



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC APPEAL NO 3 OF 2018

JOSEPH GACHAGWA NYINGI.....APPELLANT

-VERSUS-

JERIOTH MUTHONI MUGUMORESPONDENT

Being an Appeal against the Judgment/decree of the Chief Magistrate at Nyeri Chief Magistrate's Court (delivered on the 14th March 2018) in CMCC No. 176 of 2014

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was partly heard by W. KAGENDO Chief Magistrate *in the Chief Magistrate Court at Nyeri in Civil Case No. 176 of 2014* where the learned trial Magistrate, upon considering the evidence of both parties, dismissed the Plaintiff's suit with costs to the Defendant.

2. The Appellant/Plaintiff, being dissatisfied with the judgment of the trial Magistrate filed the present Appeal based on the following grounds of his Memorandum of Appeal :

i. The learned trial Magistrate erred in law and in fact in failing to make a finding that the Defendant had breached the Sale Agreement by failing to deliver to the Plaintiff on the completion, documents clearly spelt out in the Sale Agreement dated 20.11.13.

ii. The learned trial Magistrate erred in law and in fact in failing to make a finding that the Defendant having breached the Sale Agreement on the completion date, the Sale Agreement thereafter stood rescinded as clearly provided in clause 13 of the Sale Agreement.

iii. The learned trial Magistrate erred in law and in fact in failing to make a finding that the Sale Agreement having been rescinded, the Plaintiff was entitled to a refund of purchase price paid together with the penalty of 20% of the purchase price.

iv. The trial Magistrate erred in law and in fact in failing to make a finding that the Plaintiff having performed his part of the Sale Agreement, he was entitled to the prayers sought in the plaint including costs.

v. The learned trial Magistrate erred in law and in fact in failing to consider and enforce the express provisions of the Sale Agreement dated 20.11.13 in writing the judgment and no reasons provided for the same.

vi. The learned trial Magistrate erred in law and in fact in failing to make a finding that the Defendant had failed to deliver to the Plaintiff a valid and registrable transfer on the completion date.

vii. The learned trial Magistrate erred in law and in fact in failing to make a finding that the Defendant had presented herself to the Plaintiff as JERIOTH MUTHONI MUGUMO the registered owner yet her real name as per the identity card reads JERIOTH MUTHONI MUKUNDI which person was unknown at the lands office and hence could not transact on the piece of land.

viii. The learned trial Magistrate erred in law and in fact in failing to make a determination on all issues.

3. The Appellant sought for the following orders:-

i. The Appeal be allowed.

ii. The judgment and orders of the honorable W. Kagendo CM dated 14.3.18 be set aside and substituted with an order for rescission of the Sale Agreement dated 20.11.13 and for a refund of the purchase price paid, plus the Defendant to pay the Plaintiff a penalty of 20% of the purchase price for the breach of the Sale Agreement with costs and interest.

iii. That the costs of this Appeal and costs of the Chief Magistrate's court be borne by the Respondent.

4. The Appeal having been filed on the 13th July 2018, was admitted to hearing on the 11th February 2019 wherein by consent parties agreed to dispose of the same by way of written submissions.

Appellant's submission.

5. The Appellant condensed grounds number 1-5 of his Appeal and submitted that although the trial Magistrate correctly found that there had been a Sale Agreement between the Defendant and the Plaintiff whereby the vendor was to deliver documents to the Plaintiff which was acknowledged by the vendor in her evidence in court, yet the Magistrate erred in failing to make a finding that since the vendor had not delivered the said documents, more so the consent to transfer, to the purchaser, she had been in breach of the Sale Agreement.

6. The Appellant further submitted that the trial Magistrate had erred in failing to make a finding that the Sale Agreement stood rescinded once the vendor failed to deliver on the completion documents as at 14th February 2014 which was the completion date of the Sale Agreement.

7. That indeed the purchaser had promptly paid the balance of the purchase price on the 14th February 2014 when the vendor was required to have delivered all documents required to transfer the property including the consent. The learned trial Magistrate failed to make a finding that since the purchaser had performed all that was required in the agreement contrary to the vendor's conduct, he was entitled to the prayers sought in the plaint, including costs.

8. That the trial Magistrate's judgment was ambiguous in that it failed to consider and enforce the express provision/remedies provided for in the Sale Agreement which parties had executed and were aware of its provisions.

9. That the trial learned Magistrate had erred in her judgment when she failed to make a determination that the Defendant/Respondent had failed to deliver to the Plaintiff/Appellant a valid and registrable transfer on the completion date, the transfer document being invalid for reasons that it had been prepared by one Gichuki Karuga who did not exist and was not an Advocate as per the requirement of the law.

10. The Appellant further submitted that the learned trial Magistrate erred in her judgment when she failed to make a finding that the Defendant had misrepresented herself to the Plaintiff as Jerioth Muthoni Mugumo the registered owner of the suit land whereas her real name was Jerioth Muthoni Mukundi and therefore she was not eligible to transact on the suit land.

11. The Appellant relied on his pleadings and submissions to further submit that the trial learned Magistrate failed to make a determination on all the issues raised therein and therefore his Appeal had merit and the same ought to be allowed as prayed.

12. In response to the Appeal and in opposition thereto, the Respondent filed her submissions dated 28th November 2019 to the following effect;

13. She denied the fact that she had sold to the Appellant the suit land which had integrity issues and further that she had induced him into paying the balance of the purchase price by falsely representing to him that she had secured all completion documents as enumerated in clause 2 of the Sale Agreement as alluded in the Appellant's plaint. On the contrary, the Appellant had been the one who had undertaken to procure the transfer consent documents when he paid her the Sale Agreement balance.

14. It was the Respondent's submissions that the trial Magistrate had analyzed the evidence adduced and had found that the Appellant had not proved the aforesaid two allegations as stated in the judgment.

15. That indeed the Appellant's submission on Appeal was based on new evidence and documents, which documents had not been produced in the trial court before judgment had been delivered. That an example of such document/evidence was an alleged restriction on the suit by the County Director of Housing, Nyeri County, a restriction which had been placed on the suit land at the instigation of the Appellant to achieve a targeted purpose.

16. The Respondent submitted that the Appellant having failed to succeed on grounds 1-3 of his Appeal, was not entitled to damages for breach of contract. That if anything the Appellant had been the one who had breached their Agreement, and was now looking for flimsy excuses to run away from it. That he should go ahead and register the transfer as he had undertaken to do so when he paid the balance of the purchase price.

17. That the judgment of the trial court was very clear and the reasons given were sound and therefore ground 5 (five) of the Appellant's Memorandum of Appeal must fail.

18. On the Appellants 6th ground of his Memorandum of Appeal it was the Respondent's submission that nowhere in his pleadings had the Appellant pleaded that the transfer was not registrable and therefore this ground was neither here nor there.

19. On the last issue as to the identity of the Respondent, it was their submission that the Appellant had been supplied with an affidavit showing that Jerioth Muthoni Mugumo and Jerioth Muthoni Mukundi was one and the same person and therefore the Appellant's

submission on this ground must also fail. The Respondent's final submission was that the Appeal was an abuse of the court process and the same ought to be dismissed with costs.

Determination.

20. I have considered the Appeal herein, Counsel's submission and the annexed authorities. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (*See Seascope Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

21. Briefly, the matter that gave rise to the present Appeal is that a suit was filed in the year 2014 by the Appellant against the Respondent herein wherein the Appellant claimed that vide a Sale Agreement of 20th November 2013, the Respondent had agreed to sell him land parcel No Nyeri Municipality Block 1/1246 at a consideration of Ksh 2,500,000/= . That he had paid the Respondent, who acknowledged receipt of the part payment of a sum of Kshs. 1,500,000/=

22. Under clause 2(ii) (iv) and (v) of the Sale Agreement, the Respondent was to deliver to the Appellant completion documents which documents included:

- i. The transfer in triplicate duly executed by the Respondent in favour of the Appellant
- ii. Consent from the relevant Government bodies
- iii. A copy of her PIN certificate and National Identity Card
- iv. Two colored passport size photographs of the Respondent
- v. Such other documents, consents, approvals as would be necessary to register the said transfer

23. The said documents were to be received before payment of the last installment of Ksh 1,000,000/=

24. That the Respondent had subsequently duped the Appellant into paying the last instalment by falsely representing to him that she had secured the completion documents as herein above enumerated.

25. That the suit land was further not transferable on account of propriety title queries raised by the Ethics and Anti-Corruption Commission which queries had not been brought to the attention of the Appellant

26. The Appellant's suit was therefore for the rescission of the Sale Agreement for reasons that the Respondent had been in breach thereof and for the refund of the purchase price of Ksh 2,500,000/= as well as liquidated general damages of Kshs 500,000/= as per clause 13 of the Sale Agreement. In the alternative, the Appellant had prayed for an order of specific performance of the Sale Agreement.

27. The Respondent filed her defence and thereafter amended the same on 12th June 2014 wherein she denied the contents of the Appellant's plaint stating that on the contrary, she had performed her part of their Agreement and was only paid the balance of the purchase price upon the Appellant's undertaking to pursue the issuance of the consent to transfer. She had testified that at all material times she was not aware of any restrictions or queries raised by the Ethics and Anti-Corruption Commission on the suit land and as such was not liable to fraudulent misrepresentations which the Appellant had purported. Further that the Appellant was not entitled to any damages for breach of Agreement because he had been the one who had failed to fulfill his undertaking to pursue the issuance of the consent to transfer.

28. This matter had been heard and the judgment delivered on 14th March 2018 wherein the trial Magistrate upon considering all the factors at hand, held that the title had no restriction and further that the Court had not been told as to how exactly the Appellant had been duped into paying the last instalment of Ksh 1,000,000/=. That if there had been any breach, and the Appellant was the one who had breached the said Agreement by agreeing to pay the last instalment before time.

29. The Court was further satisfied that the Respondent had completed her part of their Agreement by producing and giving all the documents she had been expected to produce ad/or give to the Appellant. The Court found no merit in the Appellant's case and had dismissed the same with costs to the Respondent.

30. The Court further directed that if there were further documents that the Respondent needed to hand over so as to facilitate completion of their Agreement, then she ought to do so and if it was impracticable to complete the transaction then she shall refund the purchase price only without any interest whatsoever.

31. Having given a brief background on the matter in question, I find that the matters that arise for determination are as follows:

- i. Whether there was a valid Sale Agreement between the Appellant and the Respondent.
- ii. Whether there was a breach of the Sale Agreement by the Respondent

iii. Whether the Appellant is entitled to the remedies sought.

32. I have considered the evidence on record as well as the submission by Counsel for both parties and the matter that is not in contention is that the Respondent and the Appellant had entered into a Sale Agreement of 20th November 2013 wherein the Respondent was to sell and the Appellant was to purchase land parcel No Nyeri Municipality Block 1/1246 at a consideration of Ksh 2,500,000/=

33. It is also not in contention that the Appellant was to pay the first installment of Kenya shillings th Khs. 1,500,000/= whereby the Respondent was to deliver to the Appellant completion documents as per the provision of Clause 2 of their Agreement, pursuant to which the Appellant would pay the balance of Ksh 1,000,000/=(one million.)

34. It was also not in contention that somewhere along the way and before all the completion documents for transfer had been procured, the Appellant had completed the payment of the consideration wherein he had undertaken to pursue the consents contrary to the Sale Agreement, and at which time, not all the transfer documents had been procured. He thus filed this suit in court.

35. According to the Appellant, the bone of contention thereby arose after the documents for completion of transfer namely, the consent had not been procured and further that he had discovered that the suit property had restrictions and/or queries raised by the Anti- Corruption Commission and as such, the same was not transferable as its title had been impeached.

36. The Respondent on the other hand is categorical that she had executed her part of the Agreement and that it had been the Appellant who had offered to obtain the consent by himself and had even paid him (Respondent) the balance of the Sale Agreement.

37. That it had not been true that the suit property had restrictions and/or queries raised by the Anti- Corruption Commission as the time parties were entering into the Sale Agreement as per search certificate herein produced as exhibits. That the said restriction if any, had been placed at the instigation of the Appellant after judgment in the trial court had been delivered.

38. On the first issue as to whether the Sale Agreement was valid or not, I have looked at whether it met the requirements of a contract as per the provisions of **Section 3(3)** of the **Contract Act** which provides as follows;

3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

39. Considering that the Sale Agreement herein was in writing, contained the names of the parties, the description of the property, the Sale premium, and the conditions thereto and was signed by the parties herein. I find that it conformed to the requisite of a valid contract as per the law herein above and was therefore a valid Sale Agreement, enforceable by the parties.

40. On the second issue for determination as to whether there was a breach of the Sale Agreement by the Respondent, I find that a party cannot run away from the terms of its Agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's Agreements.

41. In the case of **Shah -vs- Guilders International Bank Ltd [2003]KLR** the Court in considering the terms of the parties contract stated that;-

“The parties executed the same willingly and they are therefore bound by it.”

42. In **Aiman vs Muchoki (1984) KLR. 353** the Court of Appeal held;

“In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer”.

43. A look at the parties' Sale Agreement, more so at clause 1(ii) the same was specific and couched in mandatory terms that;

‘The balance of Kenya shillings one million only (1,000,000/=) shall be paid after the vendor /lessee to facilitate completion of the Sale to enhance completion arrangement’ (emphasis mine)

44. Clause 13 of the Sale Agreement stipulated as follows;

That if both the vendor and the purchaser breaches the server amount it shall be required to pay a penalty of fee of 20% of the purchase price and the Sale Agreement shall thereafter stand rescinded where of the deposit made hereto shall be refunded to the purchaser together with the penalty fee or in case the breach has been occasioned by the purchaser, he shall receive the deposit paid less the agreed penalty fee.

45. From the evidence adduced in court, it is clear that the Appellant herein paid the balance of ksh 1,000,000/= before he had obtained the necessary consent for transfer from the relevant government body and upon execution of a registrable of documents in his favour contrary to their signed Agreement, for reasons that he could procure the said documents so as to complete the Sal Agreement.

46. The Appellant's further testimony was that he no longer wanted the suit property because there had been a restriction placed on it by the Ethics and Ant-Corruption Commission. Vide a search certificate herein produced an exhibit on the search which was conducted on the said parcel of land, the same did not depict this picture, on the contrary there was only a charge which the Appellant had been aware of and which charge had been discharged by the Respondent upon the parties having signed the Sale Agreement.

47. Indeed in her testimony the Respondent herein testified that she had completed her end of the bargain concerning the Sale Agreement whereby she had surrendered all documents to the Appellant who had then paid her the balance of the Sale Agreement and had also undertaken to complete the rest of the process of obtaining the consents.

48. The Court having gone through the agreement for sale and having found that the same was valid and enforceable, it thus meant that the parties were bound by the terms of the contract. See the case of **Total Kenya Ltd...Vs...Joseph Ojiem, Nairobi HCCC No.1243 of 1999**, where the Court held that:-

“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”

49. As already found and held by this Court, there was a valid Sale Agreement by the parties which agreement had been duly signed. Further, that the said Agreement had not been vitiated by any factors nor had there been any allegations or form of illegality that has been alluded to, and also having carefully considered the available evidence and the exhibits thereto together with the written submissions, I find that the if any breach occurred, then the Appellant was to blame for having breached clause 1(ii) of the parties Agreement.

50. That having been said, the last issue for determination was whether the Appellant was entitled to the remedies so sought, I find that the answer would is negative.

51. In essence therefore I find that the Appeal has no merits, I uphold the finding by the trial Magistrate in the trial Court and proceed to dismiss the Appeal with costs to the Respondent.

Dated and delivered at Nyeri this 13th day of February 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE