REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L APPEAL NO. 3 OF 2019

GILBERT KIMANI NYUMU.....APPELLANT

VERSUS

GIDEON KIPKOECH KIPTISIA.....RESPONDENT

JUDGMENT

This appeal arises from the judgment of Honourable H.M. Nyaberi (Senior Principal Magistrate in Iten Environment & land Case No. 9 of 2018 delivered on 16th January 2019.

The brief background of this case as can be gathered from the record of Appeal is that the respondent, who was the plaintiff therein brought proceedings against the appellant seeking specific performance over the parcel of land known as IRONG/ITEN/600. The respondent had entered into an agreement dated 11th April 2006 where he was sold the suit property by the appellant for a consideration of Kshs. 300,000/-. The respondent had paid part of the consideration on signing of the agreement and took possession immediately from the date of signing the agreement and a consent to transfer was secured on 12th April 2016.

The appellant filed a counterclaim and sought eviction of the respondent but the trial court dismissed the appellants' counterclaim and allowed the respondent's prayer for specific performance. Dissatisfied with the decision, the appellant filed the present appeal. The appellant listed 11 grounds of appeal faulting the learned Magistrate's decision.

APPELLANT'S CASE

Counsel for the appellant submitted that the principles guiding the court in an award for the equitable order of specific performance was laid out in Eldoret ELC No. 216 of 2014 – Kiplagat Muigei v Kipngetich Lelmen (2019) eKLR. He further submitted that the trial court erred in granting the order for specific performance in respect of a contract that was time barred by virtue of section 4(1)(a) of the Limitation of Actions Act.

Counsel for the appellant referred to page 26 of the judgment where the court observed that the suit was time barred and that the plaintiff had not filed an application to file the suit of time. Further, that in total disregard to the principle set in Muigei's case (supra) the magistrate committed an error in failure to find that the contract suffered from some defect such as the illegality which rendered the contract invalid.

Counsel faulted the learned Magistrate for not taking into account the maxim that equity follows the law and that the issue of limitation being substantive and goes to the root, competency and jurisdiction of the court. It was Counsel's submission that the court having found that the suit was filed outside the six years the court had no basis for continuation of proceedings and should have dismissed the suit. Further that the trial Magistrate erred in failing to take into account that the respondent was in breach of contract which rendered the contract unenforceable as there was a balance of Kshs. 100,000/- which was never paid.

Counsel submitted that the respondent did not produce any evidence that he paid the outstanding amount and cited the case of **Nairobi Civil Suit No. 700 of 2006, Purple Rose Trading Co. Ltd v Bhango Shashikatjai** on the relief of specific performance.

Mr Korir further submitted that the Magistrate failed to consider the principles laid out by the Evidence Act and further that it is not in dispute that the appellant is the registered owner of the suit property, having demonstrated that upon breaching the contract the respondent was rendered a trespasser or a tenant at will. The appellant preferred a counterclaim for orders of eviction against the respondent for illegally occupying the suit property. Counsel therefore urged the court to set aside the judgment of the trial court and the caution lodged against the defendant's title over the suit property be removed. He also urged the court to award the appellant costs of the appeal.

RESPONDENT'S CASE

Counsel for the respondent gave a brief background to the case and stated that the appellant sold to the respondent the suit land vide a sale agreement dated 11th April 2006 wherein he paid Kshs. 200,000/- at the execution and Kshs. 100,000/- upon attending Land Control Board on 12th April 2006 as demonstrated at pages 38-43 of the Record of Appeal. That a boundary dispute arose before the transfer of the suit property could be effected in favour of the respondent between the appellant and a 3rd party whose parcel bordered the suit property. That the dispute ended up at the Keiyo Land Disputes Tribunal whose decision and award was adopted on 25th July 2006 as the judgment of the court vide Iten Resident Magistrate's Court Land Dispute No. 22 of 2006.

The appellant challenged the decision vide Eldoret High Court Civil Application 591 of 2006 as demonstrated on page 45 of the record where the judgment dismissing the suit was delivered on 23rd August 2012.

Counsel submitted that the agreement dated 11th April 2006 was governed by the lis pendens principle and time stopped running between 2006 and 23rd August 2012 when the application was determined and therefore the respondent's case was not time barred. Counsel cited the case of Nairobi **Succession Cause No. 36808 of 2003, In Re Estate of Walter Karanja (Deceased) [2008] eKLR** in support of this submission.

Mr. Mitei further submitted that the issue of trust was canvassed during the trial and that the respondents' case revolved on trust and as such the provisions of the Limitation of Actions Act are inapplicable. Counsel cited the case of **ELC No. 783 of 2013 – Michael Gachoki Gicheru v Joseph Karobia Gicheru [2014] eKLR and ELC 481 of 2014 – Rahab Njiriku Ngugi v Lucy Nyaguthii Ndirangu [2017] eKLR.**

Counsel submitted that the appellant never raised any issue since 2006 until 2015 when the respondent instituted these proceedings and relied on the case of **ELC No. 215 of 2017 – Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei [2018] eKLR** where the court was confronted by the same circumstances and the case of Civil Suit **No. 2 of 2007 – Estate of Mohammed Ishaq & 3 others v Passaglia Giuseppe & 3 others [2014] eKLR.**

It was further submitted by Counsel that the appellant vide a letter dated 22nd August 2007 informed the tenants on the suit premises to henceforth pay rent to the respondent, further that the appellant attended the Land Control Board to obtain the consent and the same was obtained within 6 months but refused to surrender the completion documents to the respondent.

Mr Mitei submitted that it is not in issue that the respondent has been in actual and physical possession of the suit property since 2006 and has made developments on the suit property and cited the case of **Civil Appeal No. 51 of 2015 – Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** to support the submission that the appellant held the suit property in trust for the respondent. Counsel urged the court to dismiss the appeal with costs to the respondent.

ANALYSIS AND DETERMINATION

It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held inter alia, that:-

> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

I have considered the Record of Appeal, as well as the submissions by Counsel and come to the conclusion that the issue for determination is as to whether the sale agreement dated 11th April 2006 was time barred, whether the respondent was in breach of contract and lastly whether the trial court erred in granting orders for specific performance

On the first issue as to whether the sale agreement was dated 11th April 2006 was time barred, from the record and the evidence and submissions by Counsel that the agreement was governed by the lis pendens principle and time stopped running between 2006 and 23rd August 2012 when Eldoret HC Misc. App. 591 of 2006 was determined which was as a result of a boundary dispute between the appellant and a third party over the boundary of the suit land. I find that this is a true reflection of the position and therefore the agreement was not time barred as the appellant would like the court to believe. I find that the trial Magistrate made a sound finding on this.

In the case of ***Mawji vs US International University & another [1976] KLR 185,*** Madan, J.A. stated thus: -

> **"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other…"**

Also in the case of Joseph **Tireito v Jacob Kipsugut Arap Langat & 2 others [2018] eKLR** the court held and cited;

***Black's Law Dictionary 9th edition,* defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending. Turner L. J, in *Bellamy vs Sabine [1857]* 1 De J 566 held as follows: -**

"It is a doctrine of common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite ***were permitted to prevail. The Plaintiff would* be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."**

This doctrine is meant to protect the property such that the orders given are not frustrated by the alienation of property during the pendency of the suit. Therefore, any timelines pending are suspended until the matter is resolved. The proceedings were commenced three years from the conclusion of the Misc. Application No. 591 of 2006

On the issue as to whether there was breach of contract, it was the appellant's assertion that the respondent did not pay the balance of the purchase price as agreed as he was to do so on 30th December 2006. The agreement was subject to the lis pendens principle and thus failure to pay the balance on the agreed date would not amount to breach. However, the issue of proof of payment is more contentious as the respondent could not produce proof that he paid the balance. The appellant never raised any issue on the balance from 2006 to 2015. In ELC No. 215 of 2017 **Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei [2018] eKLR** the court observed;

On the second issue as to whether the plaintiff paid the purchase price in full, the plaintiff during cross examination confirmed that he paid the purchase price in full and he did not owe any money even though he did not have any document to prove that he had paid in full. If he had not paid the purchase price in full the seller or the defendant could have filed a claim demanding the balance of the purchase price. The defendant was not the seller of the suit land but a witness to the sale. The plaintiff testified that he later bought the portions which had been given to the defendants' brothers. If he had not paid the purchase price in full, would the brother to the defendant have sold to him his portion? From the evidence on record I find that the allegation that the plaintiff did not pay the purchase price in full is not founded.

It is on record that the respondent took possession of the suit land and by conduct of the appellant it is plausible that the balance had been paid as he made no claim for the same in the 9 years leading up to the current suit. Further, in his letter dated 22nd August 2007 the appellant informed the tenants to henceforth pay rent to the respondent. The same is evidenced on page 56 of the record. I find that the respondent paid the balance of the purchase price that is why the appellant sought and obtained a Land Control Board consent for the transfer.

On the issue as to whether the trial court erred in granting orders of specific performance see the case of In ***Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited (2006) eKLR*, the** court stated that: -

"Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles"

"The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant."

If the contract suffered from some defect which made it invalid, then specific performance would not be ordered. The term of the contract in contention is the payment of the balance of the purchase price. The trial court found that there was payment of the balance of the purchase price and thus ordered specific performance. The evidence of payment is based on the conduct of the appellant after the respondent occupied the suit property.

In the case of **Mwangi - v- Wambugu (1984) KLR 453,** the court held;

An appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding.

The court would not interfere with the trial court's decision on whether the balance of the purchase price was paid. From the evidence on record it is clear that such balance was paid and it was never raised until 2015. The court did not err in ordering for specific performance in this case as the contract did not suffer from any defect.I find that the appeal lacks merit and is therefore dismissed with costs to the respondent.

Dated and delivered at Eldoret on this 17th day of October, 2019.

M. A. ODENY

JUDGE

Judgment read in open court in the presence of Mr. Mitei holding brief for Mr. Kibii for the Respondent and in the absence of Mr. Korir for the Appellant.

Mr. Mwelem – Court Assistant