



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANGA

ELCA NO E003 OF 2021

PANRAS HINGA KARURI.....APPELLANT

VS

SAMMY MAINA KAMAU.....RESPONDENT

(Appeal from the whole judgement of the MCL & E case No. 16 of 2018 -

Kangema delivered by Hon P M Kiama, SPM

JUDGEMENT

1. This Appeal challenges the judgment of the trial Court in Kangema SPM ELC case No. 16 of 2018 delivered on 27/1/2021 in favour of the Respondent. The Appellant's memorandum of Appeal dated 23/2/2021 contains thirteen grounds of Appeal that mainly fault the findings of the Learned Magistrate in favour of the Respondent and dismissing the Appellant's counter claim.

2. The Respondent entered into a sale agreement dated 7/6/2016 for purchase of a portion of land from the Appellant for Kshs. 2,800,000. The parcel of land measuring 3.2 acres was to be excised from land known as LOC/19/KIWAMBOGO (hereinafter referred to as the suit land) and sold subject to the payment plan agreed thereon. At page 61-62 of the Record of Appeal the purchase price of Kshs. 2.8 M was to be paid as follows;

- a. A deposit of Kshs. 500,000/= only shall be paid directly to the vendor by way of a cheques upon execution of this agreement.
- b. Kshs. 300,000/= directly to Equity Bank to discharge a charge on the said property which discharge of charge shall be handed over to the Purchaser's Advocates.
- c. Kshs. 1,000,000/= shall be paid when the Vendor avails all the completion documents required to register a transfer in favour of the Purchaser.
- d. The balance of the purchase price being Kshs. 1,000,000/= shall be paid upon a successful transfer in favour of the Purchaser.

3. It was an express term of the Sale Agreement that the date of completion shall be 90 days of executing the Agreement or such other earlier or later date as the parties would agree in writing. The Sale Agreement was further subject to the 1989 Law Society of Kenya Conditions of Sale.

4. The Respondent's case before the trial Court vide his plaint dated 22/5/2018 was that the Appellant failed to discharge and complete the transfer of the suit land in his favour. Apprehensive that the Respondent would deal, transfer or sale the suit land to third parties to his detriment, the Respondent sought Orders namely; permanent injunction restraining the Appellant from dealing with the suit land, compelling the defendants to release the original certificate of Title and transfer of the suit land to the Respondent or in the alternative an order for the Deputy Registrar of this Court to effect such transfer.

5. The trial Court record shows that initially the case proceeded ex parte against the Appellant but upon substituted service of the pleadings, the Appellant sought leave to file his defence and counter claim out of time. He filed his statement of defence and counter claim dated 20/5/2019 denying the Respondent's claims and averred that the Respondent was in blatant breach of the Sale Agreement. In particular, he alleged that the amount of Kshs. 606,401.5/= being double the amount agreed on was paid on 8/7/2017, well over a year after the completion date and outlined particulars of breach committed.

6. In the counter claim, the Appellant *inter alia* prayed for dismissal of the respondent's suit, a declaration that the Respondent breached the

sale agreement dated 7/6/2016 thus the agreement was null and void and that the deposit paid be deemed as forfeited and any monies paid over and above the deposit be refunded to the Respondent.

7. Vide a consent recorded in Court on 13/6/2018, the 2nd defendant, Equity Bank Limited was struck off the proceedings upon availing to Court a discharge of charge together with the original title documents of the suit land.

8. The matter then proceeded for full hearing before the impugned Judgment was delivered on 27/1/2021 as indicated earlier.

9. The Respondent testified as PW1 and called one other witnesses. He informed the Court that the Sale Agreement transaction was not fully completed. That upon paying a substantial amount of the purchase price, the Appellant disappeared and police were engaged to trace him in vain. That indeed the suit land was charged to the bank and he had to pay Kshs. 601,401/= but blamed the Appellant for failing to avail the discharge documents, for that reason therefore he admitted that the transfer was not effected within the agreed 90 days though the Appellant continued to receive monies from him. He testified that the Appellant never served with any notice to complete and upon being shown a copy of it, he acknowledged it was dated 23/8/2018 after he had filed his suit. He urged the Court to allow completion of the transfer and indicated willingness to settle the outstanding balance and dismiss the counter claim.

10. On cross-examination, PW1 admitted that he had not paid the entire amount of Kshs. 2.8m as agreed but explained that the sale agreement was later varied vide an Agreement dated 7/6/2016. He added that he paid Kshs. 250,000/= in place of Kshs. 500,000/= and a further Kshs. 600,000/= to Equity Bank. He told the Court that the amount of Kshs. 606,453/= was demanded by Equity Bank to facilitate the discharge of title held by it. That the demand was in response to the Respondent's lawyer requesting for discharge documents.

11. PW2 was No. 55718 Cpl. Stephen Songor from Director of Criminal Investigations Officer(DCIO) headquarters Nairobi. He informed the Court that on 20/3/2018 he received a complaint of obtaining by false pretenses from PW1 against the Appellant. He then proceeded to record PW1's statement before preparing an Affidavit to Equity Bank Ongata Rongai Branch. That his efforts to trace the Appellant were futile. PW2 produced the OB report and copy of the Affidavit as PExh. 7 & 8. That was the end of the Respondent's case.

12. On the other hand, DW1, the Appellant testified as the sole witness. He acknowledged entering into a sale agreement with the Respondent for purchase of the suit land for Kshs. 2.8million. He explained that the terms of payment were that Kshs. 500,000/= be paid to him by cheque but that was not done. That he was only paid Kshs. 250,000 upfront while Kshs. 300,000/= was to be paid to the bank. He blamed the delay to process the discharge on the Respondent who was to specify a lawyer to handle the transaction. That he donated a Power of Attorney to Githinji & Associate Advocates after the plaintiff delayed payments for over a year. According to DW1, the purpose of the power of attorney was to obtain the suit land title deed from the bank.

13. DW1 expounded that he learnt through his lawyer that there was a miscellaneous application suit against the bank to release the title deed by Joseph Kamau. Further that the Kshs. 600,000/= was paid without his knowledge/approval nor did he authorize any filing of suit. He conceded that the Bank wrote to Githinji & Co. Advocates who was his lawyer. He denied frustrating the transfer process and indicated willingness to chart a way forward. However, DW1 told the Court that he was no longer interested in completing the transfer and would not accept any further payments hence his counter claim.

14. Moreover, DW1 affirmed that he wanted to sell the land due to financial problems he faced then including a separate loan in respect of his vehicle. He blamed the Respondent for defaulting in payments thereby occasioning him losses. It was his testimony that the Respondent used to pay him Kshs. 50000/= when he visited his offices. He beseeched the Court not to order transfer of the land but allow his counter claim.

15. In his cross-examination, DW1 admitted receiving Kshs. 250,000/- and not doing anything about the balances but maintained he was lodging his claim at that time. He also acknowledged receiving various payments beyond the 90 days' period made to him without him refunding. He also admitted having meetings with the Respondent but denied changing Advocates from time to time. In contradiction to his earlier evidence, he stated that he learnt of the Kshs. 600,000/= payment through his lawyers sometime on 30/10/2017. He said that his advocate attempted to arrange a meeting with the Respondent to no avail but no evidence was adduced to support this contention.

16. That marked the end of the defence case.

17. Parties filed their respective submissions and the Learned Magistrate upon analysis off the case and evidence adduced found that indeed the Respondent did not pay the entire Kshs. 500,000/= as agreed in the Sale Agreement but the conduct of the parties by acquiescence varied their terms. This was because the Appellant continued accepting payments even beyond the stipulated period and his failure to issue a completion notice in line with the Law Society of Kenya Conditions of Sale adopted as part of the Sale Agreement. In any event, it was the Court's finding that the Appellant did not return the monies advanced to him but instead utilized them. In the end Judgment was entered in favour of the Respondent and the Appellant's counter claim dismissed.

18. The Appellant filed its written submissions dated 19/7/2021 and rehashed the trial Court hearing and evidence adduced thereof. It was argued that due to the Respondent's failure to pay Kshs. 300,000/= as agreed in the Sale Agreement, it was impossible for completion to be undertaken because the discharge of title would pave way for transfer of the suit land. That as result of failure to pay that amount, the bank charges and interests continued accruing totaling to Kshs. 606,401/= that the Respondent paid on 8/7/2017. He went ahead to fault the Appellant for paying the said amount into the Appellant's account as opposed to paying Equity Bank directly.

19. Additionally, the Appellant submitted that the equitable remedy for specific performance as ordered by the trial Court was erroneous because the Respondent breached clause 1(II) of the Agreement. That the trial Court's order for payment of the outstanding balance amounted to rewriting the Agreement that was non-existent due to the Respondent's breach. That the agreement was subject to the Law Society of Kenya Conditions of sale and Condition 4(7)(d)(ii) entitles the vendor to forfeit and retain any deposit paid. The Appellant maintained that the Agreement was defective in the absence of the Land Board Consent. In light of the forgoing, the Appellant urged this Court to allow the Appeal and set aside the trial Court Judgment. Reliance was placed on the cases of **Reliable Electrical Engineers Ltd...**

vs.... **Mantrac Kenya Limited (2006) eKLR** and **Mburu Muhindi v Nyingi Kahinga [2018] eKLR**.

20. In opposing the Appeal, the Respondent filed his submission dated 26/7/2021. He was categorical that right from the onset, the parties rewrote the agreement upon payment of Kshs. 250,000/= to the Appellant. That there was no timeline for payment of Kshs. 300,000/= to Equity Bank. That it is the Appellant who requested the bank for the outstanding balance for discharge of title and the bank requested for Kshs. 606,401.53/= which the Respondent duly paid.

21. The Respondent pointed there was no proof of service of the purported notice to complete the sale dated 30/10/2017 addressed to Githinji & Co. Advocates and copied to him, purportedly. He argued that that letter was an indication of the Appellant's willingness to complete the sale way beyond the 90 days' period. The case of **Paradise Homes Properties Limited v Steve Wambua Musyimi & anor. [2014] eKLR** was cited in support of that proposition.

22. The Appellant contended that the Appellant cannot fault the respondent for breaching the agreement whilst he himself did not issue any notice to complete the contract within 21 days as provided under Clause 4(7) of Law Society of Kenya Conditions of Sale. That the Appellant's conduct of accepting payments beyond the completion date nullified the clause on essence of time in the Agreement and relied on the case of **Thrift Homes Limited v Kays Investment Limited [2015] eKLR**. In any event, it was submitted that the Appellant cannot fault the respondent for not paying the full purchase price when the Agreement was clear that part of the money would be paid upon availing completion documents.

23. In conclusion, he reiterated that specific performance was the only remedy available since the agreement was valid and enforceable. That the Appellant cannot benefit from the colossal sum of Kshs. 2,182/401/= already paid to him by the Respondent. He beseeched the Court to dismiss the Appeal.

24. In my view the main issues for determination in this Appeal are;

- a) Whether there was breach of the Sale Agreement dated 7/6/2016?
- b) Whether the trial Court erred in arriving at its decision?

25. In exercise of its appellate powers, this Court is invited to revisit the evidence that was adduced before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion. However, it must be borne in mind that the trial Court had the benefit of seeing the witnesses, hearing them and observing their demeanor for which allowance should be given. See the Court of Appeal holding in **Gitobu Imanyara v Attorney General [2016] eKLR**

26. It is also trite that an Appellate Court will not interfere with the exercise of the trial Court's discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice. See the case of **Mbogo & Another vs Shah [1968] EA**.

27. It is not in dispute that the parties entered into a land sale agreement dated 7/6/2016 for sale of the suit land. It is common ground that the Respondent paid Kshs. 250,000/= as opposed to Kshs. 500,000/= agreed as deposit upon execution of the Agreement.

28. According to the Sale Agreement it is clear that Kshs. 500,000/= was to be paid by cheque upon execution of the agreement. The payment of Kshs. 300,000/= was to be paid directly to Equity Bank for discharge of the charge without specifying the time line. The third payment of Kshs. 1M was to be paid to the Appellant upon him availing all the completion documents to the Respondent. The last payment of Kshs. 1M was to be paid upon successful transfer of the suit land to the Respondent. Going by the evidence and admission of the parties, all these express terms were not complied with and therefore the first issue at this point is answered in the affirmative.

29. The completion date was expressly stated to be 90 days from the date of execution unless varied by the parties in writing. The execution date was 7/6/2016 and the completion date was therefore on 7/9/2016 absent any variation. Special Condition 2 in the sale agreement indicates that time was of the essence in the contract. However, parties for one reason or the other did not comply with the 90 day completion notice. The Agreement does not contain any default clauses and the consequences thereof. In that case the 1989 Law Society of Kenya Condition of Sale adopted by the parties are applied to offer remedy for any breach.

30. Under Clause 4(7) of the Law Society of Kenya Conditions of Sale, a vendor who is ready, able and willing to complete the sale and is aggrieved by the purchaser's default to complete the contract within the completion period is required to issue a twenty-one days' notice requiring the purchaser to complete the contract. Clause 4(7) provides thus;

4(7) This sub-condition applies unless a special condition provides that time is of the essence in respect of the completion date:

a. In this condition "completion notice" means a notice served in accordance with this sub-condition;

b. If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub condition. A party shall be deemed to be ready, able and willing to complete:

- i. If he could be so but for some default or omission of the other party;

ii. Notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.

c. Upon service of the completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.

d. If the purchaser does not comply with a completion notice:

i. The purchaser shall forthwith return all documents delivered to him by the vendor and at his own expense procure the cancellation of any entry relating to the contract in any register;

ii. Without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.

e. If on any such re-sale contracted within six (6) months after the completion date the vendor incurs a loss, the purchaser shall pay to the vendor liquidated damages. The amount payable shall be the aggregate of such loss, all costs and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchase money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date;

f. If the vendor does not comply with a completion notice, the purchaser, without prejudice to any other rights or remedies available to him, may give notice to the vendor forthwith to pay to the purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from four (4) working days after service of the notice until payment. On compliance with such notice, the purchaser shall not be entitled to specific performance of the contract but shall forthwith return all documents delivered to him by the vendor and, at the expense of the vendor, procure the cancellation of any entry relating to the contract in any register;

g. Where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party may again invoke the provisions of this condition which shall then take effect with the substitution of "ten (10) days" for "twenty-one (21) days" in paragraph (c) of this sub-condition.

31. Did the Appellant issue any notice to complete the contract even in respect of the balance of Kshs. 250,000/= that was due upon execution of the Agreement? The answer is in the negative. Instead he continued to accept payment advanced to him even beyond the agreed completion period. On his cross-examination he admitted to not lodging any complaint on that balance. He stated;

"...I would say I did not receive the money wrongly. I did not refund the amount paid to me by Mpesa. I did not refund the money. It is true we would sit down with the plaintiff and discuss..." (see pages 301-302 of the Record of Appeal).

32. It is the Appellants case that he issued a rescission notice vide the letter dated 30/10/2017. This letter was addressed to his advocate and copied to the Respondent. However, no evidence was led by the Appellant to show that the letter was served upon the Respondent. It is not lost on the Court that the Appellant purported to rescind the agreement immediately after the Respondent had paid the sum of Kshs 606,401.5 on the 8/7/2017. The sum aforesaid is the exact amount indicated in the letter dated the 5/6/2017 when the bank wrote to the Appellant demanding the said amount from him, being the amount outstanding on his account at Equity Bank Limited.

33. Following this payment by the Respondent, the Appellant is insistent that the sum was paid into his account by the respondent without his authority and or consent. It is not feasible that the respondent just conjured the figure and paid it without it having come from the Appellant and or his agent.

34. In sum the said letter of rescission in my view was null and void. I say so because the Appellant failed to issue the prerequisite notice of completion as set out in the Law Society of Kenya conditions of sale. The notice of rescission if indeed it was ever issued or served on the Respondent was therefore immature.

35. It is this conduct of the parties that led the trial Court to find that the Agreement was varied by virtue of acquiescence. The Appellant continued to receive part of the purchase price was outside the completion period. It is also on record and uncontested that the Appellant disappeared and therefore was not available to produce the completion documents to obligate the Respondent to pay the balance of the Purchase price.

36. Further the trial Court found that the Respondent had paid the Appellant a total sum of Kshs. 2.1M. There was sufficient evidence in support of the diverse payments which the Appellant did not contest. From the forgoing then grounds 7 & 8 of the memorandum of Appeal fail because it was an express term that the last payment of Kshs. 1,000,000/= was to be paid upon successful transfer of the suit land.

37. To that extent, it is my view that the sale agreement continued to be sustained by the conduct of the parties. It is noted that the Appellant has received substantial amount of money with respect with the transaction.

38. The decision in **Anne Murambi v John Munyao Nyamu & another [2018] eKLR** is persuasive and relevant here. The Court allowed the plaintiff's claim to enforce a sale agreement that was not completed within the agreed completion period yet the defendants failed to issue any completion notice.

39. Clause 5 of the agreement provided that the purchaser was to take physical occupation of the property upon payment of the full purchase price. The full purchase price has not been paid. The claim for mesne profits therefore does not arise because the Appellant has possession of the property.

40. With respect to general damages, it is trite that as a general rule general damages are not recoverable in cases of breach of contract. The reason is that the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. The measure of damages is in accordance with the rule established in the case of **Hadley v Baxendale (1854) 9. Exch. 341** that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach.

41. In this case the Appellant has attributed his Credit Reference Bureau (CRB) listing to the Respondent's failure to complete the transaction. Far from it, it is clear that once the Respondent paid the bank the documents were duly discharged. It is on record that the Appellant had other loan obligations from other banks and probable defaults may have led to his status at the CRB. What is clear is that no evidence was presented that the transaction contributed to it.

42. In the end, I find that the Respondent proved his claim on balance of probabilities against the Appellant. I do not see any error on the part of Learned Magistrate's decisions and reasoning to call for this Court's interference.

43. The Appeal has no merit and it is hereby dismissed. The costs of the Appeal shall be payable by the Appellant.

44. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 15TH DAY OF SEPTEMBER 2021

J G KEMEI

JUDGE

Delivered online in the presence of:

Jimmy Maina Adv. for the Appellant

Mrs Kimani for the Respondent

Court Assistant: Alex/Kuiyaki