



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 107 OF 2019

AYUB KIINGE M'MBWIRIAAPPELLANT

VERSUS

LAWRENCE MURITHIRESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (P.M.) delivered on 31st July, 2019, in Githongo PM ELC 36 OF 2018)

JUDGMENT

1. The appellant seeks to overturn the judgment for allowing the claim yet the agreement for sale was void and an unenforceable; giving general damages without any legal basis; awarding liquidated damages which were not pleaded or proved; awarding a refund without any basis; failing to consider who had the onus to subdivide the land; allowing a claim beyond the scope of the agreement and allowing the claim when there was no evidence at all.
2. In the lower court, the respondent had sued the appellant for breach of contract to transfer to him a portion measuring **40ft by 100 ft** out of **L.R Abothuguchi/Gaitu/1891** when he had paid a deposit of **Kshs. 105,000/=** out of **Kshs. 580,000/=**. He sought for permanent injunction to stop the appellant from evicting him and in the alternative a refund of **Kshs. 105,000/=** plus interest and the value of developments thereon.
3. The appellant denied the claim and averred he had always wanted to effect the transfer but the respondent had failed to clear the balance. He alleged he had sought for the respondent to collect his deposit which he was willing to refund and counterclaimed for vacant possession, forfeiture of the deposit for loss of user and breach of contract, costs and interests.
4. Both parties complied with **Order 11** put in list of documents, witness statements, list issues and case summaries dated 1.5.2015 and 11.11.2015 respectively.

TESTIMONY

5. The respondent adopted his witness statement dated 15.12.2004 and produced his list of documents namely a sale agreement dated 13.12.2007, search certificate, demand letters dated 12.11.2004, as P exh 1, 2 and 3 respectively. He told the court though he had obtained temporary orders of injunction, he had vacated the land out of fear after his crops were destroyed and a third party had allegedly bought the land during the pendency of the case.
6. In cross examination PW1 told the court he had paid **Kshs. 105,000/=** and though clause 5 of the agreement stated he would only take up vacant possession upon the transfer, he moved in immediately he paid the deposit. He admitted he was not the one to pay for the land control board but he stated he had paid transfer fees. He admitted he had cleared the balance of **Kshs. 75,000/=**.
7. In re-examination PW1 testified the balance of **Kshs. 75,000/=** was to be paid after the transfer, and maintained he could only pay the transfer fees after subdivision which had not been done at all.
8. DW1 admitted he made a sale agreement with the respondent, did the subdivisions. He acknowledged receipt of **Kshs. 105,000/=**, leaving a balance of **Kshs. 75,000/=** which the respondent had refused to clear.
9. He stated under clause 6 of the sale agreement, the respondent was to cater for the transfer fee. He produced the sale agreement, acknowledgement letter, reply to demand letter and a request to the respondent to come and collect his deposit as **D exh 1, 2, 3, 4 and 5** respectively.
10. Further he told the court upon subdivision he sold several portions to other third parties who collected their title deeds namely **Abothuguchi/Gaitu, 3592, 3596 and 3589**. He insisted **Kshs. 75,000/=** had remained unpaid.

11. Regarding his counterclaim, DW1 testified the respondent had been on the land close to for 7 years, had declined to pay the balance and should not be allowed to come back and occupy the land hence prayed for vacant possession, forfeiture of the deposit, loss of user, damages for breach of contract, costs and interests.

12. In cross-examination, DW1 admitted the sale agreement had no timeframes for completion of the payment, stated he subdivided the land, denied the balance was to be paid after the transfer, insisted he went for land control board consent forms and said he requested for the balance but in vain.

13. Subsequently DW1 stated he sold the land to someone else in 2014. He stated he was not aware of any injunction restraining him from dealing with the land, averred he had demanded the respondent vacate his land after selling it to the third party and upon written demand letters. He denied the respondent ever brought him the balance and he refused to collect.

14. Further DW1 stated **L.R No. Abothuguchi/Gaitu/1891** no longer existed, maintained he paid the subdivision fees and that it had taken the respondent over 7 years but still failed to clear the balance.

15. The decisions of the lower court was premised on the above evidence and pleadings.

16. From the memorandum of appeal and the submissions made with leave of court by the parties, I find the issue for this court's determination to be:-

a) Whether the trial court had jurisdiction to order for a refund of Kshs. 105,000/=, general damages of 500,000/=, liquidated damages of 360,000/= plus costs and interests.

b) Whether the trial magistrate misconstrued the provisions of the Land Control Act Cap 302 and the Law of Contract Act Cap 23.

17. This being a first appeal, the duty of this court is to evaluate afresh the evidence adduced in order to arrive at its own independent conclusions while bearing in mind the trial court had the advantage of seeing and hearing the witnesses testify. See *Selle & Another –vs- Associated Motor Boat Ltd & Others [1968] 1 E.A 123.*

18. The respondent's suit was premised on the sale agreement dated 13.12.2007. Whereas the respondent testified it was the appellant who breached the sale agreement by not procuring the subdivision and land control board consent for the eventual transfer, the appellant blames the former for not clearing **Kshs. 75,000/=** as agreed so as to ensure the transfer was effected.

19. The turning point is the essential elements of the sale agreement. The total purchase price was **Kshs. 180,000/=**. A deposit of **Kshs. 50,000/=** was to be paid at the signing. Clause 2 (1) provides the balance of **Kshs. 130,000/=** shall be paid after the transfer. Clause 4 provided the vendor was to subdivide after obtaining land control board consent forms to pay the subdivision fees. Thereafter the purchaser was to take vacant possession after subdivision. Clause 5 provided the purchaser was to pay the transfer fees. There is no doubt therefore that the balance was to be paid upon the transfer.

20. The appellant testified that he made the subdivisions and produced before the court the land control board consent forms for other third parties he transferred but not the one for the respondents. Whereas the appellant alleges he made the subdivisions in favor of the respondent, he could not remember the date nor did produce any evidence to that effect.

21. Similarly during cross examination he denied the balance was to be paid after the transfer. This was contrary to clause 6 2 (1) of the agreement which is in clear terms.

22. Secondly evidence was been tendered that over and above the deposit of **Kshs. 50,000/=**. **Kshs. 65, 000/=** was paid to the appellant even before the transfer was effected. The appellant could not therefore purport to deny the clear terms of the sale agreement.

23. Further even if it was true the appellant attended land control board meeting in an effort to transfer the land to the respondent, he did not produce before the court any letters or receipts inviting both of them to a land control board meeting duly booked for that purpose.

24. Thirdly, the demand letter produced as **D exh 2** acknowledged the balance was to be paid upon transfer. So in essence the appellant knew it was his duty to procure the transfer in order to demand for the balance. In absence of any evidence that he obtained land control board consent forms in favor of the respondent, the learned trial court was right in finding it was the appellant who had breached the agreement contrary to clause 6 of the agreement.

25. Coming to the issue of who was to pay the transfer fee as per ground 2 of the memorandum of appeal, clause 6 of the agreement provided the respondent was to pay the fee but did not indicate the time. That notwithstanding, evidence was produced by the respondent that **Kshs. 14,000/=** was paid on **7.11.2008** and **Kshs. 23,000/=** was paid on **10.9.2009** as part of the agreement dated 13.12.2007.

26. In the two acknowledgement receipts, the outstanding balance of the purchase price was indicated as **Kshs. 116,000/=** and **Kshs.93,000/=** respectively; **D exh 2** was silent over the receipt of those sums yet the appellant was demanding for non-payment **Kshs. 130,000/=**.

27. A reply to the aforesaid letter dated 8.11.2014 reminded the appellant of his obligations that he was the one to transfer the land since the respondent had already paid over and above the deposit as agreed. The inference is that the appellant had been properly facilitated to effect the transfer but failed to do so on time or at all.

28. Further it was made clear in the aforesaid letter the respondent was ready and willing to clear the outstanding balance of **Kshs. 72,000/=** once the title deed was made under his name. By a letter dated 12.11.2014 the appellant duly admitted he had received a further Kshs. 55,600/=. So, he had therefore no reason to offer why he had not honored clause (2) and (6) of the sale agreement as at 12.11.2014.
29. As a sign of dishonesty on the part of the appellant he was only seeking to refund **Kshs. 78,000/=** yet as per his own acknowledgment notes, he had already taken more than half of the purchase amount. In my considered view there was no ambiguity in the sale agreement terms.
30. Turning to ground 3 & 8 of the appeal, **Section 6 (1)** of the **Land Control Act** provides a consent regarding controlled transaction shall be procured within 6 months of making the agreement. The appellant produced no evidence that he met those terms from the time the agreement was made. He did not give sufficient reasons why he did not do it yet he had been fully facilitated. Consequently, of compliance with **Section 6** above the agreement was void.
31. The reason the issue of the land control board consent was vital and relevant in the sale agreement is because it is a controlled transaction and hence the trial court was right in my view, to interpret the sale agreement in line with the law since there are dire implications if parties do not align themselves with the law. Further, the court was right in finding that since the land the respondent was purchasing was a portion of the whole, obviously it was common knowledge there would be two boards, one for the subdivision and another one for the eventual transfer.
32. Coming to on the implications of the failure to procure a consent on time or at all and the rights of the parties in a void sale agreement, **Section 39, 40 and 41** of the **Land Act** provides for the rights of a vendor in relation to a contract of sale of land and the procedure for obtaining an order of possession where the purchaser is in breach, while **Section 42** provides for the right of the purchaser against rescission of a contract for the sale of land. **Section 42 (3)** gives the court the power to grant relief to the purchaser. **Section 162(2)** of the Act provides all laws relating to land shall be construed with alterations, adoptions and exceptions necessary to give effect to this **Act**.
33. In the instant case the agreement was self-executing in the event of a breach. Clause 9 provided if any of the terms of the agreement, the no defaulting party shall be paid Kenya shillings twice the purchase price with a right to sue. Clause 10 stated the parties to this had understood the terms and conditions set out before signing.
34. In ***Kenya Tourism Development Corporation –vs- Sundowner Lodge Ltd [2018] eKLR*** the Court of Appeal held that no general and special damages are recoverable in respect to a transaction which is void. Secondly the court held the law provide a refund is recoverable as a debt and that the cause of action arises immediately the transaction is void. A limitation period for a debt is six years as per **Section 4** of the **Limitation of Actions Act Cap 22** Laws of Kenya (***See Danson Muniu Njeru –vs- William Kiptarbei Korir & 6 Others [2014] eKLR***).
35. In ***Millicent Pertetua Atieno –vs- Louis Onyango Otieno [2013] eKLR*** the Court of Appeal held:
- “Where it is the vendor who wrongfully refuses to complete the measure of damage I similarly the loss incurred by the purchaser as the natural and direct result of repudiation of the contract by the vendor. These damages include the return of any deposit paid by the vendor with interest, together with expenses which he has incurred in investigating the title and other expenses within the contemplation of parties and also where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for the loss of bargain ...”.***
36. As indicated above, the sale agreement had a clause on default. Parties anticipated an event of default. It is admitted the respondent only paid **Kshs. 105,600/=** while the trial court awarded **Kshs. 360,000/=** as liquidated damages
37. If the respondent only paid **Kshs. 105,000/=** he could not possibly get more than he had paid. He was therefore only entitled to twice of the amount which comes to money which is **Kshs. 210,000/=**.
38. The court also awarded **Kshs. 500,000/=** as general damages. As held by the Court of Appeal in ***Kenya Toursim case (supra)*** general damages are not awardable in a breach of contract. My finding is therefore is the trial court was in error to award general damages of **Kshs. 500,000/=**.
39. Evidence has been led by the appellant that he resold the land during the pendency of the suit yet there was an order to that effect which had been duly served upon him and contempt proceedings commenced. The range of the purchase price at the time for **40 ft by 100 ft** as per the sale agreement produced by the appellant was **Kshs. 310,000/=** meaning he made a profit of **Kshs. 134,000/=**. The purported sale was against a valid court order issued on 19.11.2014. The replying affidavit sworn on 7.1.2015 did not disclose that the sale had taken place before this suit was filed.
40. Similarly the letter dated 7.11.2014 did not disclose any such sale. The only inference is that the appellant backdated the sale agreement so as to defeat the cause of justice.
41. Further there was not tender for the refund in court at the time the appellant filed a defence. Similarly the appellant’s witness statement dated 12.11.2015 did not allude to disposal of the land to a third party.
42. Given the foregoing reasons it is only fair and just the appellant pays the refund with interest. ***See Mukisa Biscuits Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [197] E.A. 469. New Tyres Enterprises Ltd. –vs- Kenya Insurance Co. Ltd [1988] KLR 380.***
43. Lastly an issue was raised that the suit was caught up by **Limitation of Actions Act** as per the preliminary objection dated 4.2.2015 and which by a ruling of 10.4.2015 was dismissed on the basis that it was not pleaded and when the cause of action arose would be determined

upon receiving evidence.

44. In *Stephen Onyango Ochola & Another –vs- Edward Hongo Sule & Another [2004] eLLR* the Court of Appeal held the issue of limitation has to be specifically pleaded so as to be relied upon. In the instant case the appellant did not amend its defence and counterclaim. Parties are bound by pleadings.

45. Needless to say in the appellant's own letter dated 7.11.2014 he agreed to refund the deposit. The said letter did not specify when the breach had occurred. Similarly no evidence was led by the appellant on the date the breach occurred. In his cross examination he said there were no timelines in the sale agreement.

46. Further the evidence shows the respondent was still in occupation of the suit land as at the filing of the suit. This fact is confirmed by the appellant's own evidence in chief and in cross examination.

47. In *Joseph Odira Ombok –vs- South Nyanza Ltd [2018] eKLR*, the court held that it is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at the date of the alleged breach and not the end of the contract period. The respondent was still in occupation of the suit land up to and until he was allegedly threatened to move out while the suit was on. The appellant confirmed these facts and in his own words admitted he told him to move out after he had sold the land to a third party.

48. In my view therefore the appellant due to the doctrine of estoppel by conduct, acquiescence, or proprietary waiver as held in *Sita Steel Rolling Mills Ltd –vs- Jubilee Insurance Co. Ltd [2007] eKLR*, could not possibly claim the suit was time barred yet the respondent was still in occupation of the suit land.

49. In sum the appeal succeeds in terms of:

a) Prayer 2 which is disallowed.

b) Prayer 3 is varied to read Kshs. 210,000/=.

50. Costs of the appeal and lower court to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

IN PRESENCE OF:

MR. MUTUMA FOR APPELLANT

KITHOME FOR RESPONDENT - ABSENT

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE