REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 8 OF 2017

1. RUTH NGUNJU KARUGA

2. LUCY WAMUYU MWAI

3. PAUL MURIITHI GITHUKU.....APPELLANTS

-VERSUS-

KENNETH KAABUGA MAINA.....RESPONDENT

(Being an appeal against decree and judgment in Nyeri Chief Magistrates' Court Civil Suit No. 212 of 2016 Hon. P. Mutua, Principal Magistrate delivered on 9 February 2017)

JUDGMENT

The appellants' suit against the respondent in the magistrates' court was dismissed with costs on 9 February 2017. In that suit, they sought judgment against the respondent for the sum of Kshs. 900,000/=, costs and interest.

The suit arose out of a contract for sale of part of a parcel of land identified as Title No. Nyeri/Lusoi/1101 registered in the joint names of the respondent and his two sisters but who, incidentally, were not privy to the contract. The approximate acreage of this land was said to be 18.2 hectares out of which the respondents were to buy 5 acres which was understood to be the respondent's share.

The appellants paid the sum of Kshs. 500,000/= in settlement of the deposit of the purchase price which had been agreed at Kshs. 4.5 Million. The balance of Kshs. 4 Million was to be paid after the respondent had obtained the consent for transfer of the land. Both parties were aware and, as a matter of fact, it was incorporated in their agreement, that either a caution or a restriction had been registered against the title by one of the joint owners at the time the agreement was executed on 5 September 2013.

The contract, however, fell through and so the appellant sued for a refund of the purchase price plus 50% of the deposit being the penalty for breach of contract. He also asked for the sum of Kshs. 100,000/= which the respondent is alleged to have received in addition to the deposit particulars whereof are said to have been within his knowledge. The claim was in enforcement of the terms of the contract.

The appellant denied the claim and filed statement of defence in that regard. In particular, he contended that the appellants were all along aware that the property they were buying was jointly owned and that the he had filed a suit in Environment and Land Court to dissolve the joint ownership; that the contract was in any event frustrated by the rest of the joint owners of the property. He also contended that time was not of essence and the completion of the contract largely depended on the conclusion of the dispute between him and his sisters.

After hearing the contesting parties, the learned magistrate held that indeed time was not of essence and in the absence of a clause relating to when the contract could possibly be concluded, the appellants were bound to issue a completion notice before they initiated any suit on the contract. This, so the learned magistrate found, they did not do and for that reason, their suit was held to be premature. It is on that same note that it was dismissed with costs.

Being dissatisfied with that decision, the appellants appealed and it is their appeal that is now the subject of this judgment. They have raised the following grounds of appeal:

1. The learned magistrate erred in fact and in law in failing to apprehend the substance of the plaintiff's claim hence arrived at the wrong decision.

2. The learned magistrate erred in fact and in law in failing to appreciate and consider the substance of the defendant's defence of frustration and therefore arrive at the conclusion that the defendant was in breach of his obligation.

3. The learned magistrate erred in failing to apprehend, consider and appreciate the import of the demand notice of 14.03.2016 served upon the defendant, took into account irrelevant matters that he ought not to have taken into account hence arrived at the wrong conclusion.

4. The learned magistrate erred in entertaining a defence unknown in law and which had not even been pleaded and dismissing the appellant's claim.

5. The learned magistrate erred in fact and in law in failing to appreciate that the plaintiff's claim had substantially been admitted and there was really no issue for trial.

6. The learned magistrate misdirected himself on the facts and the law and hence arrived at the wrong conclusion.

They asked the court to set aside the decision of the magistrate's court and allow the plaintiff's claim. They also sought for the costs of the appeal and the costs in the subordinate court.

The record shows that only the 3rd appellant testified in pursuit of their claim. He exhibited a sale agreement incorporating the terms of the contract. He admitted that at the time of the agreement all the purchasers were aware that the land was jointly owned and they too were aware that a restriction had been registered against it more or less restricting any sort of dealing with the land at the time material to their suit. The 3rd appellant also agreed that they were to get their share once a family dispute between the respondent and his sisters had been resolved and this hadn't been achieved even at the time he was testifying. Finally, he conceded that the completion of the contract was not time bound.

The respondent's testimony was no different from that of the appellant. His only argument against the appellants' claim was that it was not subject to any completion date and therefore time was not of essence and that, in any event, he had not received any completion notice.

The appellant's suit would have failed on several fronts but the one I find most striking is that it was based on an illegal contract and which, by extension was void and therefore unenforceable.

It is true where, in a contract, the completion period is not so stated in express or implied terms, then it is deemed that it will be completed within a reasonable time which, in turn, will depend on the circumstances of each particular case. In such circumstances, where a party feels that the delay is undue or otherwise unreasonable, he may, among other things, notify the defaulting party of the breach and issue a completion notice.

In the present case, the completion of the contract was largely contingent upon the happening of an event which was the resolution of a dispute between the respondent and his sisters. To the extent that the timing of the determination of that dispute was uncertain, it was arguable that time was not of essence.

However, in my humble view, the question whether time was of essence should not have arisen in the first place; the primary concern ought to have been whether the contract between the parties was, in any case, legal; to this end, it is a question that, I think, ought to have been determined *in limine*.

The reason I take this position is this: it was common ground that the subject matter of the contract was land that was jointly owned. It was also common ground that of the three joint owners, only the respondent was privy to the contract in issue. To be precise, in its preamble, the contract stated as follows:

> **Whereas land parcel number Nyeri/Lusoi/1101 measuring 18.2 hectares is registered in the names of Kenneth Kabuga Maina, Nancy Njeri Kabuga and Jane Wanjiku Mugambi <u>jointl</u>y and the vendor is desirous of selling to the purchasers 5 acres out of his share of 15 acres of the said land parcel. (underlining mine).**

Thus, the question that the land which the appellants were purporting to buy was jointly owned was beyond peradventure. This fact of joint ownership and the fact that the other joint owners were not privy the sale agreement was sufficient to have the suit struck out without any need of taking of evidence; in other words, the suit ought not have proceeded to full hearing.

I say so because the contract was in clearly in flagrant breach of section 91 (4) of the Land Registration Act (No. 3 of 2012) which is clear that no tenant is entitled to any separate share in a joint ownership and further, dispositions of such tenancy can only be made by all the joint tenants. It is necessary that I reproduce the entire sub-section here for better understanding; it states as follows:

> **4) If land is occupied jointly, no tenant is entitled to any separate share in theland and, consequently—**
>
> **(a)dispositions may be made only by all the joint tenants;**
>
> **(b)on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or**
>
> **(c)each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.**

Thus, the attempt by the respondent to dispose of an interest in the Title No. Nyeri/Lusoi/1101 was not only contrary to the law but according to subsection (c) of the section 91(4) it was void. Without belabouring the point, it follows that the contract which the appellants sought to enforce was equally void *ab initio* and therefore unenforceable. To this end I need not say anything save to cite an earlier decision I made on this point in **Nyeri High Court Civil Case No. 11 of 2016 Root Capital Incorporated versus Tekangu Farmers Co-operative Society Limited 2016 eKLR**. In that case I stated, inter alia:

> **An aspect in the contracts considered illegal is that of being contrary to public policy. Ordinarily, and based on the doctrine of laisser faire, when entered into freely and voluntarily, contracts must be held sacred and enforced by courts which, ordinarily, would proceed on the assumption that their duty is to implement the reasonable expectations of the parties. (See the Law of Contract by G.C. Cheshire and C.H.S Fifoot, 5th Edition, at page 278); however, because of public welfare considerations, not every contract that has been freely and voluntarily entered into is enforceable. According to Fifoot and Cheshire (page 278), public policy will be served not by enforcing but by denouncing such contracts. The particular aspects of public welfare to which the Courts have paid attention in this regard are the safety of the state, the economic and social well-being of the state and its people as a whole, and the administration of justice. Any contract which injures or which has a direct tendency to injure any one of these public interests is deemed illegal and void. (See Fender versus John-Mildman (1938) AC 1 at pages 12-13.)**
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> **"The doctrine by which contracts are held to be void on the ground of public policy is based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals." (As per Farrel LJ in Wilson versus Carnley (1908) 1KB 729 at pages 739-40).**

The principal was again captured by Lord Truro in Egerton versus Brownlow (1853) 4HL Cas at page 196 where he stated: -

> **"Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good-which may be termed the policy of the law, or public policy in relation to the law"**

Having admitted that he received some money on the basis of what is otherwise an illegal contract, did the appellants have a remedy against the respondent? I suppose they did; it is a question that I also addressed in the Roots Capital (supra) where I noted as follows:

> **The question that follows and which I think would be relevant to the applicant's suit is, would money paid under an illegal contract be recoverable?**
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> **According to Halsbury's Laws of England (supra) paragraph 883 a claim for the return of money paid over in these circumstances may take one of the four basic forms. It may be: (1) a personal action for a debt (for instance, on a loan); (2) a personal restitutionary claim for money had and received; (3) an action in tort for the return of identifiable coins or notes or their value; or (4) a proprietary claim in equity even where the money has been paid into a mixed fund. However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received.**
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> **Most importantly and for purposes of determination of this application, it has long been held that where a plaintiff seeks to recover money paid under an illegal contract the rule is that he may not do so unless he can make out his cause of action without reliance on the illegal contract (see Berg v Sadler and Moore [1937] 2 KB 158).**

In the ultimate, I hold that there is no substance in the appellants' appeal; it is hereby dismissed for want of merits. The learned magistrate's order dismissing the appellants' suit is, however, set aside and substituted with an order striking out the suit. The respondent shall have the costs in this court and the subordinate court in any event. It is so ordered.

Dated, signed and delivered in this 4th day of May 2020

Ngaah Jairus

JUDGE