



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO 64 OF 2019

ANN NYAMBURA NYAKAIRUAPPELLANT

VS

FRANCIS WAINAINA NGIGE.....1ST RESPONDENT

WILSON NJUGUNA GAKUHA.....2ND RESPONDENT

(Being an appeal from the the judgement of Hon M W Wanjala, Senior Resident Magistrate

delivered on the 17/10/2019 in SPMCC No 2320 of 2014, Thika)

JUDGMENT

1. Dissatisfied with Trial Court's Judgement delivered in Thika CMCC No. 820 of 2015 on 17/10/2019, the Appellant filed her Memorandum of Appeal dated 11/11/2019 on grounds THAT;

- a. **The Learned Magistrate erred in law and in fact in failing to consider the evidence of the Appellant at the trial.**
- b. **The Learned Magistrate erred in fact and in law in failing to consider the submissions and entirely relied on that of the Respondent making a wrong Judgment.**
- c. **The Learned Magistrate erred in law and in fact by failing to address his mind to the submissions and authorities cited by the Appellant.**
- d. **The Learned Magistrate erred in law and in fact in holding that the plaintiff had proved his case on a balance of probabilities when there was no evidence to support his findings.**
- e. **The Learned Magistrate erred in law and in fact in holding that the Appellant failed to disclose to the Respondent that there was an adverse claim on the land by a 3rd party at the time of the sale when there was no such evidence to support his findings.**
- f. **The Learned Magistrate erred in law and in fact by issuing an order for specific performance when there was no evidence to support his findings.**

2. To place the appeal in context, a brief background of the case leading to the appeal is pertinent.

3. The Respondents instituted their suit vide a plaint dated 18/8/2015 against the Appellant seeking orders that; permanent injunction against the Appellant from interfering with land parcel No. **Ruiru/Kiu Block 2/Githunguri/3611** (hereinafter referred to as suit land), specific performance for the Appellant to transfer the suit land, general damages for breach of contract and costs of the suit.

4. The Appellant objected to the suit by filing a statement of defence & counterclaim dated 4/3/2016. In her counterclaim the Appellant sought the following orders;

- a. **an order evicting the Respondents and their agents and or the alleged buyers from the suit premises.**
- b. **general damages for trespass**

c. damages for loss of income

d. cost of the suit.

5. The suit was set down for hearing and the rival parties testified as sole witness for their respective cases.

6. The 1st Respondent testified as **PW1** and adopted his witness statement dated 18/8/2015 as his evidence in chief. He also produced the documents listed in the List of Documents of even date as **Pexh. 1 – 10**. It was his evidence that the Appellant was the registered owner of the suit land which she agreed to sell to him and the 2nd Plaintiff at Kshs. 550,000/-. Vide a sale agreement dated 25/2/2009 (**Pexh.2**) the Respondents paid a deposit of Kshs. 200,000/- having agreed to pay the balance on or before 5/3/2009. However, before the said date, a third party, Wambui Kamwana emerged claiming ownership of the suit land. It is averred by the Plaintiffs that the parties then agreed to suspend payment of the balance as the Appellant requested for Kshs. 150,000/- to sort out the ownership dispute. PW1 explained that the Appellant allowed them to take possession of the suit land after which they subdivided the land and sold to third party purchasers.

7. That the claim by Wambui Kamwana and the Appellant was escalated to the D.O, Githurai Land Dispute Tribunal and ultimately the Provincial Appeals Board. The Appeals Board determined the appeal in favor of the Appellant. The Respondents hoped she would then accept the balance of the purchase price less the costs of the expenses they had incurred in defending the Land Dispute Tribunal claim and the appeal and transfer of the suit land to them to no avail prompting them to seek legal redress.

8. In resisting the claim, the Appellant testified as **DW1**. She similarly relied on her witness statement dated 29/2/2016 and List of Documents of even date marked as **Dexh. 1-13**. She informed the court that she is the registered proprietor of the suit land having bought it from Nyakinyua Land buying Company in 2005. That she knew the Respondents and met them to discuss the sale of the suit land. That the purchase price was agreed at Kshs. 550,000/- and admitted receiving Kshs.200,000/- as deposit. She denied granting the Respondents any possession and added that the balance was not paid as agreed, on or before 5/3/2009.

9. According to DW1, the Respondents having lost interest on the suit land, engaged police officers in May 2009 and summoned her to Juja police station. That they demanded a refund of the deposit but she did not have it. That she was forced to apply for a loan of Kshs. 145,000/- from Equity Bank which she paid into PW1's account No 10090291532087 Equity Bank Limited on the 30/7/2009. In her own words the Plaintiffs had expressed no interest in completing the transaction and demanded a refund. That the 1st Plaintiff called her once demanding the balance of Kshs 55,000/- but she promised him to pay as soon as she got money.

10. She completely refuted the averments concerning Kamwana's claim over the suit land. She stated that she neither lodged a claim at the Land Dispute Tribunal, never attended the hearing nor filed an appeal at the Provincial Land Dispute Tribunal at Nyeri. That she was never summoned by the Chief nor attended any meeting with the Chief. Shown the letter dated the 17/4/2009, her response was she never received any such summons from the Chief's office. It was her case that in on the 26/3/2013 with intention of selling the land a search on the land revealed that a caution had been lodged by Wambui Kamwana claiming ownership (see search dated the 26/3/2013) Similarly a restriction stating no dealings until land application case No Ruiru/1/2010 at the Provincial Commissioners Central office is determined (refers to a letter dated the 19/4/2010 from the Provincial Commissioner's office). She then went to the Provincial Land Dispute Tribunal offices in Nyeri and confirmed that there was a Land Dispute Tribunal case at Ruiru which had been heard and determined. That on seeking the removal of the caution she was advised to obtain a court order which she did vide the Misc. Application No. 158 of 2014. That on establishing that the suit land had been encroached by third parties she instructed her lawyer to demand vacant possession in writing.

11. Upon hearing the parties and evaluating the evidence adduced in court, the Learned Magistrate was satisfied that indeed there was a sale agreement entered into by the parties. That there was breach of the terms of the Agreement on the part of the Respondents by not paying the balance of the purchase price as agreed. However, the Court was persuaded that the intervening claim by Wambui was a contributing factor noting that there was a caution on the suit land. That the denials by the Appellant of the tribunal cases was baseless as there was evidence that indeed she participated in those proceedings. Therefore, the Appellant also failed in availing a clean title devoid of encumbrances and would not turn around and benefit from her undoing.

12. Consequently, the trial court held that the Respondents had proven their case and entered Judgment in their favor albeit conditionally. That the Respondent to pay the balance of the purchase price of Kshs. 445,000/- within 14 days of the Judgment date. It is those findings of the trial court that the Appellant now contests.

13. The appeal is opposed. Parties elected to prosecute the appeal by way of written submissions.

14. The Appellant filed her submissions dated 8/9/2021 through the firm of **Ndirangu Kamau Advocates**. She argued that the Respondents did not prove their case as required. That the court erred in finding that despite the breach of Agreement to pay the balance as agreed, it still favored the Respondents on account of the caution registered on 31/3/2009. That the court failed to consider her counter claim despite evidence of trespass on her land. That the agreement having been breached and part of consideration having been refunded, there was no contract capable of being enforced. This proposition was supported by the case of **Henry Mwangi Gatai & Anor. Vs Margret Wanjiku Godwin & others [2018]eklr**.

15. Further the Appellant faulted the trial court for ordering specific performance despite the PW1's admission of subdividing the land without Land Control Board consent. That without such consent, the equitable remedy of Specific Performance does not arise. The case of **Joseph Gichuhi Kamau & Anor. Vs Salome Wacheke Kanyingi [2018] ECLR** was cited thereof. The Court was urged to allow the appeal with costs.

16. The firm of **Milimo, Muthomi & Co. Advocates** filed submissions dated 22/10/2021 on behalf of the Respondents. Two issues were drawn for determination; whether the appeal was merited and who bears costs.

17. On the first issue, they rehashed that the agreement to suspend payment of the balance price was as a result of Kamwana's claim and subsequent Land Dispute Tribunal proceedings. That the Appellant did not terminate the Agreement and in any event it did not have a termination clause having incorporated the Law Society of Kenya (1989) conditions of sale. They faulted the Appellant for not serving completion notice if she was ready and willing to complete the transaction. That even in alleging refund of the deposit, it was not in doubt that the Appellant paid Kshs. 145,000/- as opposed to Kshs. 200,000/- paid to them. Reliance was placed on the cases of **Mwangi v Kiiru [1987] eKLR and Anne Murambi v John Munyao & anor. [2018] eKLR**. They supported the trial court judgment and implored the Court to affirm it and dismiss the appeal with costs.

18. The main issues for determination are; Whether the appeal is meritorious; Whether the trial court erred in granting an order of specific performance; who meets the costs of the appeal.

19. I have perused the grounds of appeal which can be collapsed into two; whether the Hon Learned Magistrate failed to consider the evidence, submissions, authorities of the Appellant and secondly whether the grant of specific performance was founded.

20. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the Civil Procedure Act which espouses the role of a first appellate court which is to re-evaluate, reassess and re-analyze the record and draw its own conclusions.

21. Besides, that duty has been affirmed in numerous decisions of the superior courts. Notably in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 this respect..."

22. It is not disputed that the parties entered into an agreement for sale on the 25/2/2009 with respect to the sale and purchase of the suit land by the Respondents. The agreement is expressed to be between the Appellant and Jopiland Investments Limited represented by the Respondents. The consideration was agreed at Kshs 550,000/- out of which a deposit of Kshs 200,000/- was paid on or before the execution of the sale agreement. It was a term of the agreement that the balance of Kshs 350,000/- would be paid on or before the 5/3/2009. The transfer of the suit land would be immediately after the full payment of the purchase price. Parties agreed to adopt the Law Society Conditions of Sale (1989) with a disclaimer that as long as such conditions are not inconsistent with the terms of their agreement. The purchasers having inspected the suit land were deemed to have full knowledge of the same and the property was sold in vacant possession or any other agreeable mode subject to the terms then held by the Appellant (registered owner) BUT free from encumbrances. The parties anticipated occurrence of breach and provided for payment of a penalty at 25% of the purchase price being liquidated damages in favour of the party who is not in default.

23. It is not in dispute that the Respondents did not comply with the completion as set out in the agreement with respect to the payment of the balance of the purchase price on or before the 5/3/2009. The agreement was silent on what would happen on the completion date or when the completion documents would be exchanged. Regard will therefore be paid to the Law Society of Kenya (1989) conditions of sale.

24. Evidence was led by the Respondents that the completion of the sale was frustrated by the claim of Wambui Kamwana (referred as Kamwana) who was claiming title to the suit land. That arising from this obstacle the parties agreed to suspend the completion to allow them deal with the issue of the adverse claim on the suit land. That the Respondents reported the matter to the chief but was not resolved. See the letter dated the 17/4/2009 summoning the Appellant and Kamwana. It is evident that the Respondents filed the complaint with the Chief. The Appellant denied being served with the said summons and stated that she did not attend the meeting at the chief's office.

25. The Respondents averred that the matter having not been resolved at the Chiefs office, the same was escalated to the Land Dispute Tribunal at Githurai where the panel of elders held that the land belonged to Kamwana. It is the Respondent's case that the Appellant filed an appeal at the Provincial Land Dispute Tribunal where the land reverted to her.

26. The Appellant refutes any agreement to suspend the completion. She is emphatic that she did not know about the claim by Kamwana; did not lodge any complaint with the Land Dispute Tribunal nor file an appeal. It is her case that she learnt about the caution on the 26/3/2013 when she carried out a search on the suit land with the intention of disposing of the suit land. She discovered that a caution had been lodged by Kamwana on the 30/3/2009 and further a restriction had been registered restricting all dealings on the suit land until a land case No. Ruiru/1/2010 at the Provincial Commissioner's Office is determined (per the letter dated the 19/4/2010 from the Provincial Commissioner, central Province). That she followed up the matter in Nyeri and found that the appeal was determined in her favour. She then filed a case Misc Application No 158 of 2014 and obtained orders to remove the caution.

27. I have examined the Land Tribunal proceedings dated the 13/7/2011 in which the Appellant is recorded to have testified at the hearing. According to the Respondents the case at the tribunal was filed by Kamwana. The Respondent's witness insisted that the Appellant participated in the proceedings. I have perused the statement of the Respondent's witness and there is nowhere that he states that the Appellant filed the appeal. Even during the hearing, he stated as follows;

"The LDT at Githurai conducted the case and decided in favour of Wamboi Kamwana. We appealed at the provincial appeals board. The appeal was decided in favour of Anne Nyambura, the seller. It was read and adopted and an order issued for the cautions to be removed. We went to the tribunal together with the seller/Defendant."

28. I have seen the Affidavit of service dated the 16/3/2010 where the process server disclosed that the Appellant could not be traced and

therefore could not be served with the notice to read the award. In the said affidavit the process server served the Respondents. If indeed the Respondents were not parties what is the reason why they were being served in place of the Appellant? This lends credence to the Appellant's evidence that she did not participate in the Land Disputes Tribunal proceedings.

29. According to the Appellant the Respondents failed to pay and in May 2009 they tricked her to collect the balance at the Equity Bank Ruiru only to find them with the police and was taken to the police station for questioning as to the probity of her title to the land. She states that it is then that the parties agreed to refund the Kshs 200,000/- to the Respondents. She led evidence and produced a payment receipt of Kshs 145,000/- into the Respondents account No 10090291532087 at Equity Bank on the 30/7/2009. The Respondents have attempted to explain that the amount of Kshs 145,000/- was a refund to them for expenses in the land dispute tribunal case. This is unbelievable because the expenses could not have been incurred before the Tribunal case was lodged in 2010. I have carefully perused the proceedings in the lower court and find that the Respondents' explanation suffers from contradictions. In the statement of PW1, the amounts are explained as expenses while during the hearing, the said PW1 stated that the Appellant had borrowed the money from them. I agree with the Hon Magistrate that the allegation that the monies were expenses/costs of the tribunal was not supported. Weighing the evidence of the Respondents and that of the Appellant I find the explanation by the Appellant is plausible and believable. I find that the sum of Kshs 145,000/- was indeed refunds for the purchase price.

30. Was the agreement breached? The Respondents have argued that the agreement is still valid and enforceable and blamed the Appellant for failing to issue notice to terminate or rescind the same. The sale agreement did not contain express terms on termination of contract. Instead the parties incorporated the Law Society Conditions of sale. The said conditions under Clause 4(7) required a vendor who is ready, able and willing to complete the sale and is aggrieved by the purchaser's default to complete the contract within the completion period is required to issue a twenty one days' notice requiring the purchaser to complete the contract.

31. The agreement of sale shows that the period of completion was under 10 days, 8 days to be precise. It is also true that time was not of essence in the agreement. The agreement was silent on what would happen at the completion date. It is not disputed that as at the 5/3/2009 the Purchasers failed to pay the purchase price and under Clause 4 (7) of Law Society of Kenya conditions of sale, the aggrieved party being the Appellant ought to have issued 21 days notice requiring the Respondents to complete. Having made the finding that the substantial purchase price was refunded, the sale agreement was therefore varied by the conduct of the parties. I say so because the Respondents accepted a portion of the refund of the purchase price thus terminating the agreement.

32. I must pronounce myself on the conduct of the Respondents in this transaction. The Respondents admitted taking possession and subdividing the land without the approval of the registered owner. The agreement provided for possession after the full payment of the purchase price. The Appellant testified and informed the court that she did not give vacant possession or approval for the subdivision of the land to the Respondents. The Respondents led evidence that they subdivided the suit land and sold it to interalia; Philip K. Njoroge, Purity Njoki Ndung'u, Asenath Wanjira Njunji and Charles Kenneth Njunji. The sales took place between the March 2009 and October 2009. Of special mention is that the Respondents sold the first portion on the 6/3/2009, one day after the completion date. The question that must be answered is whether the Respondents had accrued any interest rights in the land capable of being conveyed to the third parties. The Appellant has confirmed that these third parties are on the land and in the words of PW1's witness stated that;

“ I did not get the permission of the defendant to enter onto the land and subdivide. I did not seek the consent of the Land control Board before subdividing. I took possession after a week of the agreement. I commenced subdivision a week after executing the agreement. I cannot comment on when I started selling the subdivided plots unless I check the register (referred ton PEX 9).

It shows that I received a payment from Purity Njoki Ndungu on 6.3.2009, from Asenath Wanjiru on 11.7.09 and from Charles Kenneth on 11.7.09, from Grace Waceke on 26.6.2009. By then, I had discovered that the property had a problem which was in the process of being sorted out.....I did not go back to our lawyer to have the Kshs. 145,000 paid to the Defendant reflected in the agreement. By the time that I sold the land to the 3rd parties, I was aware that the land had a problem..... One of the people that I have sold to has constructed a permanent house and the other a flat. I remember one of them is called Kabura. I am not aware whether they obtained relevant approvals to construct. ...”

33. The state of affairs as described above is very telling. Admittedly the activities of the Respondents in subdividing the suit land and selling the land to third parties when they had no capacity to do so and without the approval of the Appellant was to say the least illegal so much so that any purported rights so created thereafter cannot be protected by the law.

34. The issue of the land control board consent is relevant. The Respondents admit that none was obtained. Section 6(1) of the Land Control Board Act provide that land control board consent must be obtained by either party within 6 months of the agreement for sale. The Respondent has admitted that the same was not obtained. The law is clear that failure to obtain the land control board consent for agricultural land like this one voids the agreement unless the parties seek an extension to apply and obtain consent. In this case none was obtained and therefore the transaction is void.

35. Was the suit land encumbered at the time of entering agreement? The answer is to be found in the official search dated the 25/3/2009 which shows that the land was free from all encumbrances. It is therefore not correct that the Appellant failed to sell the Respondents a title free from all encumbrances.

36. Let me now revert to the issue on specific performance. **Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited (2006) eKLR**, wherein Justice Maraga (as he then was) stated that:-

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however

not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

37. The learned Hon Magistrate while granting specific performance stated as follows;

“Considering that there admittedly are 3rd parties currently occupying the parcel of land, substantive justice would demand that an order of specific performance as sought by the Plaintiffs be granted which I hereby grant.”

Having found that the Respondents were inter alia, devoid of capacity legal or otherwise to convey the interest and rights in the suit land, I find that the Learned Hon Magistrate erred in granting specific performance when it was not founded.

38. Given the finding of the court that the Respondents failed to comply with the agreement; the agreement is void for want of land control board consent to sale and subdivide; sale agreement was breached by the Respondents on account of non-performance; tainted with illegality – sale of land while they lacked legal capacity to do so; refunds having been made there was no agreement to anchor specific performance. It is the courts firm finding that specific performance cannot be granted in the circumstances and I find that the Hon Magistrate erred in so granting.

39. The issues of general damages for trespass and damages for loss of income were not considered at the lower court and I find no basis to delve into them.

40. Having now considered the pleadings, the record of appeal, the submissions and all the materials placed before me I find that the appeal has merit. It is allowed. Consequently, the judgement of the lower court be and is hereby set aside in its entirety and the judgement is substituted as follows;

a. The appeal is allowed to the extent that the Plaintiffs, their agents and assigns and or alleged buyers/occupiers be and are hereby ordered to vacate the suit land within a period of 45 days from the date of this judgment.

b. In default they shall be evicted as provided by law.

c. Costs of the suit in the lower court and the appeal shall be in favour of the Appellant.

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms Ndirangu for Appellant

Muthomi for 1st and 2nd Respondent

Ms. Phyllis – Court Assistant