REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 68 OF 2019

JORDAN PROPERTIES LIMITED.......APPELLANT

VERSUS

MARAGRET NJOKI MIGWI...........RESPONDENT

JUDGMENT

A. Introduction

1. The appeal herein was commenced vide a memorandum of appeal dated 6/11/2019 against the trial court's judgment (Hon. H. Nyakweba PM) in Embu CMCC 11 of 2018. The appellant raised ten (10) grounds challenging the said judgment.

2. At the hearing of the appeal, the same was disposed of by way of written submissions.

3. The appellant, in support of the grounds of appeal, submitted that the suit having been based on a written contract, the respondent was estopped by virtue of section 98 of the Evidence Act from adducing oral evidence to vary, contradict, add and subtract from the same. Reliance was made on **Caroline Cherono Kirui -vs- Liner Cherono Towett (2018) eKLR**. On ground number 2, it was submitted that the trial court erred in applying the doctrines of equity (applying the doctrine of piercing the veil) whereas there was a statute (Law of Contracts Act) which was applicable in the circumstances and relied on **David Sironga Ole Tukai –vs- Francis Arap Muge C.A No. 76 of 2014**. The appellant made submissions in support of his other grounds of appeal and cited authorities to buttress his position in that regard. The respondent on her part submitted in rebuttal wherein she controverted the appellant's submissions on each and every ground as was framed in the memorandum of appeal.

B. Re-evaluation of the evidence before the trial court

4. The duty of this court (first appellate court) is now settled. Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya requires a first appellate court "to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions by the superior courts among them **Peter M. Kariuki –vs- Attorney General [2014] eKLR** where the court held *inter alia* as follows: -

> **"We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. (See also *Peters –vs- Sunday Post Limited [1958] EA 424).***

5. In **John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR** the Court of Appeal held that there is no uniform method for evaluation of the evidence on record and that what is expected of a trial court is to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts have been proved or disliked).

6. I have read and evaluated the record and evidence adduced thereto by the parties. I have also considered the memorandum of appeal, submissions of both counsels and the authorities referred to by the parties in support of their rival positions.

7. In summary, the appellant instituted the suit before the trial court seeking refund by the respondent herein of Kshs. 6,000,000/- being the amount it had paid to the respondent in part performance of the agreement for sale of land parcel No. LR Gaturi/Githimu1794 and whose purchase price was Kshs. 20,000,000/-. The appellant averred that the respondent failed to procure from Barclays Bank of Kenya, duly executed transfer forms, original title and discharge of charge which was a condition of the said agreement and further failed to obtain Land Control Board consent and thus breached the said agreement.

8. The respondent filed her statement of defence wherein she denied the contents of the plaint and further averred that the land the subject of the agreement was bought by herself and one Tisiano Cosmas Mugo (her former husband) during subsistence of their marriage and after which the said Tisiano charged the land with Savings & Loan but later defaulted. That, as a result of this, the respondent was advanced Kshs. 5,120,000/- by Barclays Bank Limited to secure the said property from being auctioned but due to her business experiencing challenges, the said Tisiano Cosmas Mugo contrived a plan to form a company (the plaintiff herein) as a special utility vehicle for saving the land from eminent auction. She further averred that the money subject of this suit was proceeds of sale of rice and cereals (which was the business she was engaged in) and which her husband (Tisiano) used to deposit in her account at Family Bank using the plaintiff's name. That the deposit slips obtained after making the said deposit would be shown to Barclays Bank to ensure that the suit land was not auctioned.

9. When the matter came up for hearing, the appellant called Tisiano as its only witness who adopted his witness statement and list of documents. He testified in support of the appellant's case on the existence of the agreement for sale and default by the respondent to transfer the suit land. In cross examination, he denied having transferred the suit to the respondent and that the respondent colluded with the bank to fraudulently transfer the same to her. Further that, the pay-in slips were from family bank but the bank auctioning the suit land was Barclays bank and the money deposited in the said bank was from his account. That he resided on the suit land and was the director of the plaintiff company.

10. The respondent testified in support of her case wherein she reiterated her averments in her defence and further produced her list of documents. She called DW2 who corroborated her evidence to the effect that the money paid in her account was not from the appellant or PW1.

11. Upon considering the evidence tendered before it, the trial court proceeded to render itself in its judgment wherein it dismissed the appellant's suit and hence the instant appeal.

C. Issues for determination

12. I have read and evaluated the record and evidence adduced thereto by the parties. I have also considered the memorandum of appeal, submissions of both counsel and the authorities referred to by the parties in support of their rival positions. It is not disputed that there was an agreement entered into between the parties herein for sale of the suit premises.

13. The respondent in her statement of defence averred that the agreement was entered into in an attempt to avoid the suit land from being auctioned. This was due to her failure to service the loan which she had secured using the suit property. In my opinion, this implied illegal intent in the formation of the plaintiff and further in the execution of the intended sale agreement. The issues which this court ought to determine in the circumstances are; -

i. Whether the contract between the parties herein was illegal and thus void, if so

ii. Whether the amount (if any) paid under the said contract ought to be recovered

iii. Whether the trial court erred in dismissing the suit before it

I. Whether the contract between the parties herein was illegal and thus void

14. In **Kenya Airways Limited versus Satwant Singh Flora [2013] eKLR which authority was cited with approval by the Court of Appeal in Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR,** the court in laying guidelines to be applied by the court when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract held that; -

> **………………..(iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."**
>
> **(iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality (emphasis mine)**
>
> **(v)……………………………..**

15. I have perused the copies of the green card which were produced as evidence in the trial court and I note that (at page 68 of the record of appeal) entry no. 2 is in relation to discharge of the charge which was in favour of saving loans. The said entry was entered on 13/05/2009. At page 69 of the record of appeal, there appears another copy of the green card and whose entries 8 and 9 are to the effect that on 14/05/2009, the respondent herein was registered as the owner of the land and title deed issued. Under entry 3 therein, on 14/05/2009, there was charge registered in favour of Barclays Bank to secure a sum of Kshs. 5,120,000/-. There is a note to the effect that the charge under entry 3 reserved the rights under Section 83 and 84. It was after the registration of this charge that on 6/03/2012, the sale agreement subject of this suit was entered into.

16. Contracts which are illegal and/or against public policy or morality are void. According to the authors in **Law of Contract by G.C. Cheshire and C.H.S Fifoot, 5th Edition, at page 279,** illegal contracts are usually divided into two classes-those illegal at common law and those prohibited by statute. Section 65(3) of the repealed Registered Land Act Cap 300- which was the operative law at the time of

registration of the charge in favour of Barclays Bank, provides that; -

> **"The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument."**

As an encumbrance, it means that the suit land would not be available for sale to the appellant herein.

17. From the above analysis of the law and the pleadings, it is evident that the respondent, at the time of executing the agreement subject of this suit did not have the capacity to enter into the said agreement for the reasons that her interests on the said land were not absolute. Any contract in that respect was void for want of capacity to contract. Further, the said contract was illegal and in violation of an express provision of the statute. By the respondent agreeing to dispose the suit land to the appellant without the consent of the chargee, it clearly points to the intentions to deny the said chargee of its right of exercising statutory power of sale under the charge. Such a contract is not only in contravention of the law but also against public policy.

18. PW1 testified to the effect that he had not transferred the said property to the respondent and pleaded fraudulent dealings between the respondent and the said bank. However, he failed to prove the said fraud and which was contrary to the trite law that fraud must be specifically pleaded and strictly proved. (See **John K. Malembi –vs- Trufosa Cheredi Mudembei & 2 others [2019] eKLR**). By PW1 alleging fraud, one is left wondering on what basis he purported to transact on behalf of the appellant now that he knew that he had not transferred the suit land to the respondent. In my opinion, the evidence on record is to the effect that the respondent herein was registered as the owner of the suit land pursuant to a lawful transfer by PW1 and a charge was lawfully registered in favour of Barclays Bank.

II. Whether the amount (if any) paid under the said contract ought to be recovered

19. Having opined that the contract herein was void, the question that needs to be answered is; would money paid under the said contract be recoverable? In other words, did the trial court err in dismissing the suit before it (which was for recovery of the Kshs. 6,000,000/- allegedly paid to the respondent)? To answer this question, I rely on the case of **Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & another [2016] eKLR** where Jailus Ngaah J in handling a similar issue held that; -

> **"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."**

20. The Learned Judge making reliance on the Supreme Court of United Kingdom's decision **in Patel versus Mirza (2016) UKSC 42**, observed that a defendant who has benefited from an illegal contract to possess or keep what he has been paid under the contract is a cause based on unjust enrichment is sustainable. That a defendant's enrichment is *prima facie* unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not), an event or a state of affairs, which failed to materialize.

21. It is my opinion from the above, therefore, that the appellant herein was entitled to recover any amount paid under the said contract (though illegal). The question therefore which begs for an answer is **whether the appellant tendered evidence to prove having paid the said amount to the respondent?**

22. It is trite law that the burden of prove is always on he who would fail if a fact is not proved. Generally, he who alleges must prove. The degree of prove is always that of balance of probabilities. In **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR,** the Court of Appeal held as thus; -

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."**

23. The appellant maintained the position that the money in issue herein was paid by it to the respondent in part performance of the agreement herein but which the respondent failed to perform. Its witness (PW1) produced bank deposit slips and which indicated the appellant having deposited the money in the respondent's bank account with Family Bank. The respondent did not dispute the deposit of the said funds into her account but testified that the said money came from her and was deposited by the appellant in her account to try and maneuver their way out of impending auction of the suit land. However, there was no evidence tendered to support the said assertions. The bank statements produced by the respondent in the trial court do not indicate any transfer of funds in to the appellant or PW1's account. Further, her testimony to the effect that the deposits were made by the appellant and was from the proceeds of sale of rice and cereals was never supported with evidence. As such, it is my opinion that on a balance of probability, the appellant was able to prove that indeed money was deposited in the respondent's account and the same being part of the purchase price of the suit land. That being the case, the said amount was recoverable despite the contract being illegal.

III. Whether the trial court erred in dismissing the suit before it

24. The grounds of appeal as they appear on the memorandum of appeal clearly indicate that the appellant's main contention was on the trial

court's dismissal of the suit before it. The appellant raised a ground to the effect that the trial court erred in allowing oral evidence to be adduced in court whereas there was a written agreement. Under section 97 of the Evidence Act, oral evidence ought not to be adduced where a document which in law is required to be in writing. (See **John Onyancha Zurwe Vs Oreti Atinde Civil Appeal NO. 217/2003).** However, under section 98(1), such evidence can be adduced to prove any fact which would invalidate any document, or which would entitle any person to any decree or order relating thereto; **such as fraud, intimidation, illegality, want of due execution, want of capacity in any contract**. In the instant case, the trial court observed that the contract was illegal and void. As such, the evidence by the respondent in regards to the said illegality was admissible and not precluded by the "parole evidence rule.'

25. The trial court in its judgment found that there was no evidence as to the incorporation of the appellant as a company and as such it did not have the capacity to contract. However, from the evidence presented before the trial court at the hearing, it appears that there was no dispute as to the existence of the said plaintiff company. In fact, the respondent acknowledged having entered into an agreement in issue. It is my opinion therefore that the court ventured into areas which it was not invited to determine on in the pleadings and which did not arise during the hearing of the suit.

26. It was also a ground of appeal that the trial court erred in law and in fact by determining on the issue of fraud whereas the same was not pleaded. However, as I have opined elsewhere above, it does not matter as to whether illegality has been pleaded or not. What is required is for the illegality to be brought to the notice of the court and the evidence tendered to prove the same. It is my opinion therefore that the trial court did not err in determining the issue on illegality of the contract. Further, a perusal of the statement of defence filed in the trial court clearly alludes to illegality tainting the agreement.

27. It is my opinion in the circumstances that the suit before the trial court was founded on a contract which was illegal. However, the trial court ought to have allowed the appellant herein to recover his money and which money the appellant had paid to the respondent. In my opinion, the appellant was able to prove that it had indeed given the said money and as such, allowing the respondent to possess or keep what she had been paid under the contract would amount to unjust enrichment.

28. It is my opinion therefore that the appeal herein ought to succeed as prayed.

29. That a defendant's enrichment is *prima facie* unjust if the claimant has enriched the defendant on the basis of a consideration which fails.

30. In the end, I find that the appeal has merits, and the same is allowed. The judgment and the decree of the trial court in Embu PMCC No. 11 of 2018 is hereby set aside and substituted with an order allowing the plaintiff's suit.

31. Each party shall bear its own costs of the appeal.

Delivered, dated and **signed** at **Embu** this **2nd** day of **December, 2020.**

L. NJUGUNA

JUDGE

……………………………………………..…………..for the Appellant

…………………………………………………………for the Respondent