



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT COURT AT MERU**

**ELC APPEAL NO. 49 OF 2018**

**THE CHAIRMAN FULL GOSPEL CHURCH (KANGARA) ..... APPELLANTS**

**VERSUS**

**FREDRICK MWORIA M'NCHIRU .....RESPONDENT**

*(Being an appeal from the Judgment of Hon. J.M. Irura (S.R.M.) delivered on 24<sup>th</sup> October, 2018, in Nkubu SRM CC No. 60 of 2004)*

**JUDGMENT**

1. Through a memorandum of appeal dated **22<sup>nd</sup> November, 2018** the appellant seeks this court to set aside the judgement made on **24.10.2018** in **Nkubu SRM CC No. 60 of 2012** in which the applicant was sued by the respondent for declaratory orders that they had breached the terms and conditions of the sale agreement dated **29.1.1996** and an order directing the District Land Registrar Imenti County District to strike out and or cancel in the Register the appellant's name for **L.R No. Nkuu/793** and replace it with that of the respondent.
2. The appellant's grounds of appeal are that: the trial court did not set out and evaluate salient issues for determination; failed to find the claim statute barred; failed to find the total consideration had fully been paid and if not paid ought to have ordered it be cleared by the appellants; failed to find the respondent's suit unsustainable; did not give reasons for the judgment; did not apply or misapplied the relevant law and facts; failed to consider the entire evidence by the appellants and their submissions.
3. By consent parties agreed to dispose the appeal though written submissions filed on **1.10.2021** and dated **10.9.2021** respectively.
4. This being a first appeal, it is expected this court shall hear, re-appraise and reconsider the entire pleadings, evidence and submissions to establish if the lower court considered all the facts evidence and applied the law in reaching its findings and conclusion (**See Selle & Another –vs- Associated Motor Boat Co. ltd & Others [1968] EA 123.**
5. The respondent pleaded he entered a sale agreement on **29.1.1996** with the appellant for  $\frac{1}{2}$  acre of his **L.R No. Nkuene/Ukau/434** for **Kshs. 80,000/=**, in which a deposit of **Kshs. 26,934/=** was paid to him leaving a balance of **Kshs. 53,066/=** which was to be paid upon transfer.
6. The respondent signed all transfer forms, handed over his original title deed to the appellant so as to go and effect subdivisions, while awaiting the balance. It was averred the appellant went ahead, subdivided the original land and caused their portion to be registered under their name but failed to clear the balance on time or at all.
7. The respondent urged the agreement to be declared invalid due to the aforesaid breach; sought cancellation of the title deed and replacement with respondent's name.
8. The appellant by an amended defence dated 19.12.2011 claimed:-, the suit was statute barred; no cause of action was disclosed; alleged full consideration had been paid and hence prayed the court do declare there was no breach of the agreement as alleged or at all.
9. The respondent testified that he was approached by the appellant for sale of  $\frac{1}{2}$  acre of his land to which they agreed a consideration of **Kshs. 80,000/=** produced an agreement as **P Exh 1** and an acknowledgment of payment as **P Exh 2**. He stated he, in good faith handed over the original title deed to the appellants wrote them a demand letter which he produced as **P Exh 3** dated **28.4.2000** together with copy of green card as **P Exh 4**. Though the appellants sought to take vacant possession the respondent declined until they cleared the balance. The respondent testified he gave the title deed and also signed the transfer forms for registration in good faith hoping his balance shall be cleared as agreed.
10. The respondent testified he later on established the appellant had carried out a subdivision of his Parcel No. 434 but was not given a new number for his remaining portion.

11. The respondent testified he chased the appellant away when they attempted to come with a land surveyor to erect new beacons. He prayed for the nullification of the agreement and cancellation of the title deed.

12. In **cross examination**, the respondent denied ever receiving the balance, maintained he had sued the rightful party, stated though the agreement was made in 1996, he was no longer interested in the balance but his land; admitted he only received 20,000/= but voluntarily signed the transfer form and attended the Land Control Board meeting for he believed the appellant was genuine and would eventually honour their promise to clear his balance.

13. Regarding the refund of the deposit, the respondent maintained he was willing to do so and maintained the appellant deceived him into transferring them his land but failed to clear the balance. He testified the appellant misrepresented facts to him, could not allow them to occupy the land for they illegally acquired it and had lost trust them anymore.

14. The defence called three witnesses.

**DW1** adopted his witness statement dated **5.6.2012**, admitted the church had a board of trustees, stated it was true they bought and were transferred the suit land by the respondent for **Kshs. 80,000/=**, though vacant possession had not been handed over to them on account of dispute over a balance.

Further, DW1 in cross examination alleged he paid **Kshs. 40,000/=** on **4.7.2005** though he had no acknowledgement receipts; claimed the agreement wasn't done before a lawyer, and testified **Kshs. 61,000/=** had been paid.

15. **DW2** as a member of the appellant church, adopted his witness statement dated **5.6.2012**, confirmed there was a sale agreement, though he was not party to it, but was told by **DW1** **Kshs. 40,000/=** had been paid to the respondent. **Further DW2** alleged as the treasurer of the appellant he released **Kshs. 40,000/=** to **DW1** for onward transmission to the respondent.

16. **DW3** adopted his witness statement dated **5.6.2012**, told the court he was aware of the transaction as a church member; though not privy to the agreement. **DW3** maintained he was with DW1 when the respondent was given **Kshs. 40,000/=**; though the respondent did not sign any acknowledgment receipt.

17. The record does not show if parties filed or made any submissions. Similarly it is also not clear if parties agreed on any issues for determination.

18. The appellant on ground No. 1 of the appeal submits the trial court failed to isolate and or analyse the salient issues for determination. As indicated above, parties herein were given an opportunity to comply with case conference directions. One of the requirements of case conference directions is for parties to file and serve list of issues in their view if they are not able to agree on a joint list of issues. In the instant case there was no such compliance.

19. That notwithstanding at **page 74** of the record of appeal the trial court rightly in my view, isolated the issues for determination which clearly flow from the pleadings and evidence led by the parties. Similarly throughout the judgement the trial court considered each of the issues and made definite findings and conclusions. This ground is therefore rejected as lacking merits.

20. On ground 2 of the appeal the appellant submits the suit was time barred as per **Limitation of Actions Act Cap 22**. P Exh 1 was made on **29<sup>th</sup> January 1996** with clear timelines for compliance. **Section 3 of the Law of Contract Act Cap 23 Laws of Kenya** provides that no suit upon a contract of land may be brought unless the contract is in writing, signed by the parties and is attested. It is undisputed fact that the suit arose out of no-completion with P Exh 1 on the part of the appellant. Clause 3 of the agreement is clear the completion date was January 1999. Thereafter the respondent was to be handed over vacant possession. The respondent wrote P Exh No. 3 a year after the deadline seeking for the balance which elicited no response from the appellant. Given this view the learned trial magistrate erred in law and in fact finding the completion date to be in **January 1996 and not 1999**.

21. It is pleaded and proved the appellant had the title in their favour by 21.7.1997. The appellant cannot therefore blame the respondent as he was rightly entitled to the balance. The agreement was self-executing and with clear deadlines all which the respondent adhered to. Obviously one would not have expected a prudent owner to release his land to the appellant before he was fully paid the purchase. Similarly the agreement and which the parties signed indicted the consequences for non-compliance the land to revert back to the respondent with some damages. By defaulting the appellant knew the consequences of non-compliance and hence could not fault the learned trial court for finding the appellant at fault and apportioning blame on them with attendant consequence.

22. The appellant neither pleaded any breach of the agreement on the part of the respondent nor did they try in any way to mitigate the loss until the suit was filed. Even during the trial, the appellant insisted to have made full payment yet produced no proof as to the date, place and particulars of payment.

23. On ground 3 of the appeal the appellant faults the trial court for not ordering the balance if found not to have been paid to be cleared so as to complete the transaction. The appellant did not plead or testify that they were ready to complete the transaction. There was also no alternative prayer or pleadings to that effect. Similarly there was no counterclaim at all made to the claim.

24. In **Nabro Properties Ltd. -vs- Sky Structures Ltd. & 2 Others (2002) KLR 299** the court held:

***“The appellant had not paid the full purchase price and had not applied for extension to complete the transaction ----- “A party seeking specific performance must state and show and satisfy the court it can comply and be ready and able. A mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden case or the appellant”***

25. Looking at the entire pleadings and evidence there is nowhere the appellant pleaded or led evidence that they were willing, if found non-compliant with the agreement, to clear the balance. Even after admitting to have paid 61,000/= there was still a balance of Kshs. 19,000/= yet the appellant did not led evidence to demonstrate its willingness to clear the same. Parties are bound by their pleadings and a court of law cannot allow an unpleaded issue. It cannot also give a prayer which has not been sought for by a party and evidence led in support of such a request. In absence of such pleading and prayers it is my finding the said ground of appeal fails.

26. Under **Section 97 (1) of the Evidence Act** the respondent produced the sale agreement and proved breach of its terms. The appellant did not challenge the contents and terms of P ex 1 nor did they say there was variation thereof, subsequently or otherwise. Consequently, it is therefore my finding that ground 4 of the appeal lacks merit..

27. Regarding ground No. 5 the respondent made clear pleadings, produced documentary evidence in support of those pleadings and in particular proved breach on the part of the appellant. On the other hand the appellant did not deny the land had been transferred into their name within the timelines indicated in the sale agreement. Given such evidence the learned trial court could not be faulted for reaching a finding that the respondent had proved his case to the required standards and that he was entitled to the prayers in the plaint.

28. Concerning grounds No's 6, 7 & 8 **Order 21 Rule 4** provides judgments in defended suit shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

29. In the instant suit, the court looked at each of the rival set of facts and evidence. Eventually the trial court analysed the law applicable. The decision in my view is well founded and hence the appeal fails on those grounds.

30. Lastly, an issue was raised by the appellant as to their capacity to be sued during cross-examination and which perhaps made the trial court to determine whether there existed an agency relationship as regards the appellant and its agents to the agreement.

31. First the amended defence dated 19/12/2011 admitted the descriptive parts in paragraphs 1 & 2 of the amended plaint. The appellant did not raise any objection as to the capacity to sue and be sued. Further the appellant admitted the suit land was registered under their name upon transfer by the respondent. Even in the current appeal, the appellant does not deny ownership at ll. The appellant is the duly registered owner of the suit land and is therefore estopped from reneging from that position.

32. In sum it is my considered view the appeal lacks merit and the same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 27<sup>TH</sup> DAY OF OCTOBER, 2021**

**In presence of:**

**KAIMENYI KITHINJI FOR APPELLANT**

**GIKUNDA ANAMPIU FOR RESPONDENT**

**COURT ASSISTANT - KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**