v. The learned trial magistrate erred in law and fact by failing to take into consideration the appellant's case.

    vi. The learned magistrate erred in law and fact by failing to consider the appellant's submissions and authorities thus leading to resultant miscarriage of justice to the appellant.

    vii. The learned magistrate erred in not sufficiently taking into account evidence presented to her in totality and in particular the evidence presented on behalf of the appellant.

    viii. Judgement was against the weight of the evidence.

8. Parties agreed to canvass the appeal by way of written submissions

The Appellant's Submissions

9. In support of the appeal, counsel for the appellant filed written submissions dated 26th January, 2024. He framed two main issues or determination. On the first issue of whether the trial magistrate erred in dismissing the appellant's suit, it was submitted that the appellant proved his case as the agreement was clear on the terms agreed, which agreement was witnessed and executed. That the respondent breached the said agreement by ailing to fulfil his obligations by failing to avail completion documents to effect the transfer of the purchased portion of land.

10. It was further submitted that the trial magistrate misapprehended the evidence by determining on the issue of who was the proprietor of the suit land instead of focusing on whether the contract was breached by the respondent.

11. Counsel for the appellant submitted and reiterated the principle that courts cannot re write contracts for the parties as was held in the case of Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited [2017]eKLR.

12. The appellant's counsel further submitted that the trial magistrate erred in law in failing to appreciate that the claim was for refund of deposit purchase price and not specific performance of the breached contract and that she relied on the exhibits which were not produced in evidence by the respondent in reaching her determination.

13. Further submission was that the trial magistrate made a determination to the effect that the contract between the parties was frustrated, an issue which was never pleaded or evidence led by the respondent. Counsel reiterated that the terms of the contract were clear on the consequences of breach. He relied on the case of Hydro Water Well (K) Ltd v Sechere & 2 others [2022]e KLR.

14. On the issue of whether there was a conflict of interest as alleged by the respondent on the part of the advocate who acted for both parties in drawing and witnessing the sale agreement who also became the advocate for the appellant, a party to the said alleged breached agreement, it was submitted that there was no such conflict of interest as there was no evidence of breach of fiduciary duty of confidentiality or the duty of loyalty to the client. Counsel relied on the case of King Woolen Mills Ltd & Galot Industries v Kaplan & Stratton Advocates [2021]eKLR and submitted that there was no prejudice suffered by the respondent in the same advocate who drew for the parties the agreement representing one of the parties thereto, being the appellant herein. He relied on other decisions William Audi Odode & Another v John Yier & Another Court /Appeal Civil Appl No. NAI 360 / 2004 (KSM 33 / 2004) and Dorothy Seyanoi Muschioni v Andrew Stuat & Another [2014]e KLR.

15. Counsel submitted in conclusion that the appellant had proved his case to the required standard on a balance of probabilities hence the trial magistrate's decision should be set aside and the claim by the appellant allowed with costs.

The Respondent's Submissions

16. It was submitted that from the evidence produced specifically the response to the demand letter issued by the appellant, the respondent did not sell his land to the appellant but was rather duped into signing the agreement as he could not accept the purchase price of One million when the land is valued at Kshs. 52,000,000.

17. The respondent further submitted that there was no way he could have completed the transaction as he was incarcerated for a period of 5 years thus the contract was frustrated beyond his control.

18. It was further submitted that the fact that both parties had the same advocate amounted to a conflict of interest which was definitely against the respondent and as such the trial magistrate did not err in holding as such. Reliance was placed on the case of Jackson Kaio Kivuva v Penina Wanjiru, Kajiado Law Courts High Court Appeal No. 15 of 2015.

Analysis and Determination

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate

court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

20. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. Before I address the issues in this suit, I wish to discuss the legal burden of proof. Sections 107 and 108 of the *Evidence Act* Cap 80 provide for burden of proof and who is to prove it that:

> 107. Burden of proof
>
> (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden

22. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

23. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the "onus" is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant "on a balance of probabilities". This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

24. In the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR, the Court of Appeal examined the standard of proof in the foregoing;

> " The burden of proof is placed upon the Appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:- "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. Thus, proof on a balance or 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. Earlier on, the Court of Appeal in the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR stated that the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in sections 109 and 112 of the *Evidence Act*, thus:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

26. Similarly, in the case of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR the Court of Appeal explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

27. Therefore, in a Civil case, if the probabilities are weighed and found equal, the Defendant will be successful as the Plaintiff carries the burden of proof. If the scale however tips in the slightest in the favour of either of the parties, that party will be successful. Anything more than an equal weight will ensure that party is victorious.

28. I have considered the record herein. The main issues for determination are whether the appellant proved his case against the respondent on a balance of probabilities to warrant a finding of breach of contract on the part of the respondent and therefore whether damages of 30% of the unpaid purchase price was due and payable to the appellant by the respondent. The other issue is whether the deposit of Kshs 250,000 paid to the appellant by then respondent is refundable.

29. It is not disputed that the parties herein entered into a sale agreement dated 23rd August 2018 with the respondent for sale of a part of land parcel measuring 0.65ha out of land parcel known as Kabondo/Kodhoch/328.

30. Paragraph 3 of the said agreement provided that the vendor would put the purchaser into possession of the property upon payment of the deposit amount. Paragraph *13* provided that any party in breach of the agreement would pay 30% of the total purchase price to the wounded party.

31. The appellant testified in support of his case but the respondent did not call any evidence in support of his defence as filed. The evidence adduced before the trial court and relied on by the appellant included a response to the demand letter by the respondent in which he stated that he could not transfer the suit property to the appellant on account of being incarcerated in prison.

32. It is trite that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

33. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove his case. In the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR, the court stated:

> " I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not. (See Kirugi and Another v Kabiya and Others [1983] e KLR).

34. The appellant, despite the absence of evidence from the respondent was obligated to prove his case on a balance of probabilities. The appellant produced the letter indicating that the respondent was incarcerated and as such could not complete the transaction as agreed. The respondent did not adduce any evidence of incarceration, even if that were the case that indeed that incarceration prevented him from performing his part of the bargain which included placing the appellant in possession of the purchased portion of land and secondly, subdividing and transferring the said purchased portion in favour of the appellant.

35. The Black's Law Dictionary, 9th Edition, page 213 defines a breach of Contract as:

> " a violation of a contractual obligation by failing to perform one's own promise, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty, he has at least a claim for nominal damages."

36. In Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR the Ugandan case of Nakana Trading Co. Ltd V Coffee Marketing Board 1990 – 1994 EA 448, was cited where the High court in Kampala held that:

> " In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the

court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous..."

37. The Court of Appeal in National Bank of Kenya vs. Pipeplastic Samkolit (k) Ltd & Another [2001] eKLR held that:

> " A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

38. In the instant case, the agreement between the appellant and the respondent provided that the buyer was to pay a deposit of Kshs 250,000 and take possession then the balance would be paid after the transfer of the purchased portion of land was effected in favour of the buyer.

39. In his pleadings at paragraph 8 of the plaint and evidence as adduced, the appellant claimed that the respondent was dishonest in claiming that he was the registered proprietor of the land that he was selling when he was not the bona fide owner thereof.

40. The question is, what land was the appellant purchasing and which he expected the respondent to subdivide and transfer to him upon payment of deposit of Kshs 250,000 deposit towards purchase? Did the appellant carry out an official search to establish whether the respondent was the registered owner of the suit land before entering into a sale of land agreement and expecting the respondent to perform his part of the bargain and if so, where is that official search certificate which is listed as document number 4 by the appellant in his list of documents, for the parcel of Land Kabondo/ Kodhoch/328? Was the respondent capable of transferring to the appellant what he did not have in the first instance?

41. This brings to the fore the term of the contract that whoever breached the contract would pay 30% of the purchase price to the innocent party. If the buyer had already paid Kshs 250,000 to the seller, that being the only obligation that he had towards the agreement in issue, the question is, how else would he expected to be in breach of that agreement and be liable to pay the seller 30% of the purchase price? Was breach of the agreement foreseeable by the appellant?

42. In my view, the sale agreement was skewed towards punishing one party and that party is the seller who, in the first place, had no title to the land which the appellant was purporting to purchase in the first place. In law, one cannot sell what he does not own.The seller then did not have a valid legal title on which he could pass on to the appellant buyer or to anyone else.

43. Albeit the respondent did not tender any evidence in defence, I find and hold that this is one of those cases that fall into the category of an unfair and void contract and therefore incapable of being enforced from the very word go.

44. I say so, for the reasons that firstly, whereas I appreciate that the two parties entered into a sale of land agreement, there is no evidence that the land belonged to the seller at the time of sale. Secondly, the terms of the sale agreement were in my view, so unfavourable to the seller that they represent an unfair bargain from the onset that to allow payment of damages for breach of contract which was void from the commencement as it was incapable of being enforced since the seller had no title to pass to the buyer would be to perpetuate an injustice to the seller herein and unjustly enrich the buyer who knew from the beginning that the seller had no title to pass to him.

45. In my humble view, the default term and damages quantified in the agreement in issue were harsh and unconscionable and amounted to a scheme to unjustly enrich the appellant buyer, to the substantial prejudice of the seller.

46. The appellant knew from the onset that this was an agreement that was incapable of specific performance as the seller had no title to the land hence the unfair terms where the seller would pay damages equivalent to the purchase price which he had not even received.

47. Furthermore, the sale agreement does not stipulate the timelines for transfer of the purchased portion of land from the seller to the buyer. It follows that time was not of essence as far as the performance of the alleged "contract" was concerned and therefore the question is, at what stage did the appellant conclude that the agreement had been breached by the seller? Of course, in ordinary parlance, an agreement remains in existence until it is terminated but from my careful perusal of the agreement in issue in these proceedings, that agreement was incapable of being performed by the respondent who had no title to the sold portion and therefore he could not pass any title that he did not have.

48. Needless to say that whereas the issue of conflict of interest by the advocate Mr. Bruce Odeny who drafted the agreement for both parties may not be a big deal of an issue here, noting that a party is entitled to legal representation of an advocate of their choice unless there is evidence of breach of duty of fiduciary or confidentiality, this court wonders what the appellant was buying and being witnessed by an advocate in terms of the sale of land agreement, without carrying out any official search to establish the ownership of that land. Could the same party who did not even produce a search certificate for the purchased land now accuse the respondent of dishonesty and for making the appellant believe that the respondent was the bona fide owner of the land when he was not? What advise did the appellant get while entering into a sale of land agreement, knowing that land is not a movable chattel and ownership means having legal title thereto?

49. This is a court of law as well as a court of justice. I find that the agreement in issue was one sided all along. It is surprising that the appellant was to deposit Kshs 250,000 and get possession of the purchased portion then get a transfer of the land into his name before he could complete payment of the balance of purchase price and whereas this may be well with the parties, the fact that incase of breach, the appellant was to get 30% of an amount that he had not paid as purchase price yet what he had paid as deposit was not even equivalent to that 30% of the total purchase price! Can this be said to be a fair bargain? The answer is a clear NO.

50. Having established as much, what recourse then do the parties herein have. In certain instances, parties provide for termination clauses within the contract itself. In this case there was no termination clause in the agreement between the parties herein, and the fact that a void agreement is incapable of being performed and therefore it cannot be breached.

51. It is also clear that the parties herein cannot agree on the way forward. That being the case and taking into consideration that the contract entered into between the parties hereto was incapable of being performed by the respondent from the moment it was entered into, it is my considered view that the appellant was only entitled to a refund of the deposit received by the respondent which is Kshs 250,000.

52. I Therefore find and hold that the appellant failed to prove his claim for the quantified damages for breach of contract against the respondent on a balance of probabilities as the agreement dated 23rd August 2018 was incapable of being performed.

53. I uphold the judgment of the trial court dismissing the claim for damages for breach of contract for different reasons stated herein but set aside the order of dismissal of the appellant's claim for refund of the Kshs 250,000 being deposit made to the respondent and substitute that order with an

order entering judgment for the appellant against the respondent for Kshs 250,000 which amount is refundable notwithstanding the void agreement which was incapable of being performed. This amount of Kshs 250,000 will earn interest at court rates from the date of filing suit in court on 20/7/2022 until payment in full.

54. I however find that the finding by the learned trial magistrate that the contract was frustrated was an erroneous finding as there was no such evidence adduced of frustration of the contract, the respondent having failed to testify to prove that he was incarcerated in prison.

55. This appeal is therefore found to be partially successful and therefore each party do bear their own costs of this appeal.

56. As both parties were misled into believing that they were entering into a valid sale of land agreement which agreement was void and they relied on legal advise from counsel acting for both of them, I order that each party bear their own costs of the suit in the lower court.

57. This file is closed.

Dated, Signed and Delivered at Kisumu this 14th May, 2024

R.E. ABURILI

JUDGE