



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 34 OF 2020

FRANKLINE KINOTI KIRIGIA APPELLANT

VERSUS

JOTHAM KINYUA M'MUTIGA RESPONDENT

(Being an appeal from the Judgment of Hon. T.M. Mwangi (S.P.M.) delivered on 27TH February, 2020, in Meru CM ELC. No. 62 of 2019)

JUDGMENT

1. By an appeal dated 28.5.2020, the appellant faults the lower court decision on the grounds that the court misapplied the law, failed to appreciate the appellant's claim for a refund was an alternative prayer; failed to consider the respondent had admitted readiness to effect the transfer; did not appreciate that a constructive trust in favour of the appellant existed; failed to invoke the doctrine of proprietary estoppel; declined to order transfer and or completion of the transaction and lastly ruled against the weight of the available evidence and law.

2. In the trial court the appellant pleaded breach of a sale agreement by the respondent who had failed to transfer him ½ acre from **Parcel No. Kiirua/Naari/3335**, by accepting the balance of **Kshs. 33,000/=**. He sought for specific performance of the agreement, in the alternative a refund of the deposit, special damages, interests and costs of the suit.

3. The respondent denied the claim, alleged breach was on the part of the appellant in paying the balance as a result of which the subdivision and transfer could not occur, denied receipt of notice and demand to sue and sought the suit be dismissed.

EVIDENCE

4. **PW1** testified how the transaction was undertaken and produced a sale agreement dated 14.7.2014, lease agreement dated 8.9.2010, search for Parcel No. 3335, agricultural officer's assessment report, receipt, photographs, demand letters and acknowledgement of a demand letter as **P exh 1 – 8** respectively.

5. In **cross examination PW1** admitted there was an outstanding balance of **Kshs. 33,000/=**, transfer was to be done by 2018, the delay to transfer and or clear the balance was because at the deadline the respondent had no title deed but he had put him into possession of the land.

6. The plaintiff (appellant) testified, admitting he declined to pay the balance before the transfer was effected and denied there was a misunderstanding regarding an access road. The appellant admitted receiving **P exh 7 (a)** ordering him to vacate the land to which he responded and that he stated he could not pay the balance since the respondent was not willing to attend land control board. He however insisted he could not clear the balance before the transfer was effected despite the notice of eviction.

7. Further, the appellant clarified that the differences arose in 2017 and efforts to amicably settle the matter before Mithega Advocates were unsuccessful despite some breakthrough in September 2018 to attend the land control board but the respondent insisted his children were in school who should be available during such a visit.

8. In **re-examination** the appellant stated clause number 4 was that the transfer be done in 2017 while under clause 5 the respondent was the one to pay subdivision costs.

9. Regarding the notice to vacate, he insisted he had aid **Kshs.457, 000/=** while the balance was to be paid by September 2017 with the subdivision due on 2018. He insisted the transfer could not occur before subdivision.

10. Further the appellant stated he also put in conditions before clearing **Kshs. 33,000/=** because the respondent had also breached the sale

agreement.

11. Similarly the appellant maintained that the respondent was the one to undertake subdivisions. He admitted to be in possession of the land hence entitled to have the land transferred so as to clear the balance.

12. DW1 told the court he willingly entered into a sale agreement with the appellant, put him into possession but declined to pay him the balance following which differences arose over an access road which led them to visit the chief's office was per **D exh 1 and 2**. He produced **D exh 3** a demand letter from his lawyers. Further DW1 produced a mutation form as **D exh 4** showing he subdivided the land on 20.11.2019 hence he did not breach the sale agreement. DW1 insisted that the appellant was under duty to comply with paragraph **1 (c) & (e) of P exh 1** so as to complete the transaction which he failed to honour.

13. As regards completion of the transaction, DW1 insisted the appellant unblocks the access road, pays the balance of Kshs. 33,000/= and lastly honour the damages for breach of the agreement.

14. In **cross-examination**, DW1 denied filing any counterclaim, started clause **1 (c) & (e) of P exh 1** must be read together and admitted that the agreement was silent on whether the balance should be paid before the subdivision. He stated that he did the subdivision to pave way for the transfer and that the appellant had blocked his access road as per **D exh 1**.

15. As per clause **1 (3) of P exh 1**, the balance was payable in September 2017 and said he was still willing to transfer the land to the appellant.

16. DW2 told the court he was aware DW1 subdivided his land since he was his neighbor, urged a boundary fence between the parcels be re-established since an access road had been blocked though it had not affected his land.

17. With leave, plaintiff made written submissions dated 8.1.2020 and 16.1.2020.

18. The appellant submitted he had been put into possession, had a balance of Kshs. 33,000/= which he was willing to clear. The respondent is the one who had frustrated the agreement through unreasonable demands and since the respondent on cross examination had admitted readiness to transfer land to him, he was entitled to the prayers sought in the plaint. He further submitted that he was entitled to costs since the breach was occasioned by the respondent.

19. On his part, the respondent submitted he did his part by subdividing the land so as to facilitate the transfer but the appellant frustrated it first by blocking his access road, secondly by notifying him of breach on 8.4.2019, thirdly by failing to clear the balance on time or at all and lastly suing him in court yet he had been put in to possession.

20. The appellant attacks the judgment for misapplying the law over the facts and evidence, giving an alternative prayer, and failing to find there was a constructive trust and a doctrine of estoppel in his favour and lastly failing to order completion of the transaction.

21. On the first issue as to whether the court shouldn't have granted the alternative prayer, in *Alex Wainaina T/A Commercial Agencies –vs- Jason Mwangi Wanjihia [2015] eKLR* the court held where a relief is for prayer in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so.

22. In my view the learned trial court found there had been significant breach of the sale agreement by both parties whose implications were that the land control board consent was not procured on time or at all contrary to **Section 6** of the **Land Control Act** hence making specific performance untenable in the circumstances.

23. Secondly, specific performance is a discretionary remedy which courts will only grant on well-reasoned principles based on the existence of a valid enforceable contract.

24. In the instant case the sale agreement had fundamental defects and gaps which the parties were unable to agree on particularly the sequence of events. No independent witness such as the lawyer who drew the agreement came to testify and fill in the missing gaps. All these made the sale agreement unenforceable and invalid.

25. There was also an alternative remedy which in my considered view was the option since both parties stood their grounds with each blaming the other with no one giving a way forward. The law is that courts cannot rewrite or vary contracts for the parties unless by consent as held in *Kenya Breweries Ltd –vs- Kiambu General Transport Agency Ltd [2000] E.A 398*. Therefore in the instant case, the appellant stood his ground that he could only clear the balance if the transfer was effected.

26. On the other hand the respondent introduced new demands such as re-opening of the blocked access road and payment of damages for the breach over and above clearance of the outstanding balance. All these counter demands in my view made the main prayer for specific performance untenable.

27. Thirdly, the appellant did not fulfil his obligations under the sale agreement yet he wanted to be allowed to benefit from the agreement without impediment.

28. In *Nabro Properties Ltd –vs- Sky Structures Ltd & 2Others [2002] KLR* the Court of Appeal held where an agreement is impossible to perform it could not form a cause of action for specific performance. The breach herein was well known to the parties yet none made any efforts to rectify the same. Similarly evidence tendered by both parties clearly demonstrated none was ready and willing without conditions to fulfill the sale agreement inspite the past breaches.

29. Further, the appellant willingly and voluntarily pleaded his claim in the alternative and left it to the court to make findings and conclusions. He cannot therefore blame the court for choosing any of the alternatives.

30. The appellant blames the court for failing to invoke the doctrine of constructive trust and proprietary estoppel. There is no evidence on record led by the appellant on existence of any trust. The pleadings by the appellant are silent on this trust. Similarly no submissions were made regarding the two doctrines. Parties are bound by pleadings.

31. In Willy Kimutai Kitilit –vs- Michael Kibet [2018] eKLR the court held that the two doctrines above are applicable and enforceable to land subject to **Land Board Act** depending on the circumstances of each case.

32. In this case the respondent subdivided his land in 2017. He produced a mutation form to that effect. The appellant did not deny those facts. Even after the appellant was notified through the respondent's advocate's letter, he still did not take up the challenge and rectify the situation.

33. Again for lack of land control board consent, the parties agreed there be refund of the purchase price as the only option. In my view the parties had voluntarily consented to this eventuality. There was no clause in the agreement as rightly held by the trial court in the event the respondent was unable to procure a land control board consent on time or at all. The court was under no obligation to seek for enforcement of an agreement which was already void for lack of a land control board consent which was in any event due to the fault of both parties. It cannot be said the respondent was willing to effect the transfer yet both had pleaded the agreement had been frustrated.

34. Even after the initial breach and subsequent frustration both parties made no efforts to draft and agree on an addendum to the sale agreement.

35. Regarding costs and interests under **Sections 26 and 27** of the **Civil Procedure Act**, the general rule is in costs follow the event unless the circumstances and reasons given to deny a successful party costs and interests. The discretion to grant and award costs must however be exercised judiciously.

36. In Supermarine Handling Services Ltd –vs- Kenya Revenue Authority [2010] eKLR the court held that an appellate court may interfere with the discretion on costs where no reasons for the decision are given by the trial court or if the discretion is exercised unjudicially or on wrong principles.

37. The trial court did not give any reasons for denying the successful party costs and interests yet there was evidence a demand letter was served before filing the suit. The trial court found the suit in favour of the appellant but diverted from the general rule, as regards costs.

38. I therefore find there was no basis at all to deprive a successful party the costs.

39. As to the issue of interest **Section 26 (1)** of the **Civil Procedure Act** grants a court discretion to award and fix the rate of interests in two stages for the period from the date the suit is filed to the date of judgment and from the date of judgment to the date of payment of the sum on judgment or such other time as the court may fix.

40. As regards the 1st stage, the same is only claimable inter alia if an agreement between the parties provided the right to interest or if it can be implied from the parties' dealings.

41. In this case the appellant had prayed for the same but it appears no evidence was tendered in support of the prayer. The court however did not determine if it was payable or not and the reasons for not granting it. (See Permuga Auto Spares & Another –vs- Margaret Kori Tagi [2016] eKLR, Gulamhusein –vs- French Somaliland Shipping Co. Ltd. [1959] E.A 25. The court did not give any good reason why interest would not be awardable.

42. In my view therefore, it appears there was an error apparent on the face of the record which can be corrected under Section 99 of the **Civil Procedure Act**, **Order 45 rule 1** of the **Civil Procedure Rules** as read together with **Section 80** of the **Civil Procedure Act**.

43. In sum the appeal fails. The lower court decision is upheld save that refund shall attract interests at court rates from the date of judgment until payment in full.

44. Costs for lower court suit and half costs for the appeal are awarded to the appellant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 1ST DAY OF DECEMBER, 2021

In presence of:

Gichunge for appellant

Respondent in person

Court Assistant - Kananu

HON. C.K. NZILI

