



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 11 OF 2018

EPHANTUS NJERU TIRAS.....APPELLANT

VERSUS

PAULINE MUTITU KIVUTI.....RESPONDENT

(Being an appeal against the judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 21st May 2018 in Embu CMCC No. 55 of 2016)

JUDGEMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 21st May 2018 in *Embu CMCC No. 55 of 2016 – Pauline Mutitu Kivuti Vs Ephantus Njiru Tiras*. By the said judgement, the trial court declined the Respondent’s claim for specific performance of some agreements with respect to *Title No. Ngandori/Ngovio/820 (suit property)* but instead ordered a refund of the purchase price in the sum of Ksh. 380,000/-. The Respondent was also awarded costs of the suit.

2. The material on record indicates that vide a plaint dated 27th April 2016 the Respondent pleaded that vide two sale agreements dated 12th October 2011 and 29th February 2012 respectively, she bought a portion of one acre out of the suit property at a consideration of Kshs. 600,000/-. It was pleaded that she made part-payment of Kshs. 380,000/- but the Appellant in breach of the agreements allegedly refused to excise that portion of one acre from the suit property for the purpose of completing the sale. It was further pleaded that the Appellant had, instead, commenced construction of a permanent house on the very portion of the suit property which was the subject of the sale agreements. Consequently, the Respondent sought the following reliefs against the Appellant:

- a) *An order for specific performance of the said agreements for sale.*
- b) *Costs of the suit and interest.*

3. Although there is no indication on record of the Appellant having filed a defence, he filed a written statement dated 1st December 2017 in which he denied the Respondent’s claim in its entirety. He denied having entered into any sale agreement for the sale of the suit property. He emphasized that he had never even imagined selling a “fraction” of the suit property during his lifetime. The Appellant further stated that he had only allowed the Respondent to harvest tea leaves from a certain portion of the suit property whereby it was agreed that she would keep one half of the proceeds of sale whereas she was to remit the other half to Agricultural Finance Corporation (AFC) for settlement of an outstanding loan facility on behalf of the Appellant.

4. The Appellant further stated that although the Respondent harvested his tea bushes for about six (6) years she never remitted a single cent to AFC in consequence of which he reported the matter to the local elders for resolution. It was contended that the said elders directed the Respondent to stop harvesting tea leaves from the suit property and to pay the Appellant all proceeds she had earned for 6 years. Consequently, the Appellant asked the court to dismiss the Respondent’s suit.

5. The material on record indicates that upon hearing the matter the trial court found for the Respondent. The court believed the evidence of the Respondent and found as a fact that the sale agreements pleaded by the Respondent had been proved. However, the court could not order specific performance because it found that the consent of the Land Control Board had not been obtained with respect to the transaction. Accordingly, the court ordered only a refund of the purchase price, in the sum of Kshs. 380,000/- which had been paid by the Respondent. The Respondent was also awarded costs of the suit.

B. THE GROUNDS OF APPEAL

6. Aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 14th June 2018 raising the following seven (7)

grounds of appeal:

- a) *The learned trial magistrate had no powers to make the orders in the judgement delivered on 21st May 2018 and did in any event exceed his jurisdiction in granting orders not sought and not pleaded by the Respondent.*
- b) *The learned trial magistrate erred in law and in fact by failing to appreciate and put into consideration the Appellant's evidence with respect to the terms of the agreement between the Appellant and the Respondent which did not include sale of the suit land.*
- c) *The learned trial magistrate misdirected himself in law and in fact by granting orders not sought in the Respondent's pleadings.*
- d) *The learned trial magistrate erred in law and in fact by finding that the Respondent was owed Kshs. 388,000/- by the Appellant without proper demonstration as to how the said amount was paid and if at all that amount was received by the Appellant.*
- e) *The learned trial magistrate erred in law and in fact by failing to pay attention to the discrepancies in the Respondent's written witness statements in respect of the description of the land allegedly bought and amounts paid, and thereby made the wrong decision.*
- f) *The learned trial magistrate erred in law and in fact by failing to appreciate that the Respondent was bound by her own pleadings and she could not be granted a relief not pleaded.*
- g) *That the orders granted by the trial court were unreasonable and could not be complied with without unreasonable difficulty and expense and hence the orders are oppressive and prejudicial to the Appellant.*

C. DIRECTIONS ON THE HEARING OF THE APPEAL

7. When the appeal was listed for directions on 5th February 2020 it was directed that the appeal shall be canvassed through written submissions. The Appellant was granted leave to file a supplementary record of appeal within 14 days and written submissions within 30 days. The Respondent was granted 30 days upon the lapse of the Appellant's period to file her submissions.

8. There is no indication on record of the Appellant having filed any supplementary record of appeal within the stipulated period or at all. The material on record indicates that the Appellant filed his written submissions on 13th March 2020 but the Respondent's submissions were not on record by the time of preparation of the judgement.

D. THE ISSUES FOR DETERMINATION

9. The court has perused the grounds set out in the Appellant's memorandum of appeal as well as the material on record. Although the Appellant raised 7 grounds of appeal, the court is of the opinion that resolution of the following issues would effectively determine the appeal:

- a) *Whether the trial court erred in holding that the Respondent had proved the existence of the sale agreements the subject of the suit.*
- b) *Whether the trial court erred in holding that the Respondent had proved part-payment of Kshs. 380,000/-*
- c) *Whether the trial court erred in directing the Appellant to refund Kshs.380,000/- to the Respondent.*
- d) *Whether the appeal should be allowed as prayed.*
- e) *Who shall bear costs of the appeal.*

E. THE APPLICABLE LEGAL PRINCIPLES

10. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

“...Briefly put they are that this court must 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

11. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** rendered the applicable principles as follows:

“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case,

and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

F. ANALYSIS AND DETERMINATIONS

a. Whether the trial court erred in finding that existence of the sale agreements was proved

12. The court has considered the entire material on record and the Appellant’s submissions on the 1st issue. The Appellant submitted that the trial court erred in finding and holding that the Respondent had proved the existence of the pleaded sale agreements with respect to the suit property. It was contended that there was no evidence of sale but of a different kind of arrangement. It was further contended that there were discrepancies in the evidence of the Respondent’s witnesses and that the description of the property the subject of the sale agreements was not so clear.

13. The court has noted from the record that the advocates for the parties adopted an abridged version of a hearing. They did not call the individual witnesses to the witness box but they decided to adopt their written statements and dispense with their oral evidence and cross-examination. The trial court, therefore, only examined the witness statements and documents on record to arrive at its verdict. So, the trial court did not enjoy any particular advantage which is denied to this court.

14. In its judgement the trial court found that the Respondent’s three (3) witnesses were all the Appellant’s siblings. He found no reason why they would all tender adverse evidence against the Appellant unless they were truthful. Although the Appellant vehemently denied the existence of any sale agreement with respect to the suit property, this court’s own evaluation of the material on record reveals that the Appellant was being very economical with the truth.

15. There are on record two sale agreements dated 11th November 2011 and 29th February 2012 purportedly signed by the Appellant. There was no allegation at the trial that his signatures were forged. There was no indication that he had at any time reported to any law enforcement agencies that a false document bearing his purported signature had been made for the purpose of depriving him a portion of the suit property. There was no indication that he had, indeed, reported the matter to any of his siblings or local administrators for investigation.

16. The court is, therefore, unable to find any error on the part of the trial court in finding and holding that the Respondent had demonstrated the existence of the sale agreements the subject of the suit. This court’s own evaluation of the material on record leads to the same conclusion which the trial court reached. Accordingly, the 1st issue is answered in the negative.

b. Whether the Respondent had proved part payment of Kshs. 380,000/-

17. The court has also considered the evidence and submissions on record on the 2nd issue. The Appellant submitted that there was no sufficient evidence to demonstrate part-payment of the purchase price in the sum of Kshs. 380,000/-. It was submitted that the documents tendered were inconclusive on the total amounts paid, when they were paid, and to whom they were paid. The court is of the opinion that payment of money can be proved through other evidence other than documentary evidence. Documentary evidence may be the best mode of such payment but it is not the only mode of proving payment. Payment may be proved through a combination of oral and documentary evidence as happened in this matter.

18. The parties to the appeal appear to be siblings and it should not always be expected that they would exchange payment receipts for every payment. The Respondent’s witnesses were the Appellants siblings and they tendered evidence vouching for the payment of Kshs. 380,000/-. This court, too, believes the combination of the oral and documentary evidence on record on the payment of the sum of Ksh. 380,000/-. The trial court cannot be faulted for having found that such payment was proved to the required standard.

c. Whether the trial court erred in directing a refund of the purchase price

19. The 3rd issue is whether the trial court erred in directing a refund of the amount paid on account of the two sale agreements. It was submitted by the Appellant’s advocates that the trial court erred in making such an award because the Respondent had not included an alternative prayer for a refund thereof. The Appellant relied on the cases of **Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR** and **Raila Amolo Odinga & Another V IEBC & 2 Others [2017] eKLR** for the proposition that parties are bound by their pleadings.

20. The court has considered the Appellant’s submission on this issue as well as the authorities cited in support thereof. The court agrees that parties are generally bound by their pleadings and that a court should not base its decision on an issue which was not pleaded unless it is apparent from the course of the proceedings that the issue was left to the decision of the court. See **Odd Jobs V Mubia [1970] EA 476**. The reason why parties are bound by their pleadings is generally to ensure that issues are well defined and narrowed down before trial. The other reason is to avoid surprise at the trial.

21. The material on record shows that every aspect of the Respondent’s case was pleaded and known to the Appellant. The Appellant categorically denied the existence of any sale agreement(s) for the sale of any portion of the suit property. The Respondent had sought specific performance of the sale agreements but the prayer was declined by the trial court which instead directed a refund of the purchase price already paid.

22. Although it is usual for a party seeking specific performance of an agreement for the sale of land to claim a refund of the purchase price as an alternative relief, the Respondent did not include such alternative relief. However, the court is of the view that the Appellant was not

taken by surprise at the trial nor did he suffer any *prejudice* since the refund arose out of the same transaction which was the subject of the suit. The facts and circumstances on which the order for specific performance was grounded were the same ones on which the refund was ordered.

23. The court is of the opinion that for the purpose of achieving completeness of resolution of the dispute and the overriding objectives stipulated in **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21)** the trial court was entitled to order a refund of the purchase price. It would have been expensive and time consuming for the Respondent to pursue a refund of the purchase price and adduce the same evidence in separate proceedings.

24. In the case of **Lucy Mirigo & 550 Others V Minister for Lands & 4 Others [2014] eKLR** the Court of Appeal considered the application of the overriding objectives in the **Appellate Jurisdiction Act (Cap. 9)** which is in *pari materia* to **Sections 1A and 1B of the Civil Procedure Act (Cap. 21)** as follows:

“In evaluating the evidence on record, this Court is mandated not to give undue regard to technicalities through the overriding objectives as enshrined in Sections 3A and 3B of the Appellate Jurisdiction Act and as stated in Douglas Mbugua Mungai -vs- Harrison Munyi – Civil Application No. Nai. 167 of 2010:

‘We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly’ As was stated in Stephen Boro Gitiha- vs- Family Finance Building Society & 3 Others, Civil Application No. Nai. 263 of 2009. “The overriding objective overshadows all technicalities, precedents, rules and actions ... and whatever is in conflict with it must give way.”

25. The court, therefore, finds no fault with the order of the trial court directing a refund of the purchase price which is a statutory remedy provided for under **Section 7 of the Land Control Act (Cap. 302)**. It was a measure which was taken perfectly in consonance with the overriding objectives of providing just, expeditious, proportionate and affordable resolution of disputes. It would have been utterly unjust to allow the Appellant to keep both the land and the purchase price. It would have been expensive and time consuming to let the Respondent to file a fresh suit for recovery of the purchase price. Accordingly, the 3rd issue is answered in the negative.

d. Whether the appeal should be allowed

26. The 4th issue is whether the appeal should be allowed as prayed by the Appellant. The court has found no fault with the judgement of the trial court on the basis of the grounds set forth in the memorandum of appeal. The court has also found against the Appellant on the key issues which were framed for determination. It would, therefore, follow that there is no merit in the appeal hence the Appellant is not entitled to the reliefs sought. The 4th issue is accordingly answered in the negative.

G. COSTS OF THE APPEAL

27. The 5th issue is on costs of the appeal. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful party herein should not be awarded costs of the suit. Accordingly, the Respondent shall be awarded costs of the appeal.

H. CONCLUSION AND DISPOSAL ORDERS

28. The upshot of the foregoing is that the court finds no merit in the appeal. Consequently, the same is hereby dismissed in its entirety with costs to the Respondent. It is so decided.

JUDGEMENT DATED and SIGNED in Chambers at EMBU this 28TH DAY of MAY 2020. Judgement delivered via zoom platform in the presence of Ms. Mukami for the Appellant and in the absence of the Respondent.

Y.M. ANGIMA

JUDGE

28.05.2020