Kiprop v Kiptui (Civil Appeal E001 of 2024)
[2024] KEHC 14702 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14702 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E001 OF 2024

RB NGETICH, J

NOVEMBER 21, 2024

BETWEEN

WILSON KIPROP ..... APPELLANT

AND

CHRISTOPHER KIPRIRIAN KIPTUI ..... RESPONDENT

(This appeal emanates from a judgment delivered by Hon. Caroline R.T Ateya Principal Magistrate on 20{{^th}} December, 2023 in Kabarnet Civil Suit No. E008 of 2021.)

JUDGMENT

1. The appellant herein filed suit before the trial court vide plaint dated 1st February 2021 seeking refund of Kshs 35,500 being purchase price for sale of land as a result of breach of agreement. The trial court by judgment delivered on 20th December 2023 dismissed the appellant's claim.

2. Being dissatisfied and aggrieved buy the said judgment, the appellant filed memorandum of appeal dated 12th January, 2024 on the following grounds: -

    i. That the learned trial magistrate erred in both law and fact in finding that the Appellant had proved his case on a balance of probability and/or that the balance of probability shifts in favour of the Respondent when there were evidence to the contrary that the Respondent had defrauded the Appellant of his money.

    ii. That the Honorable Learned Magistrate erred in law and in fact in failing to find that the Respondent was in breach of the sale agreement by altering the purchase price and/or failing to provide any consideration for the purchase price.

    iii. That the Learned Magistrate erred in law and in fact in failing to find that the Appellant was entitled to a refund of the purchase price after the Respondent had frustrated the sale agreement.

iv. That the Learned Magistrate erred in law and in fact in finding that the appellant was in possession of some land allegedly measured for him by the Respondent even after finding that it was not clear which parcel of land was being sold to the Appellant.

v. That the learned Magistrate erred in both law and fact in failing to find that the Appellant was nolonger interested in the sale agreement but a refund of his money.

vi. That the Learned Trial Magistrate erred in law and in fact in finding that the Appellants claim lacks merit when they were evidence to the contrary that the Appellant never received any consideration in form of land for the purchase price.

3. The Appellant prayers for:-

a. This appeal be allowed.

b. The Judgement of the Trial court be set aside.

c. Costs of this appeal and costs in proceedings at the lower court.

4. The appeal was canvassed by way of written submissions, only the Appellant filed his submissions.

Appellant's Submissions

5. The Appellant has summarized the grounds of appeal and framed them as follows:

a. Whether there was breach of the sale agreement between the parties herein.

b. Whether the Appellant is entitled to a refund of the purchase price.

c. Whether the appeal should be allowed and the trial court's judgment be set aside.

6. In submitting on whether there was breach of the sale agreement between the parties herein, the Appellant submit that it is the Respondent who approached the Appellant and requested him to purchase one acre of his parcel of land to be excised from Plot No.2617 to enable him sort out school fees issues which request the Appellant acceded to and agreed to purchase the land at Kshs.30,000/=.

7. That on 22nd January, 2014, the Respondent approached the Appellant again and requested him to purchase a further ¼ of an acre at Kshs.10,000/= which he agreed. On 1st January, 2015 and 1st February, 2015, the Appellant paid Kshs.500/= and Kshs.5,000/= respectively. The said payments have been captured in the Sale Agreement and even though the purchase price in the agreement was Kshs.30,000/=, the Respondent later manipulated it to read Kshs.40,000/= which means he unilaterally changed the purchase price.

8. That all this while, the Appellant had not been shown the portion of land which he was purchasing and it is when he demanded to be shown the said property that the Respondent showed him his own homestead and proceeded to measure 1 acre for him which for all intents and purposes forms part of the Appellant's late father's parcel of land number 2628 Kapkuk Adjudication section.

9. It is the Appellant's case that the Respondent's capricious increase of the purchase price from Kshs.30,000/= to Kshs.40,000/= is a fundamental breach of the agreement and thus changing the terms of the initial agreement. That the Respondent's proclamation that the Appellant was purchasing his homestead is also a fundamental breach of the agreement as this information had not been initially disclosed to the Appellant otherwise the Appellant would not have entered into an agreement knowing that he is purchasing his own homestead.

10. The Appellant submits that the Respondent illegally and unlawfully misrepresented to him that he was selling 1 ¼ acres to be excised from his parcel of land number 2617 yet he had no intention of doing so. That it is clear that the Respondent conned him which is supported by the letter by the Adjudication Officer dated 21st February, 2020.

11. The Appellant submit that the Respondent breached the fundamental terms of the sale agreement which go to the root of the agreement and the trial Court erred in both law and fact in failing to find that the Respondent was in breach of the sale agreement by altering the purchase price and/or failing to provide any consideration for the purchase price.

12. On whether the Appellant is entitled to a refund of the purchase price, the appellant submit that it is clear from the pleadings and all the documents on record from both parties that the Appellant paid Kshs.35,500/= as the purchase price and submit that the Respondent failed to perform his obligations as per the sale agreement as he manipulated the purchase price to read Kshs.40,000/= for 1 acre instead of 1¼ acre and also misrepresented the subject property being sold to the Appellant as the Appellant found out that he was purchasing his homestead which forms part of his late father parcel of land No. 2628.That the Appellant had a right to repudiate the sale agreement herein and seek a refund of the purchase price as there was no consideration provided by the respondent.

13. That further, any boundary dispute between the respondent and the appellant's late father estate cannot be the basis of denying the appellant a refund of his money and the respondent did admit in his evidence that he had no problem on the purchase price to the appellant, however the court found otherwise and submit that the Appellant is entitled to a refund of the purchase price.

14. The appellant urged this court to reevaluate the evidence adduced before the trial court and consider paragraph 11 of the trial Court's Judgment delivered on 20th December, 2023. The appellant submit that he agrees that the land parcel number was not indicated in the agreement but maintain that there was no vacant possession since the Respondent did not show the Appellant what property he was purchasing until the Appellant demanded to be shown, that's when he was shown his homestead and he decided to demand refund of the purchase price since the Respondent did not perform his obligations.

15. He submits that the trial court stated that money was paid and land was measured and that the trial court failed to consider the facts and evidence produced by the Appellant demonstrating that there was no vacant possession and that the Respondent conned him. He relied on the case of Mursal & Another v Manese (suing as the Legal administrator of Dalphine Kanini Manesa Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment).

16. In conclusion, the appellant submit that the Respondent breached the agreement forcing him to seek a refund of the purchase price and urged this Court to allow the appeal, set aside the trial court's judgment delivered on 20th December, 2023 and order the Respondent to pay the costs at both the appeal and lower court level.

Analysis And Determination

17. The principle that govern the first appellate court was set out in the Selle vs. Associated Motor Boat Co. [1968] EA 123 where the court stated as follows:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 this respect. In particular the 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. Further in the case of Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71 East African Court of Appeal stated as follows:

> " This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."

19. In view of the above, I wish to consider whether the appellant herein proved his case on a balance of probabilities. In the case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... 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 Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

20. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated that:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

21. The issue before the trial court was whether the Respondent was in breach of the contract. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J. held as follows: -

> " The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract."

22. Further in the case of Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609, held as follows:

> " The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable."

23. From the foregoing, the role of the Court is to interpret the contract as written and agreed upon by the parties. The Plaintiff's claim is mainly founded on the sale agreement between him and the Defendant. It is not in dispute that there existed an agreement between the parties herein. The Appellant avers that on or about the 16th January,2014, the Respondent who is the Appellant's neighbor approached him and informed him that he had school fees problems and requested him to purchase one acre to be excised from his parcel of land no.2617 Kapluk Adjudication section. They discussed the purchase price of the said one acre in the presence of the Respondent's son now an adult and agreed at Kshs.30,000/=.

24. That pursuant to the said agreement, the Appellant paid the Respondent Kshs.15,000/= in the presence of his son Edwin Kipririan who wrote an acknowledgement note of an even date, acknowledging receipt of Kshs.15,000/= and indicating the purchase price of the one acre as Kshs.30,000/= and the next installment payment date as 22nd January.2014. The Appellant duly paid the purchase price of Kshs.30,000/= as per the acknowledgement note.

25. Further on or about the 12th March,2014, the Respondent again approached and requested the Appellant to purchase a quarter (1/4) of an acre at Kshs.10,000/= to be excised from the same parcel of land plot No. 2617 which request the Appellant acceded to and paid the Defendant Kshs.500 as deposit and a further Kshs.5,000/= on 1st February, 2015 leaving a balance of Kshs.4,500/=.

26. That all this time, the Respondent had not shown the Appellant the ¼ acres he was purchasing though they were peacefully co-existing as neighbours, the Appellant occupying his late father's parcel of land No.2628 Kapluk Adjudication section while the Respondent was in occupation of his parcel of land no.2617.

27. The appellant's argument is that the Respondent illegally and unlawfully misrepresented to him that he was selling 1 ¼ acres to be excised from his parcel of land number 2617 yet he had no intention of doing so therefore breaching the fundamental terms of the sale agreement which go to the root of the agreement.

28. It is presumed that at the time of making a contract the parties are like-minded and that their bargain is motivated by commonality of purpose. However, if a mistake arises in the course of the contract, the court shall determine whether the mistake goes to the root of the agreement and whether it was a mistake of both parties. In the General Principles of the Law of Contract by K. Laibuta, common mistake is described as follows: -

> " A mistake is said to be common where both parties operate under the same mistake which is fundamental and not merely collateral to the attainment of the main object of the contract."

29. A mutual mistake is described in the same book of K. Laibuta as follows: -

> " Mistake is termed as mutual where parties misunderstand one another and are at cross-purposes. Purported acceptance of something different from what was actually offered is ineffectual and does not bind the parties in contract".

30. A unilateral mistake is described in the same literature as follows: -

> " Mistake is unilateral where only one party is mistaken while the other is clear minded as to the terms of the contract".

31. Certain factors which reverse the legal effect of a transaction and render it unenforceable in law or inequity are recognized by common law. The contract may be rendered void at the onset or voidable at the instance of the aggrieved party depending on the fundamental nature and effect of the particular factor. Their overall effects are to negate one or more of the essentials of a valid contract, such as mutual consent or intention to create legally binding relations.

32. A mistake can only vitiate a contract if it is on the part of either or both parties in respect of either the subject matter or some fundamental term that goes to the root of the contract. In the case of Sapra Studio vs Kenya National Properties Limited [1985] eKLR where the case of Bell vs Lever Bros [1932] AC 1 the court stated as follows:-

> " The common mistaken assumption of both parties was as to the existence of a fact which formed an essential and integral element of the subject matter of the agreement and I think it was sufficient fundamental to avoid the contract".

33. In the case of Lole vs Butcher [1949] ALL ER 1107 Lord Denning, LJ considered factors which may render a contract a nullity as follows:-

The correct interpretation of the case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their innermost state of mind have to all outward appearances agreed with sufficiently certain in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some conditions expressed or implied in it or for fraud or on some equitable ground".

34. The appellant alleged that the Respondent altered the purchase price to read Kshs.40,000/= per acre from the initial agreement of Kshs.30,000/= and the piece of land was to be excised from the Respondents parcel of land number 2617. From the evidence of the parties, the subject matter of the agreement was the sale of one and a quarter acre to be excised from the Respondents parcel of land number 2617 to the Appellant. From the evidence adduced, it is clear that the Respondent misled the appellant on the portion of land he intended to give him in exchange for money advanced to him to address the school fee issue that he had. For the Respondent to show the appellant where the appellant lived after receiving almost the whole amount of purchase price in my view an act of deceit. Even if the land parcel is not indicated in the written agreement done later, the portion could not certainly be where the appellant resided. In my view, the respondent misrepresented facts to the appellant to make him believe that he intended to sell land to him.

35. It is not disputed that the respondent received Kshs 35,500 form the appellant. The appellant filed suit claiming refund on account that the respondent frustrated the contract and in my view the trial magistrate erred by failing to order refund of the said amount that was paid by the appellant to the Respondent. The appellant is therefore entitled to refund of Kshs. 35,500.

36. From the foregoing, I hereby enter judgment for the appellant against the Respondent for Kshs 35,500.

37. Final Orders: -

    a. The respondent to refund Kshs 35,500 to the Appellant.

    b. Costs of this suit both in the trial court and appeal to be paid by the Respondent to the Appellant.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 21ST DAY OF NOVEMBER 2024.

RACHEL NGETICH

JUDGE

In the presence of

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Mr. Chebii for Appellant

No appearance for Respondent