REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 33 OF 2018

(Appeal from the judgment and decree delivered in Nyeri Chief Magistrates Court Civil Appeal No. 33 of 2018 (Hon. P.M. Mutua Senior Principal; Magistrate) on 5 June 2018)

CHARLES KAMAU NJOROGE.....APPELLANT

VERSUS

MARY WAKAMBA NDUNGU.....RESPONDENT

JUDGMENT

On 10 July 2017, the appellant sued the respondent for a refund of Kshs. 300,000/= being the deposit of the purchase price of a parcel of land that he contracted to buy from the respondent. Over and above the refund of the deposit, he also sought to be paid 30% of the purchase price which, according to the agreement executed between them, was the penalty for breach of contract.

In the plaint filed in court on 10 July 2017, the appellant contended that on 6 October 2015, he entered into an agreement with the respondent to buy the latter's land described as Title No. Nyeri/Watuka/3484 measuring approximately two (2) acres at the total sum of 800,000/=. Out of this sum, he paid Kshs. 300,000/= as deposit at the execution of the contract; the balance of Kshs. 500,000/= was to be paid within sixty (60) days of the date of the agreement.

However, after the execution of the agreement, so the appellant averred, he visited what he described as the 'maps office' at Nyeri and discovered that there was no record of the land he was purchasing. Nonetheless, when he conducted an official search at the Lands Registry, he established that the land was registered but that it measured 1.5 acres and not 2 acres indicated in the sale agreement.

With these findings the appellant came to the conclusion that the respondent was in breach of the agreement and it is against this background that he sued for the refund of the purchase price and payment of the penalty for the breach.

The respondent denied the claim and in her statement of defence filed on 15 August 2017 she admitted that indeed a sale agreement had been executed between herself and the appellant for the sale of her property Title No. Nyeri/Watuka/3484. She, however, denied that this property doesn't exist in the 'maps' registry as alleged or that she misrepresented its acreage. On the contrary, she alleged that the appellant had inspected the land and was not only aware of its actual size but had also agreed to buy it in the state and condition in which it was.

The respondent contended that whereas she was always ready and willing to complete her part of the agreement, it was the appellant who breached it when he sought to alter its terms unilaterally. And owing to this breach, so she averred, she was entitled to retain the sum of Kshs. 240,000/= which represents 30% of the purchase price as the penalty for the breach.

The learned magistrate held that in fact it was the appellant who was in breach of the contract and the respondent was entitled to withhold 30% of the purchase price as the penalty for the breach; he therefore ordered the defendant to refund the deposit of the purchase price less the penalty of Kshs. 240,000/=. He ordered the parties to bear their respective costs.

The appellant appealed against this decision and it his appeal that is now the subject of this judgment. In his memorandum of appeal dated 3 July 2018, the appellant raised the following grounds:

1. The learned magistrate misdirected himself in law in failing to comply with order 21 rule 4 of the Civil Procedure Rules.

2. The learned magistrate misdirected himself in law by insisting on an independent witness and determining the case on technical grounds contrary to the express provisions of the law.

3. The learned magistrate erred in law in failing to consider section (sic) 159 of the Constitution of Kenya.

4. The learned magistrate erred in making the decision he made without considering the matter properly and without giving reasons for the decision.

5. The learned magistrate erred in law and fact in making his decision without considering all the facts before him and ignoring his paramount duty as well as his inherent powers of doing substantial justice in the matter having regard to circumstances of the case.

6. The learned magistrate misdirected himself in consideration of the law and facts before him and erred in coming to his decision on wrong principles thus occasioned miscarriage of justice.

7. The learned magistrate's decision is unfair and unjust and cannot be maintained as it is contrary to the interests of justice as there was no counter-claim and a set-off on record.

8. The decision of the learned magistrate is unfair as it did not comply with the law of contract and was based on the wrong principles.

At the trial, the appellant testified that he entered into a sale agreement with the respondent for the purchase of land known as Title No. Nyeri/Watuka/3484 which the respondent told him measured 2 acres. The agreed purchase price was the sum of Kshs. 800,000/= out of which he paid the sum of Kshs. 300,000/=. He later found out that the land was in fact 1.5 acres. The respondent did not give him any documents to complete the transaction and neither did she obtain the consent to transfer the land. He produced a copy of the search certificate in respect of the land showing that the respondent was its registered owner; the sale agreement which they executed and the demand letter written by her advocates demanding a refund of the deposit of the purchase price lest he sued.

He admitted in cross-examination, though, that he was to pay the balance of the purchase price within 60 days but he couldn't pay because he hadn't been given any documents by the respondent. He also admitted that the sale agreement did not specify the acreage. Further, he admitted that he received from the respondent's advocates a notice demanding completion of the agreement.

On her part the respondent admitted that she entered into an agreement with the appellant as alleged in his plaint but that though she was ready and willing to complete the transaction and transfer the land to him, the appellant had declined to pay the balance of the purchase price as agreed. She admitted that she received a demand notice from the appellant but that she responded and informed the appellant that she was ready to refund the deposit less the penalty.

In answer to questions put to her in cross-examination, the respondent admitted that she was selling 2 acres of land at 400,000/= per acre. She admitted that the search indicated that the land is 0.62 ha which, according to her was equivalent to 2 acres. Nonetheless, her case was that the acreage was much more on the ground than it appeared in the lands register.

It is apparent from the evidence at the trial that the appellant and the respondent entered into a contract of sale of land the purchase price having been agreed at Kshs. 800,000/=. It was also common ground between them that a sum of Kshs. 300,000/= was paid as deposit leaving a balance of Kshs. 500,000/= which was to be paid within 60 days from the date of the agreement.

As I understand the appellant's case, he could not perform his part of the agreement because there was a clear breach with respect to the subject matter. According to him, the land being sold did not appear in what he described as the 'maps office' at Nyeri, and, over and above that, it was less than what was agreed upon. He pleaded that the land sold was 2 acres yet when he finally conducted a search at the lands registry he discovered that it was 1.5 acres instead.

He also complained that the respondent couldn't provide the documents for the transfer including the consent to transfer.

Looking at the sale agreement, the appellant's complaints would appear to have been baseless primarily because the payment of the balance of the purchase was not conditional on the respondent doing anything in performance of his obligations under the contract. The contact was clear that the balance of the purchase price was to be made within sixty days of the date of the agreement.

As far as payment of this balance is concerned, it would not matter that the appellant later found out that there were no records of the land in the maps office or that the acreage of the land was less than what he thought he was buying. The presumption is he either had established these facts or he ought to have established them before he executed the contract.

In any event, it is obvious from the agreement that the acreage of the land was not specified; what was sold is described in the agreement as "*all that parcel of land known as NYERI / WATUKA/3484 registered in the name of the vendor*". So, it would, on the face of it, be asking too much from the court for the appellant to insist that he was buying two acres of land when the agreement to which he bound himself says nothing about the extent of the land.

But it later emerged that all was not lost for the appellant; his case found a lifeline from none other than the respondent herself. During her cross-examination, the respondent sated as follows with regard to this question of acreage:

> ***"I was selling 2 acres at 400,000= per acre…the plot is 0.62 ha which is equivalent to 2 acres. I told the plaintiff that we go to the ground but he did not come. On the ground it is 2 acres. In papers it shows 0.62 ha but it is 2 acres.***

So, although the acreage of the land was not expressly stated in the contract, it was clear to the respondent as much as it was to the appellant, that the land sold was not only 2 acres but also that each acre would cost Kshs. 400,000/=.

But there are two other things that emerged from the respondent's testimony that ought to have been construed in the appellant's favour; first,

the respondent may have been under the mistaken impression that 0.62 ha is equivalent to 2 acres. In truth 0.62 hectares is equivalent to 1.5 acres and not 2acres. Secondly, she may well have been aware that the land was 1.5 acres as per the registration documents but that she believed it was more on the ground, to be precise, she thought that it was 2 acres. However, there was no evidence to support her presumptions and, I doubt, there would be such evidence because, the acreage as registered in the lands register has to be a true representation of the acreage on the ground.

It is also clear from the respondent's testimony that the appellant may not have inspected the land after all; this is what I read from her statement that:

> **"I told the plaintiff that we go to the ground but he did not come".**

The conclusion that one can possibly make from these facts is that there was either a misrepresentation or a mistake on the part of the vendor. If I have to be fair to the respondent and conclude that her actions amounted to a mistake rather than a deliberate misrepresentation, the question that ought to have concerned the trial court is whether the mistake which, for all intents and purposes, was unilateral, was fundamental to the contract.

I would, for my part, answer this question in the affirmative. The mistake was fundamental and not a mere warranty for the simple reason that it went to the root of the contract; the respondent was mistaken as to the nature of the subject matter of the contract. That being the case, the contract was voidable at the instance of the appellant; that is, he had a choice to proceed with it or avoid it altogether once he established the true state of affairs. At the very least, he was relieved of his obligations under the contract or, as it were, he was discharged from those obligations.

It follows that he could not be faulted for withholding payment of the balance of the purchase price; certainly, he couldn't be punished for a mistake that is clearly of the respondent's making. He was perfectly in order to rescind the contract and everything else being equal, to sue for damages for the breach. This remedy has been explained in **Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT**/(i) Grounds for Rescission/986 where it is stated as follows:

> ***Where a contract is induced by innocent misrepresentation, a court of Chancery may allow the representee a prima facie right to rescind it ab initio; that is, the contract may be annulled in every respect so as to produce a state of affairs as though the contract had never been entered into (Buckland v Farmer & Moody [1978] 3 All ER 929 at 938, sub nom Buckland v Farmar & Moody [1978] 1 WLR 221 at 232, CA, per Buckley LJ). Other cases where equity will rescind a contract ab initio include constructive fraud, and mistake. (emphasis mine).***

It follows that the appellant was entitled to the remedy of rescission and, at the very minimum, he deserved a refund of the deposit of the purchase price.

I must hasten to state that had the appellant been diligent enough, he could probably have avoided the contract from the very beginning or, alternatively he would have known the nature of the property he was purchasing; the information on the acreage of the land was always available and therefore if he was keen enough, the ambiguity of its acreage shouldn't have arisen. It is for this reason that I would be reluctant to award him damages for breach of contract.

In the final analysis, I find the appeal to have merits and is hereby allowed; the learned magistrate's judgment is set aside; it is substituted with an order for judgment for the plaintiff in the sum of Kshs. 300,000/= together with costs and interest from the date of judgment in the lower court. The appellant shall also have costs of the appeal. It is so ordered.

Dated, signed and delivered on this 14th day of May 2020

Ngaah Jairus

JUDGE