



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO. 18 OF 2019

JOHN MURIITHI MWANIKI.....APPELLANT

VERSUS

RICHARD KOSKEI BUNEY..... RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgment of Hon. S.N. Mwangi (Senior Resident Magistrate) dated and delivered on 6th November, 2019 in **Nyahururu Chief Magistrate Environment and Land No. 273 of 2018 - Richard Koskey Buney v John Muriithi Mwaniki**. By the said judgment, the trial court directed the Appellant to refund the Respondent the purchase price of ksh 183,000/= together with interest from the date of execution of the contract. The trial court further awarded the Respondent kshs 100,000/= as general damages for breach of contract together with interest from the date of the contract. The Respondent was also awarded costs of the suit.
2. The material on record shows that by a plaint dated 7th March, 2017, the Respondent sued the Appellant seeking an order for specific performance of a certain rescission agreement dated 29th April, 2016. The Respondent had pleaded that by a written agreement dated 29th April, 2016 the parties had mutually rescinded an earlier sale agreement for the sale of **Plot No. U39** African Location in Rumuruti (*the suit property*). It was further pleaded that by the terms of the agreement, the Appellant was to refund him the sum of kshs 183,000/= within 90 days in default of which the Appellant was to hand over all completion documents for the suit property to facilitate its transfer to the Respondent.
3. The Respondent further pleaded that although the Appellant had defaulted in making the refund he had refused, failed and neglected to hand over the completion documents as per the terms of the rescission agreement hence the suit.
4. By a statement of defence dated 2nd June, 2017, the Appellant pleaded that it was the Respondent who had breached the initial sale agreement for the suit property by failing to pay the balance of the purchase price and that he had coerced him to enter into the rescission agreement dated 29th April, 2016.
5. The Appellant further pleaded that he had no option other than to sell the suit property to raise funds for the refund and that upon sale the Respondent had refused to accept the refund of ksh 183,000/= despite the same being tendered. The appellant maintained that he had always been ready and willing to refund the said sum.
6. It was the Appellant's further defence that since the suit property had already been disposed of to a third party, it could not be the subject of an order for specific performance hence he prayed for dismissal of the Respondent's suit with costs.
7. By a reply to defence dated 16th June, 2017, the Respondent denied having breached the initial agreement for the sale of the suit property. He also denied coercing the Appellant to enter into the rescission agreement. He denied having declined to accept a refund of the purchase price and pleaded that he had provided the Appellant with a bank account into which he could deposit the sum of kshs 183,000/= before the lapse of the stipulated period but he had failed to make the deposit.
8. By a judgment dated and delivered on 6th November, 2016, the trial court found the Appellant to have breached the rescission agreement dated 29th April, 2016 by failing either to refund the sum of kshs 183,000/= or to hand over the completion documents to the Respondent. The trial court recognized that the suit property was no longer available hence it awarded the Respondent general damages of kshs 100,000/= for breach of contract together with interest thereon with effect from 29th April, 2016. The trial court also ordered the Appellant to refund the purchase price of kshs 183,000/= together with interest thereon with effect from 29th April, 2016. Costs of the suit were awarded to the

Respondent.

B. THE APPELLANT'S GROUNDS OF APPEAL

9. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 26th November, 2019 raising the following 9 grounds of appeal:

- a) *That the learned trial magistrate erred in law and in fact in finding that the Appellant breached the agreement dated 29th April, 2016 contrary to the evidence on record.*
- b) *That the learned trial magistrate erred in law and in fact in finding that the Appellant had no right to sell the suit plot to enable him to raise the refund on the purchase price.*
- c) *That the learned trial magistrate erred in law and in fact in finding that the Appellant intentionally caused the suit land to be sold to defeat not only the Respondent's rights but also to breach the contract dated 29th April, 2016 contrary to the evidence on record.*
- d) *That the learned trial magistrate erred in law and in fact in finding that the Appellant frustrated the contract dated 29th April, 2016 by refusing to have the completion documents given to the Respondent within 90 days of their agreement.*
- e) *That the learned trial magistrate erred in law and in fact in disregarding the Appellant's evidence which proved that he had severally attempted to refund a sum of Kshs. 183,000/- to the Respondent before lapse of 90 days of the agreement dated 29th April, 2016 but the Respondent frustrated him.*
- f) *That the learned trial magistrate erred in law and in fact for awarding a sum of Kshs. 183,000/- plus interest from 29th April, 2016 and general damages of Kshs 100,000/- plus interest from 29th April, 2016 which amounts were not pleaded by the Respondent or sought for through evidence.*
- g) *That the learned trial magistrate erred in law and in fact in failing to find that parties are bound by their pleadings and on delving onto issues not pleaded or raised in evidence in her judgment.*
- h) *That the learned trial magistrate erred in law and in fact for disregarding the evidence on record and for dismissing the Appellant's defence.*
- i) *That the learned trial magistrate erred in law and in fact in awarding the Respondent costs of the suit plus interest.*

10. The Appellant consequently sought the following reliefs:

- (a) *That the appeal be allowed.*
- (b) *That the judgment and decree of the trial court dated 6th November, 2019 be set aside.*
- (c) *That the Respondent's suit in Nyahururu CM ELC No. 273 of 2018 be dismissed with costs.*

C. THE RESPONDENT'S CROSS - APPEAL

11. The record further shows that the Respondent was dissatisfied with part of the judgment of the trial court in so far as he was not granted an order for specific performance. He, consequently filed a notice of cross-appeal dated 2nd December, 2019 raising the following grounds:

- (a) *The learned trial magistrate erred in law and fact by failing to find that the sale of plot U 39 African location by the Appellant to a Third Party was null and void in view of the terms of the agreement dated 29th April, 2016.*
- b) *The learned trial magistrate erred in law and fact in failing to find that the agreement dated 29th April, 2016 was enforceable as against the Appellant.*
- c) *The learned trial magistrate erred in law and fact by failing to enter judgment in favour of the Respondent as prayed in the plaint.*

12. The Respondent, therefore, prayed for the following reliefs:

- (a) *That the Appellant's suit be dismissed with costs.*
- (b) *That judgment be entered in favour of the Respondent as prayed in the plaint.*

D. DIRECTIONS ON SUBMISSIONS

13. When the appeal was listed for directions on 8th June, 2021, it was directed, with the concurrence of the parties, that it shall be canvassed through written submissions. The parties were granted 30 days each to file and exchange their submissions. The record shows that Appellant's submissions were filed on 16th September, 2021 whereas the Respondent's submissions were filed on 20th September, 2021.

E. THE ISSUES FOR DETERMINATION

14. The court has considered the Appellant's grounds of appeal, the Respondent's cross- appeal as well as the material on record. The court is of the opinion that the main issues for determination are as follows:

- (a) **Whether the Respondent's cross- appeal is competent.**
- (b) **Whether the trial court erred in law in directing the Appellant to refund the purchase price of kshs 183,000/=.**
- (c) **Whether the trial court erred in law in awarding the Respondent general damages for breach of contract.**
- (d) **Whether the trial court erred in law in failing to order specific performance as sought by the Respondent.**
- (e) **Whether the trial court erred in law on the award of interest.**
- (f) **Whether the trial court erred in law on the award of costs.**

F. THE APPLICABLE LEGAL PRINCIPLES

15. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

"...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. Similarly, in the case of **Peters v Sunday Post Ltd [1958] EA 424** Sir Kenneth O'Connor, P. rendered the applicable principles as follows:

"...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

17. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in **Watt v Thomas [1947] A.C 424** at page 429-430 as follows:

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

G. ANALYSIS AND DETERMINATION

(a) Whether the Respondent's cross - appeal is competent

18. The court has considered the submissions of the parties and the material on record of this issue. The Appellant contended that the Respondent ought to have filed his own separate appeal and that the procedure of filing a notice of cross-appeal was irregular and unknown

to the law. He cited the case of **George Kianda & Another v Judith Katumbi Kathenge & Another**[2018] eKLR in support of that submission.

19. On his part, the Respondent submitted that it was competent to file a notice of cross- appeal and relied upon the provisions of **Order 42 Rule 32 of the Civil Procedure Rules** and the case of **Diamond Trust Bank (K) Limited v Galaxy Ventures (K) [2020] eKLR**.

20. The court has noted that the **Civil Procedure Rules** envisage the filing of a cross- appeal by a Respondent. The court has further noted that it is empowered under **Order 42 Rule 32** to determine all the issues regarding all the parties to an appeal even in the absence of a cross- appeal. **Order 42 Rule 32** stipulates that:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal.”

21. The court has further noted that in the **Diamond Trust Bank** case, the High Court considered the case of **George Kianda** case and declined to follow the opinion that a Respondent ought to file a separate appeal first before applying for consolidation. The court is thus satisfied that the Respondent’s cross- appeal is competent and fit for adjudication within the meaning of **Order 42 Rule 31**.

(b) Whether the trial court erred in law in directing the Appellant to refund the purchase price of kshs 183,000/=

22. The court has considered the material on record and the submissions of the parties on this issue. The Appellant’s main objection to the award was that it was not specifically prayed for in the plaint. The Respondent supported the awarded on the basis that a refund was provided for in the rescission agreement dated 29th April, 2016 between the parties and that parties were bound by the terms of their bargain. The parties cited various authorities in support of their respective submissions.

23. Although the Respondent did pray for a refund of the purchase price as an alternative in case he failed in his quest for specific performance, the court is of the opinion that the trial court did not err in law in making an order for a refund of the purchase price upon declining to grant specific performance. The material on record shows that the rescission agreement provided the Appellant with only two options; either to refund the purchase price of kshs 183,000/= or to hand over the completion documents to facilitate transfer of the suit property to the Respondent. The Appellant was not supposed to keep both the money and the suit property.

24. Having found that the suit property had already been sold to a third party, the only option the trial court had of bringing a complete resolution of the dispute was to order a refund of the purchase price. The court does not take the view that the Respondent should have been required to file a separate action for the refund of the purchase price. Accordingly, the court is of the opinion that the trial court was right in giving effect to the overriding objective of facilitating resolution of disputes in a timely, proportionate, just and cost- effective manner by ordering a refund of the purchase price. Accordingly, the 2nd issue is answered in the negative.

(c) Whether the trial court erred in law in awarding the Respondent general damages for breach of contract

25. The Appellant faulted the trial court for awarding the Respondent general damages of Kshs.100,000/= for breach of contract. It was submitted that general damages were not neither sought in the pleadings nor proved at the trial. The Appellant cited the case of **Caltex Oil (Kenya) Ltd v Rono Limited [2016] eKLR** and **Consolata Anyango Ouma v South Nyanza Co. Ltd [2015] eKLR** in support of his submission. The Respondent, on the other hand, did not submit on this issue at all.

26. The court is satisfied on the basis of the material on record that the trial court erred in awarding the Respondent *general damages* for breach of contract. As a matter of law, it is special damages and not general damages which are awardable for breach of contract. In the case of **Kenya Power & Lighting Co. Ltd v Abel M. Momanyi Birundu [2015] eKLR** the Court of Appeal held, *inter alia*, that:

“Authorities are legion to the effect that no general damages may be awarded for breach of contract. See Dharamshi v Karsam [1974] EA 41 which was cited with approval in Provincial Insurance Co. East Africa Ltd v Nandwa [1995 – 98] 2 EA 288. The latter decision was cited to the learned Judge of the High Court. Notwithstanding that this settled position of the law was expressly brought to the attention of the learned Judge, and was alluded to by the subordinate court, we are puzzled that the learned Judge still awarded the respondent the said general damages.”

27. Similarly, in the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** , it was held by the Court of Appeal that:

“...as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication.”

(d) Whether the trial court erred in law in failing to order specific performance as sought by the Respondent

28. By his cross-appeal, the Respondent faulted the trial court for failing to find and hold that the rescission agreement dated 29th April, 2016 was still enforceable against the Appellant. The Respondent took the view that the sale of the suit property to a third party was null and

void hence it should have been ignored. The Respondent submitted that parties were legally bound by the terms of their agreement hence the trial court had a duty to specifically enforce the agreement by compelling the Appellant to hand over to him the completion documents for the suit property.

29. The Appellant, on the other hand, opposed the cross-appeal and supported the judgment of the trial court on the issue of specific performance. The Appellant submitted that the suit property was no longer available hence specific performance and delivery of completion documents was no longer possible. The Appellant relied upon the case of **Boniface Miheso Ingosi v Nelson Alusiola Muga Shikami [2018] eKLR** in support of that submission.

30. In the case of **Boniface Miheso Ingori (supra)**, the court made the following pronouncement on the remedy of specific performance:

“ In the case of Fiat Kenya Ltd v Ali Juma Rable [1973] EA 11 the court held that:

The court never awards specific performance when it is incapable of enforcing the order. By parity of reasoning I do not think it should ever award specific performance if it entertains any serious doubt that the contract is capable of performance.”

31. There is uncontroverted evidence on record to the effect that the Appellant had sold the suit property in order to raise money to refund the Respondent. The purchaser was not joined in the suit and neither was a prayer for nullification of the sale sought before the trial court. The Respondent's belief that the sale to a third party was null and void is not sufficient to nullify or cancel the sale. In the premises, the court agrees with the Appellant that specific performance by delivery of completion documents was not possible. Accordingly, the trial court was right in declining to grant specific performance as sought by the Respondent.

(e) Whether the trial court erred in law on the award of interest

32. The court has considered the submissions and material on record on this issue. The Appellant faulted the trial court for awarding interest on both the refund and general damages with effect from 29th April, 2016. It was submitted that the award was not anchored in the pleadings and that it was not even canvassed at the trial. The Appellant relied on the case of **Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 Others [2018] eKLR** in support of his submission. The Respondent, however, did not tender any submissions on the issue of interest.

33. In the case of **Jane Wanjiku Wambu (supra)**, the High Court held as follows on the award of interest:

“Second, under Section 26 (1) of the Civil Procedure Act, the court has discretion to award and fix the rate of interest to cover two stages namely:-

(a) The period from the date the suit is filed to the date when the court gives its judgement.

(b) The period from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.

Third, when it comes to the period before the filing of the suit, Section 26 of the Civil Procedure Act has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest or where there is no stipulation but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. See Gulam Hussein v French Somaliland Shipping Company Limited [1959] EA 25; Highway Furniture Mart Limited V The Permanent Secretary & Another EALR (2006) 2 EA 94; Mulla – The Code of Civil Procedure (16th Ed.) Vol 1. at page 505.”

34. The court is satisfied on the basis of the said authority that the trial court erred in law in awarding interest with effect from 29th April, 2016 when no basis for the award of interest before the date of filing suit had been laid at the trial. There was no evidence of any agreement to that effect between the parties. There was no evidence of any mercantile or trade usage to that effect either. Accordingly, the court is inclined to set aside the award of interest on the refund of Kshs.183,000/= with effect from 29th April, 2016 and direct that interest thereon shall run from the date of judgment. There shall be no interest on general damages since the entire award of Kshs.100,000/= shall be set aside.

(f) Whether the trial court erred in law on the award of costs

35. The court has noted that although the Appellant raised this issue in his memorandum of appeal, it was not pursued during the hearing since no submissions were made thereon. The guiding principles on the award of costs are contained in **Section 27 of the Civil Procedure Act (Cap. 21)**. Costs of an action or proceeding are at the discretion of the court subject to the general principle that costs shall follow the event. Accordingly, a successful litigant should normally be awarded costs unless, for good reason, the court directs otherwise. **See Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.**

36. The court is of the opinion that the trial court did not err in law in awarding the Respondent costs of the suit as the successful party in the litigation. There is no evidence on record to demonstrate that the trial court committed an error of principle in making the award. **See Dhirani v Mohamed Ibrahim (1946) 13 EACA 69 and Sheikh Jama v Dubat Farah [1959] EA 789.** Accordingly, the trial court's award on costs shall be affirmed.

H. CONCLUSION AND DISPOSAL

37. The upshot of the foregoing is that the court finds merit in some of the grounds of appeal not in others. The appeal shall be allowed in part whereas the cross-appeal shall be dismissed. Accordingly, the court makes the following orders for disposal of the appeal and cross-appeal:

- (a) **The trial court's award of general damages of kshs 100,000/= for breach of contract together with interest thereon is hereby set aside in its entirety.**
- (b) **The order for the Appellant to refund the purchase price of ksh 183,000/= is hereby affirmed save that interest thereon shall run with effect from the date of judgment and not the date of the rescission agreement.**
- (c) **The trial court's order awarding the Respondent costs of the suit is hereby affirmed.**
- (d) **The Respondent's cross-appeal is hereby dismissed.**
- (e) **There shall be no order as to costs on the appeal and cross- appeal.**

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 21ST OF OCTOBER , 2021.

IN THE PRESENCE OF:

MS. WANJIRU MURIITHI FOR THE APPELLANT

MR. NDERITU KOMU FOR THE RESPONDENT

CA- Carol

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Y.M. ANGIMA

JUDGE