



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 134 OF 2013

JOHN KIMANTHI GATHARIKI.....APPELLANT

=VERSUS=

REUBEN MWAURA GICHIA.....RESPONDENT

(Being an appeal against the Ruling/Order of the Senior Resident Magistrate

Court –Mombasa- Honourable Mr. Gacheru Dated 6th September, 2013 in CMCCC No. 2338 of 2012)

JUDGMENT

1. The Chequered history of this matter can be traced as far back as 27/7/2012 when the Appellant allegedly rescinded a contract entered into by the parties for sale of two plots owned by the Appellant to the Respondent.

2. It is a common ground that vide a sale agreement dated 27/3/2012 the Appellant agreed to sale to the Respondent two plots namely Plot No. 25/19 Chaani Site and Plot No. 25/20 Chaani Site for a consideration of Kshs. 5,000,000/=. The Respondent then made part payment of the purchase price in the sum of Kshs. 1,250,000/= in relation to each plot. The contract then stipulated that the balance was to be paid on or before 18/4/2012.

3. Vide a Plaint dated 31/10/2012, the Appellant then sued the Respondent in the Chief Magistrate's court at Mombasa alleging that he had rescinded the contract on 27/7/2012 on the ground that the Respondent had not honoured a terms of the agreement which provided that the balance was to be paid on or before the 18th April, 2012. He then sought the trial court to award among other prayers that;

a) A declaration that the contract is null and void

b) Damages for breach of contract

c) Declaration that the Plaintiff/Applicant do refund the Defendant/Respondent the part payment of without any interest whatsoever minus costs as per (a) and (b) above.

d) Costs and interest e.

e) Any other reliefs the court may think fit and Justice to meet the ends of Justice.

4. In Response to the Appellant's claim, the Respondent filed a written statement of Defence dated 27/11/2012 wherein he averred that whereas the parties had agreed that the Balance to the purchase price was to be paid on or before 18/4/2012, parties engaged in further communications resulting into the time for completion not being of essence. He averred that he did not neglect and/or deliberately refuse to honour his contractual obligations. He also raised a counterclaim seeking the court to enter Judgment against the Plaintiff for specific performance of the contract dated 27/3/2012 in relation to the two Plots.

5. The Plaintiff/Appellant further filed an application dated 31/10/2012 seeking for the court to enter judgment in his favour for:

a) Spent

b) Damages for breach of contract

c) Declaration that the agreements aforementioned are null and void and that the Applicant be allowed to refund to the Respondent the part payment of the purchase price without any interest whatsoever minus the costs of this suit.

d) That, costs and interests be awarded at court rates.

6. The ground upon which the Plaintiff/Appellant sought the Judgment at an interlocutory stage is that the Respondent has failed to honour his contractual duty to pay the purchase balance on/or before 18/4/2012 despite persistent reminders. He averred that the breach has continued to cause him irreparable harm.

7. By a Ruling dated 6/9/2013 the trial Magistrate dismissed the Appellant's Notice of Motion Application dated 31/10/2012 and gave reasons that the two agreements for sale did not say what was to happen in the event that either of the parties breached the agreement. Also, that although the Applicant was not entitled to an award of damages, there was not enough evidence at the moment to enable the court ascertain the same. The court further stated that there was need to hear the case on its merits so as to ascertain whether the agreements were null and void. In the premises, the court then directed that the status quo of the 2 plots to be maintained and the sum of Kshs. 2,500,000/= paid to the Plaintiff/Applicant to be deposited in court.

8. Aggrieved by that Ruling, the Plaintiff/Applicant preferred the instant appeal which is premised on grounds that: -

a) The learned Magistrate had no jurisdiction to grant the orders;

b) The learned magistrate erred in granting orders that had been irregularly prayed for by the Respondent by way of submissions;

c) The learned magistrate erred in making a decision that was contrary to the application that was before him;

d) The learned magistrate erred in law and in fact by granting the orders barring the sale/disposal of the suit properties and in the same breath ordering the Appellant to deposit the amount paid by the respondent in court;

e) In view of the circumstances set out herein above, the learned magistrate totally misdirected himself in granting the orders.

9. Based on those grounds the Plaintiff/Appellant seeks this court to set aside and/or reverse the ruling of the trial magistrate.

10. Directions were given that the appeal be disposed by way of written submissions and both parties have complied with those directions. Submissions were filed way back in the year 2016 and I will briefly set out each party's position as below.

Plaintiff/Appellant's submissions

11. The Applicant submitted that the trial court lacked jurisdiction to grant the orders as it did since by dint of the State Law [Misc. Amendment Act] No. 12 of 2012, the Senior Resident Magistrate Court had power to entertain cases not exceeding the value of Kshs. 3,000,000/=. The subject suit properties being valued at Kshs. 5,000,000/= meant that the trial court could only down its tools and not to make any further order.

12. On the second ground, the Appellant argued that it was irregular for the trial magistrate to direct for the deposit in court of the Kshs. 2,500,000/= paid as deposit by the Respondent. It is the Appellant's case that Respondent had brought a new issue in his submission and specifically, that he had issued the Appellant the agreed sum of Kshs. 5,000,000/=. In the Appellant's view, all submissions ought to have been discarded.

13. With regard to the third ground appeal, it is submitted that the trial gave orders which were contrary to the application and the admission by the Respondent. The Respondent had agreed that there was an agreement for purchase of the properties at a consideration of Kshs. 5,000,000/= and further that he (the Respondent) had not honoured his obligation in paying the purchase price on the agreed date. It is submitted that the court had to consider the agreement as it was and not extrinsic factors that were alleged by the Respondent. In the Appellant's view, the breach of the contract happened when the Respondent failed to pay the balance within the agreed timeframe.

14. Lastly the Appellant submitted that the trial court made sharp orders by directing that the Applicant should not sell the suit properties and at the same time directed the deposit of Kshs. 2,500,000/=. The Appellant avers that he could not get any money without selling the suit properties and the court was thus trying to enforce an order incapable of being enforced.

Respondent's Submissions

15. The Respondent on the other hand submitted that the appeal had been filed outside the 30 days in which a competent appeal could be filed and should be struck out. On the grounds of appeal, the Respondent argued as regards the first ground of Appeal that the Appellant did not raise any objection to jurisdiction before the trial court and is debarred from contesting jurisdiction at this point.

16. On the second ground of appeal, the Respondent submitted that the Appellant was seeking a summary Judgment by the application and the trial court was right in holding that there was need to consider more evidence vis-à-vis the Respondent's counter claim.

17. Lastly, the Respondent submitted that it was within the discretion of the trial court to direct the deposit of the Kshs. 2,500,000/= so as to safeguard the interests of both parties and also preserve the suit properties by restricting any speculated sale by the Applicant.

Analysis and Determination

18. Despite the fact that the court was not supplied with the trial court file, I have considered the Appellant's application dated 31/10/2012 as

contained in the record of appeal, the submissions made by both parties thereto as well as the Ruling of the trial court delivered on 6/9/2013.

19. This appeal is an expression of the Appellant's dissatisfaction with the trial court's decision. The Respondent's objection to the appeal was based **Firstly**, on its competency and **Secondly**, on the demerits of all its supporting grounds. Therefore, what clearly emerges as the main issue for determination herein is whether the appeal is proper and competent before this court and if so, whether the grounds in support of the appeal are meritable for the purposes of this court interfering with the ruling made by the lower court.

20. With regard to the propriety and competency of the appeal, the Respondent contended that the appeal was incompetent having been filed out of time and without any leave of the court and should be struck out. The Appellant on his side opted not to submit on this issue. In any event, Section 79G of the Civil Procedure Act is operative in answering the question whether the Appeal is competently filed within this court. The Section provides as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

21. From the reading of Section 79G above, it would be right for me to state that for a party to set on foot a competent appeal, then the same ought to be filed within 30 days of the decision being appealed against. Any delay after that period must be accounted for and sufficiently explained by the Appellant.

22. In the present case, the Ruling being appealed against was delivered on 6/9/2013 whilst the Appellant filed the Memorandum of appeal on 8/10/2013, which means, 30 days from 6/9/2013 ended on the 7/10/2013 and the record clearly shows that the appeal was filed one day later. The Appellant has not explained the one days delay at all and at this point the court is at liberty to dismiss the appeal on that ground alone. However, given the age that this appeal has been pending before this court having been filed about 8 years ago, I invoke the court's discretionary power under **Rule 3(8)** of the Practice and Procedure Rules as well as **Article 159** which enjoins the court to make such orders as may be necessary for the ends of justice. If I dismiss the appeal on the point of the Appellant not explaining why the appeal was filed one day late, then I will not have put the dispute which has a protracted background to an end. Most importantly, courts exist for the purpose of dispensing justice and I will therefore proceed to consider the merits of the appeal.

23. With regard to the merits of the appeal, the grounds in support thereof generally raise complaints of the lower court in failing to enter a summary Judgment and/or finding that the Respondent was in breach of the sale agreement despite the clarity of issues. The Applicant also contended that the trial court had no jurisdiction to grant the orders which were outside its pecuniary jurisdiction.

24. In my view, I find this contention somehow vexatious for the reason that it is the Appellant herein who had filed the suit in a court which he is now alleging had no pecuniary jurisdiction to give orders as it did. If I was to hold that the trial court had no jurisdiction to give any orders as alleged by the Applicant, then the obvious order that would follow would be that the appeal is incompetent since it has roots in an incompetent suit.

25. That notwithstanding, to ascertain whether the trial court had jurisdiction to give orders as it did, I will first establish on what the cause of action was. In the Plaint dated 31/10/2012, the grievances by the Appellant are based on the Respondent's failure to Honour the terms of the agreement. Therefore, clearly the cause of action was an alleged breach of contract and not the value of the subject matter. At no point were the parties in their pleadings seeking to court to ascertain the value of the subject matter. All that the court was to determine was whether the Respondent had breached the contract in failing to pay the sum of Kshs. 2,500,000/= at the agreed completion date and if so, whether the Applicant was entitled to any damages. It is therefore my humble finding that the matters were well within the Jurisdiction of the trial court and the arguments by the Appellant that the court had no jurisdiction are misplaced.

26. In essence, what the Appellant appears to say is that the trial court had only one avenue to walk through, which is entering a summary Judgment since the totality of evidence commanded so. Did the court then err in not entering summary judgment as sought in the Application dated 31/10/2012?

27. I must point out that the test for and procedure to be followed on an application for summary judgment is to ascertain if the defence raises a triable issue. A single triable issue is enough to deny a Plaintiff the summary process. The issue must however be a bona fide one, though it need not be one that must succeed at trial. Unlike applications for judgment on admission, a court proceeding under Order 36 of the Civil Procedure Rules is entitled to consider the merits of any defence raised.

28. These principles were also well captured in the case of ***D.T. Dobie & Co Ltd – Vs – Muchina & Another (1982) KLR 1*** where the court stated thus;

“if a pleading does not disclose any reasonable cause of action or defence it ought to be dismissed.....No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption... A court of justice ought not to act in darkness without the full facts of the case before it.”

29. In the present case, I have considered the two sale agreements dated the 27/3/2012. I note that the two were a replica of each other save for the subject properties. Both agreements provide that payment on the balance will be before the 18/4/2012. The Defendant does not deny that he did not pay the balance on or before 18/4/2012 but averred that parties engaged in communications afterwards rendering the completion date not of essence. The trial court also found that the Respondent was in breach of the terms of the sale agreement but stated that the agreement did not state what was to happen in the event of breach. It is based on the Respondent's failure to pay at the completion date

that the Appellant purport to have rescinded the agreement.

30. In reference to **Chitty on Contracts 27th Edition Volume 1 General Principles, Sweet & Maxwell 1994 at page 1029** the author states that **“At law, time is always of the essence of the contract when any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will be for breach of it---stipulations as to time were generally of the essence of the contract, so that a party could treat the contract as repudiated if the other party’s performance was not completed on the date stipulated by the contract.”**

31. The sale agreements were a contract between the parties. However, I do not agree with the disposition by the Appellant that at any point they should be declared null and void because nullity denotes an action which had legal effect at its inception.

32. My understanding is that when a party to a contract promises to do a certain thing at a specified time but fails to do it the contract becomes avoidable but not void. If the intention of the parties was that time should be of essence, then both parties were to ensure that due and proper compliance of the terms of the agreement were met in order to complete the transaction within a reasonable time. Therefore, the question that stands out and which is the Respondent’s pivot of defence is whether time was of essence. This is the question which requires proper answer in order to determine whether summary Judgment could have been entered in favour of the Appellant.

33. Having established that in this case there was a date set for the completion of the sale, being 18/4/2012, each party was expected to perform its part of bargain, failure to which either party would treat the contract as rescinded. In the case of **Sisto Wambugu –vs- Kamau Njuguna [1983] eKLR** the Court held that,

“Contracts for the sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day.”

34. In the instant case, I similarly find that the Appellant was at liberty to rescind the sale as from 18/4/2012 when the Respondent failed to pay the balance as agreed. Since the Appellant expressed his desire to rescind the contract, a declaration is hereby issued to the effect that the sale agreements dated 27/3/2012 between the parties stand rescinded. The Respondent would have been entitled to the prayer of specific performance had he paid the balance on or before 18/4/2012.

35. However, the general principle is that where a buyer rescinds a contract, he must return any money that may have been paid to him by the purchaser. It is therefore directed that the Appellant must refund the Kshs. 2,500,000/= paid as deposit to the Respondent after which he will be at liberty to pursue the claim for an award of damages, if any.

36. In the premises, the Ruling of the trial court of 6/9/2013 is hereby set aside to the extent of issuing a declaration to the effect that the Appellant had a right to rescind the sale agreements as at 18/4/2012 and the two agreements dated 27/3/2012 are hereby rescinded with a direction that the Appellant return the amount of Kshs. 2,500,000/= paid to him.

37. Lastly, on the prayer for costs, the applicable law is found in Section **27 (1) of the Civil Procedure Act** which provides that costs largely follow the event, and the court is given discretion to determine which party will meet the costs and to what extent. With the above facts, I find that it is only appropriate that each party bears its own costs.

It is hereby so ordered.

Dated, Signed and Delivered at Mombasa this 8th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY