



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL CASE NO. 18 OF 2020

SAMUEL MURIGI WAIGWA.....APPELLANT

=VERSUS=

FRANCIS BABU MWANGI..... RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate Court at Ruiru, delivered by Honourable C K Kisiangani, Senior Resident Magistrate, on 29/4/2020 in MCL & E Case No 41 of 2019)

JUDGMENT

Background

1. This appeal arises from a judgment rendered by Hon C K Kisiangani, SRM, in **Ruiru MCL & E Case No 41 of 2019**. The respondent in this appeal, **Francis Babu Mwangi**, was the plaintiff in the said suit. Brief facts of the case were that, vide an agreement for sale dated 23/10/2018, the respondent sold to the appellant Land **Title Number Ruiru Kiu Block 2 (Githunguri) 14214**, measuring approximately 0.035 of a hectare (**the suit property**) at Kshs 2,800,000. The appellant made a partial payment of Kshs 1,000,000, leaving a balance of Kshs 1,800,000. Pursuant to the agreement for sale, the respondent caused the suit property to be registered in the name of the appellant. The appellant did not, however, pay the balance of the purchase price. When the respondent demanded the balance of the purchase price (Kshs 1,800,000) through a letter dated 7/3/2019, the appellant, through a letter dated 25/3/2019, stated that a sum of Kshs 713,493 had been deducted from the outstanding balance of the purchase price to settle an invoice by M/s **Sampesa Agency Limited**, a company associated with the appellant, on account of services rendered to the respondent by the said company. The appellant contended in the said letter that he had invited the respondent to go to his offices to collect “cheques” less the above figure of Kshs 713,493. The appellant further contended that he was hesitant to deposit the money in the respondent’s bank account because he realized that the “account numbers were conflicting.”

2. What followed the appellant’s letter dated 25/3/2019 was the respondent’s letter dated 9/4/2019 marked “**NOTICE OF COMPLETION**”, in which the respondent stated that, as a consequence of non-remittance of the balance of the purchase price, the respondent was proceeding to invoke the provisions of special conditions (b) of the sale agreement and that he had, through the said letter dated 9/4/2019, “rescinded and cancelled” the sale agreement. The respondent further intimated that he would refund the appellant the amount of “Kshs 999,000” paid by the appellant as deposit. Further, the respondent stated in the said letter that he would proceed to institute court proceedings for an order of rescission of the sale agreement and cancellation of the title held in the appellant’s name.

3. Indeed, the respondent proceeded to file the above suit in the Senior Principal Magistrate Court at Ruiru on 29/5/2019, seeking the following verbatim reliefs:

a) An order for rescission of the agreement for sale between the plaintiff and the defendant of the suit property title number Ruiru Kiu Block 2 (Githunguri) 14214.

b) An order directing the defendant to give vacant possession of the suit property to the plaintiff.

c) An order that the registration of the transfer effected on 19/2/2019 against and on the suit property at the Land Registry Thika/Ruiru be vacated and or cancelled.

d) An order be issued directing the Land Registrar Thika/Ruiru, Kiambu County, to forthwith rectify the proprietorship section of the suit property, title number Ruiru Kiu Block 2 (Githunguri) 14214 by cancelling any entry of proprietorship and certificate of title issued to the defendant and any consequential entries and to register a new title to the plaintiff of the said suit property.

e) An order for permanent injunction against the defendant, his servants, agents, or any persons claiming under or through him from interfering with, selling, entering, alienating, charging transferring, occupying, possessing, leasing, building or in any manner whatsoever dealing with the suit property.

f) Damages and or mesne profits for loss of the suit property from the date the agreement was rescinded until determination of this suit.

g) An order for forfeiture of 10% (ten percent) of the purchase price paid by the defendant and refund of the balance without any interest less other costs as stipulated in the Law Society of Kenya Condition for Sale.

h) Such further order as the honourable court may deem just to grant in the interest for justice.

4. The appellant filed a defence dated 19/9/2019 in which he denied being in breach of the sale agreement. He contended that there was no proper basis for rescission. The appellant further averred that the respondent's plea for an order of rescission was premature. He urged the court to dismiss the suit.

Appeal

5. Upon conclusion of trial, and upon considering the parties' respective evidence and submissions, the trial court granted the respondent orders of rescission as sought in the plaint. Aggrieved by the findings and award of the trial court, the appellant brought this appeal, advancing the following verbatim grounds of appeal:

1) The trial magistrate erred in law and in fact in disregarding the evidence and submissions tendered by the appellant.

2) The trial magistrate erred in law and in fact in granting an order of rescission where the title to land parcel no Ruiru Kiu Block 2 (Githunguri) 14214 (hereinafter referred to as the "suit property") had passed to the appellant lawfully yet the respondent's cause of action in the circumstances is a claim for balance of purchase price.

3) The trial magistrate erred in law and in fact in cancelling the title deed in favour of the appellant when no fraud tendered by the respondent (sic).

4) The trial magistrate erred in law and in fact in exposing the appellant to doubt jeopardy in cancelling his title deed while the defendant had developed the suit property, paid a sum of Kshs 1,713,492 against a purchase price of Kshs 2,800,000.

5) The trial magistrate erred in law and in fact in failing to appreciate that the appellant's exhibits 1, 2, 3 and 4 clearly established an agreement between the parties which the trial court ought to have interpreted vis-à-vis the sale agreement dated 23/10/2018.

6) The trial magistrate erred in law and in fact in giving the law of contract a narrow interpretation in view of the evidence and exhibits produced by the parties.

7) The trial magistrate erred in law and in fact in relying on extraneous matters and wrong principles of law thus arrived at a wrong conclusion.

8) The trial magistrate erred in law and in fact in delivering judgment in favour of the respondent against the weight of evidence tendered.

Submissions

6. The appeal was canvassed through written submissions dated 23/6/2021, filed by the firm of *Milimo, Muthomi & Co Advocates*. Counsel for the appellant identified the following as the issues falling for determination in the appeal:

(i) Whether the appeal has merit:

a) Whether the appellant and the respondent breached the agreement dated 23/10/2018.

b) Whether the trial court erred in granting an order of rescission;

c) Whether the trial magistrate erred in cancelling the title deed for Land Parcel Ruiru Kiu Block 2 (Githunguri) 14214.

(ii) Who shall bear the costs?

7. On whether the parties breached the agreement, counsel for the appellant submitted that because the transfer in favour of the appellant was effected on 19/2/2019, it was clear that the respondent had failed to meet the contractual deadline of 23/1/2019 and that parties had, by mutual consent, extended the completion period. Counsel added that because the respondent still held the original title deed and had lodged a caution against the parcel register claiming a beneficial interest in the suit property, the demand letter served on 25/3/2019 and the notice of completion dated 9/4/2019 were of no consequence and were in fundamental breach of clause 8 of the sale agreement which provided that the suit property had been sold free from any encumbrance.

8. On whether the trial court erred in granting an order of rescission, counsel for the appellant submitted that special condition (b) of the sale agreement provided that the remedy of rescission would be exercised only upon refund of the purchase price already paid. Counsel added that the trial court erred in granting an order of rescission where title to the suit property had already passed to the appellant lawfully. Counsel contended that the respondent's cause of action, in the circumstances, lay in a claim for balance of the purchase price.

9. On whether the trial magistrate erred in cancelling the title held in the name of the appellant, counsel submitted that the criteria set out in Section 80 of the Land Registration Act had not been satisfied, hence there was no basis for rectification of the parcel register. Counsel urged the court to allow the appeal and award the appellant costs of the appeal and the suit in the Magistrate Court.

10. The respondent filed written submissions dated 9/7/2021, through the firm of *Kimandu & Ndegwa Company Advocates*. On whether there was breach of the sale agreement to warrant rescission, counsel for the respondent submitted that the appellant had admitted in his evidence that he owed the respondent Kshs 1,800,000 and that he had received the demand letter dated 7/3/2019 and the rescission letter. Counsel argued that the appellant had further admitted in his evidence that no claim had been made for the sum of Kshs 713,492 alleged to have been owed to **Sampesa Agency Limited** by the respondent. Counsel for the respondent contended that the trial magistrate properly evaluated the evidence placed before her and made a proper finding to the effect that the appellant was in breach of the agreement for sale.

11. Counsel for the respondent added that a notice of default was properly given but the appellant failed to remedy the default and the appellant's default is what culminated in the rescission. Counsel submitted that clause (b) of the special conditions in the sale agreement allowed the respondent to rescind the agreement in the event of non-completion by the purchaser. Counsel for the respondent argued that the letter dated 7/3/2019 was a completion notice which the appellant elected to ignore.

12. On whether the trial court was justified in cancelling the title held in the name of the appellant, counsel for the appellant submitted that the trial court having arrived at a finding that the respondent had proved his case as per the required standard, it was justified in cancelling the title and there was no double jeopardy.

13. On the appellant's contention that he paid Kshs 713,492 to M/s **Sampesa Agency Limited** on behalf of the respondent, counsel submitted that the trial court properly held that there was no agreement pursuant to which the appellant purported to pay the sum of Kshs 713,942 to a third party. Counsel urged the court to dismiss the appeal.

Analysis and Determination

14. I have examined and considered the full record of the trial court; the grounds of appeal; and the parties' respective submissions together with the issues they identified. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the issues falling for determination in this appeal. In my view, the following are the issues that fall for determination in this appeal; (i) Whether the appellant breached the sale agreement dated 23/10/2018; (ii) Whether the remedy of rescission had crystallized and/or was available to the respondent in the circumstances of the dispute; (iii) What remedy, if any, was available to the respondent in the circumstances of the dispute?; (iv) What orders should be made in relation to costs?; and (v) What disposal orders should be made in the circumstances? I will make brief sequential analysis and pronouncements on the five issues in the above order.

15. As a general principle, the jurisdiction of the first appellate court is to re-evaluate and re-assess the entire evidence with a view to arriving at proper inferences of fact and independent conclusions. [See the Court of Appeal decisions in: (i) **Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & company Advocates [2013] eKLR**; and (ii) **Mwana Sokoni v Kenya Bus Services Limited [1985]**.

16. The first issue is whether the appellant breached the sale agreement. Clause 11 of the sale agreement provided as follows:-

"The completion date shall be ninety (90) days from execution hereof unless the parties agree otherwise in writing, time being of the essence."

17. Clauses 1, 2 and 3 provided as follows regarding the purchase price and the mode of payment:

"1. The purchase price for the property is Kenya Shillings Two Million Eight Hundred thousand (Kshs 2,800,000) which purchase price shall be paid by the purchaser to the vendor as follows:

2. Kenya Shillings Two Million Eight Hundred thousand (Kshs 2,800,000) upon successful transfer of the land in the name of the purchaser.

3. All the purchase money shall be paid to the vendor either by cheque, RTGS or direct deposit into his Bank Account No. xxxxxxxxxxxx held at Equity Bank Kenya Limited KNUT House Branch."

18. There was common ground that the suit property was registered in the name of the appellant on 19/2/2019. Indeed, the appellant, through a letter by his advocates dated 25/3/2019, stated as follows:

“The property was successfully transferred in favour of our client on or about February 2019 facts whereof are well within your client’s knowledge.”

19. It does emerge from the evidence presented to the trial court that the appellant paid Kshs 1,000,000 but did not bother to pay the balance of the purchase price, despite acknowledging successful registration of the suit property in his name. He did not bother to pay the balance even after the respondent had made a formal demand. He did not deposit the money in court even after the respondent had sued him. This, in my view, was a fundamental breach of the sale agreement which clearly provided details of the respondent’s bank account where the money was to be deposited upon successful transfer of the suit property into the appellant’s name. I therefore find and agree with the trial magistrate that the appellant, by failing to pay the balance of the agreed purchase price, breached the agreement for sale.

20. The second issue is whether the remedy of rescission had crystalized and/or was available to the respondent in the circumstances of the dispute. Special condition (b) provided as follows:

“In the event the purchaser is unable to complete this agreement on the completion date or in any way breaches this agreement, the vendor shall be entitled to rescind this agreement and refund any amount held advanced by the purchaser.[sic]”

21. Further, clause 10 of the sale agreement incorporated the Law Society of Kenya Conditions of Sale (Latest Edition). The latest edition of the Law Society of Kenya conditions of sale is the 2015 Edition. Paragraph 13.4.1 of the Law Society of Kenya Conditions of Sale (2015 Edition) contain the following framework on rescission:

“Purchaser’s failure to comply with notice to complete

“13.4.1 If the purchaser fails to complete in accordance with a completion notice to complete, the vendor may rescind the agreement, and if he does so:

a) The vendor may without prejudice to his rights in law and at equity:

(i) Declare forfeited and keep a deposit of up to ten percentum (10%) of the purchase price and accrued interest thereon.

(ii) Sell the property and any contents included in the Agreement to a third party;

(iii) Claim damages from the purchaser.

b) The purchaser must immediately return all title deeds and documents in his possession that belong to the vendor and at his own expense procure the cancellation of any entry relating to the agreement in any register.

22. It is clear from the above framework in paragraph 13.4.1 of the Law Society of Kenya Conditions of Sale [2015 Edition] that rescission must follow a completion notice duly issued and served. Secondly, our courts have been categorical that the notice to complete must be unequivocal and must be clear that in the event of non-completion as specified in the notice, rescission would follow. Was there a compliant preceding completion notice? My answer to this question is in the negative. I say so because there was no evidence of a compliant completion notice prior to the purported rescission by the respondent.

23. Two letters were produced as evidence by the plaintiff. The first letter is dated 7/3/2019. The letter dated 7/3/2019 reads as follows in the relevant part:

“Ours is to demand which we hereby do the immediate payment of the balance of the purchase price of Kshs 1,800,000.

Take notice therefore that should you fail to comply with the said demand we have mandatory instructions to institute legal proceedings for kshs 1,800,000 within the next fourteen (14) days from the date hereof against you at your cost and or peril.

Please note that by a copy of this letter we will proceed to lodge a complaint with the Kenya National Police Service of obtaining property by false pretenses contrary to Section 313 of the Kenya Penal Code if we do not hear from you within the period stipulated above.”

24. The letter dated 7/3/2019 was clearly a demand for balance of the purchase price. The letter was categorical that in the event of non-remittance of balance of the purchase price, the respondent was going to institute proceedings for recovery of the sum of Kshs 1,800,000. Further, the respondent threatened to lodge a complaint with the police relating to the offence of obtaining by false pretence. The letter did not contain a notice of an intended rescission. It cannot therefore be said to be a compliant notice that precedes rescission as required under paragraph 13.4.1 of the Law Society of Kenya Conditions of Sale.

25. The second letter is dated 9/4/2019. This particular letter was a reaction to the appellant’s lawyers’ letter dated 25/3/2019. Although the letter dated 9/4/2019 was marked “NOTICE OF COMPLETION”, it was not a notice requiring the appellant to complete the transaction. The letter indicated that the contract had been rescinded. It reads thus:

“Our client as a consequent (sic) of non-remittance of the balance of the purchase price is proceeding to invoke the provisions of clause (b) of the sale agreement under the heading special conditions by issuing a completion notice to complete failure of which the agreement for sale entered between our client and yours is hereby forthwith rescinded and or cancelled and our client shall refund the amount of Kshs 999,999 paid as deposit, subsequently, and subject to our letter of 7th March 2019 our client shall in due course institute legal proceedings for rescission of the sale agreement and cancellation of the tile in your clients favour.”

26. It is therefore clear that the respondent purported to rescind the contract without complying with the requirement for prior completion notice. Consequently, it is my finding that the right to rescind the contract had not crystallized because the requisite completion notice had not been issued.

27. Was the remedy of rescission available to the respondent in the circumstances of this dispute? The suit property had already been transferred into the name of the appellant; the appellant had taken possession of the suit property; and the appellant had commenced developments on the suit property. The question as to whether rescission as a remedy is available to a vendor who has fully discharged his obligations in a land sale contract and conveyed the land to the purchaser was the subject of determination by the Court of Appeal in **Mwangi v Kiiru [1987] eKLR** where Nyarangi JA observed as follows:

“..... the land having been transferred and as the suit is not on quantum merit, the respondent’s remedy is to sue for damages for breach of contract and the damages can be referable to the balance of the purchase price.”

28. The prevailing jurisprudence is that where the aggrieved vendor has fully performed his primary obligations and has conveyed the land to the purchaser and handed over possession of the land, the remedy of rescission is not available. The available remedy is to sue for balance of purchase price. That is my finding on the second limb of the second issue.

29. In light of the above findings, it is my finding on the third issue that the remedy available to the respondent is an award of the balance of the purchase price. The appellant contended that he paid for the respondent a sum of kshs 713,942 which the respondent owed **M/s Sampesa Agency Limited**. Firstly, the contract pursuant to which the respondent sued the defendant was a contract for disposal of an interest in land and was governed by the strict formal requirements of Section 3 of the Law of Contract Act. There was no evidence that the agreement for sale was amended to allow the appellant to pay the purchase price to a third party. Secondly, the appellant did not bring a counterclaim. Similarly, he did not plead a set-off. In my view, if the respondent owed Sampesa Agency Limited money, the creditor was and is at liberty to pursue the claim directly against the respondent. The appellant had no right to withhold the purchase price on account of a third party.

30. Because the respondent made a prayer that the court grants him “such further order as the honourable court may deem just to grant in the interest of justice” I will award him the balance of the purchase price together with interest from the date of filing suit. Contractual interest would have been awarded from the date of default had the respondent placed before court evidence relating to the applicable Central Bank of Kenya interest rates at all material times.

31. On costs, I would award the respondent who was the plaintiff in the trial court costs of the suit in the Magistrate Court. There will be no award of costs in this appeal because the errors leading to the appeal were made by the trial magistrate.

Summary of Findings

32. In light of the foregoing, the following is a summary of this court’s findings on the key issues identified in this appeal:

a) The court finds that the appellant breached the sale agreement dated 23/10/2018 by failing to pay the balance of the purchase price despite the suit property having been conveyed to him and despite him having taken possession of the suit property and having commenced developments thereon.

b) The court further finds that the remedy of rescission had not crystalized because the respondent purported to rescind the sale agreement without giving a proper completion notice. Further, in view of the fact that the suit property had already been conveyed to the appellant and possession had been granted to the appellant who had commenced developments thereon, the remedy of rescission was no longer available to the respondent.

c) The remedy available to the respondent was an order for recovery of balance of the purchase price together with interest and costs of the suit.

d) The respondent shall have costs of the suit in the magistrate court.

e) Parties shall bear their respective costs of this appeal because the errors leading to this appeal were made by the trial court.

Disposal Orders

33. In light of the above findings, the court makes the following disposal orders:

a) The disposal orders made by the trial court in the judgment rendered in Ruiru MCL & E Case No 41 of 2019 are hereby set aside and are hereby substituted with the following award in favour of the plaintiff in the said suit, Francis Babu Mwangi:

i) An award of Kshs 1,800,000 being the balance of the purchase price relating to Ruiru/Kiu Block 2 (Githunguri) 14214.

ii) Interest on the above sum at court rate from the date of filing suit till payment in full.

iii) Costs of the suit.

b) Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF DECEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Ndegwa for the respondent

Court Assistant: Lucy Muthoni