



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 7 OF 2017

(Formerly Machakos ELC Appeal No. 7 of 2017)

MWAURA KARUGA.....APPELLANT

VERSUS

APOLLO J. KHARUGA.....1ST RESPONDENT

JESSE MUTHIGA ALBERT...2ND RESPONDENT

JUDGMENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Kajiado Hon. M. O Okuche made on 21st January, 2015 in Kajiado PMCC No. 130 of 2008)

Introduction

By a Memorandum of Appeal dated the 7th July, 2015, the Appellant appeals against the whole of the Judgment delivered by Hon. M. O Okuche Principal Magistrate's Court at Kajiado on the 21st January, 2015. The genesis of this appeal is the Judgement of the Principal Magistrate Hon. M. O Okuche in the Kajiado PMCC No. 130 of 2008 where he ruled in favour of the Appellant and directed that the 2nd Respondent to refund him Kshs. 200,000/=. In the said suit the Appellant had sought for the following orders as against the Respondents:

- a. An order of specific performance of the Agreement dated the 6th August, 2002 to the effect that the 2nd Defendant be compelled to receive the balance of the purchase price and execute the transfer documents in respect to all that piece of land known as NGONG/ NGONG/ 23159 in favour of the Plaintiff.
- b. In the alternative, an order that the 1st Defendant revokes the Power of Attorney Number 011/2001 of 30th April, 2001 by the 1st Defendant in favour of the 2nd Defendant and the 1st Defendant thereby execute the Transfer documents in respect to the suit property.
- c. In the alternative, the Registrar of Titles – Kajiado be compelled to execute the transfer documents of the suit land in place of the 2nd Defendant.
- d. Costs of this suit plus interest at Court rates

The appellant being dissatisfied by the whole Judgement filed an appeal at the Environment and Land Court in Machakos on 8th July, 2015.

The Memorandum of Appeal contained the following grounds;

1. THAT the learned Magistrate erred in law and fact dismissing the suit against the 1st defendant when indeed the 1st Respondent was a necessary party for the proper determination of all issues.
2. THAT the learned Magistrate erred in law and fact by introducing his own evidence on the alleged completion date "ought to be" when there was no such date in the agreement and the conclusion thereof was not objective.

3. THAT the court failed to appreciate that there was no determined date when the first installment was payable and the court's fixing installment date was speculative.
4. THAT even if we were to accept that the completion date was 6th January 2003 when the 2nd Respondent demanded the outstanding purchase price on 24th November 2002 it was clear breach of the terms and the Appellant was not obliged to make the payment as demanded.
5. THAT the learned Magistrate himself having found that the parties had by their conduct, acts and omissions varied the terms of the said agreement and they were caught by the rules of estoppel but nevertheless failed to appreciate that the agreement remained valid and enforceable.
6. THAT the subordinate court failed to recognize that the Respondents had not counter-claimed for any sum or the title documents.
7. THAT the Defendant had not denied in their statement of Defence that a consent had been obtained and there was no complain in the pleading as to the manner of obtaining the consent and the Defendant would not be allowed to rely on that defence.
8. THAT the lower court failed to appreciate that the issue of whether or not the agreement for sale was void and had been framed as an issue for determination and indeed from the evidence and documents before the court the consent had been obtained and the provisions of the Land Control Act were therefore not applicable.
9. THAT the trial court failed to appreciate that the alleged termination of the agreement by the Respondent was not pursuant to clause 4 or 5 of the Sale Agreement.
10. THAT the learned Magistrate misdirected himself in granting for refund of Kshs. 200,000, which was not supported by the pleading and if it was an equitable award then the Court ought to have granted interest thereon as a natural consequence.
11. THAT the trial court failed to award costs of the suit when in essence the Plaintiff suit had succeeded and this was a misdirection on the part of the Court.

The Appellant prays;

- a. This Appeal be allowed.
- b. That judgment and Order issued on the 21st January, 2015 be set aside.
- c. That the Plaintiff's suit in the Lower Court be allowed as prayed.
- d. That the costs of this Appeal be provided.

The Respondent filed a Cross Appeal based on the following grounds:

- i. The Learned Magistrate acted beyond her jurisdiction in granting reliefs neither specifically pleaded nor prayed for by the Appellant in his Pleint.
- ii. The Learned Magistrate erred in Law and fact in entering judgement gratuitously in favour of the Appellant by awarding him the sum of Kshs. 200,000 which had neither been prayed for nor requisite cause of action specifically pleaded and even despite and amidst the Magistrate concluding that the Appellant was not entitled to any of the prayers he had sought in the Pleint.
- iii. The Learned Magistrate erred in Law and fact in holding or reaching a conclusion that the 2nd Respondent was in breach of the Agreement dated 6/08/02 and instead failing to hold that the 2nd Respondent was not in breach and that to the contrary the Appellant had solely breached the said Agreement.
- iv. The Learned Magistrate erred in Law and fact in failing to hold that the Appellant committed breach of the said Agreement long before the said transaction was voided by operation of statute to wit the Land Control Act.
- v. The Learned Magistrate erred in Law and fact in failing to hold that the Appellant had declined to receive or accept refund of consideration from the 2nd Respondent and hence a suit against the Respondent for refund of consideration was premature and/or misconceived.
- vi. The Learned Magistrate in any event erred in Law and fact in failing to hold in the alternative that the only amount hat the 2nd Respondent was liable to refund to the Appellant is sum of Kshs. 155,000 pursuant to the said Agreement for sale and in light of the relevant default clause being a term of the said Agreement.
- vii. The Learned Magistrate erred in Law and fact in holding that the 2nd Respondent was guilty of laches by adopting or relying on wrong principles of estoppel as against the 2nd Respondent.

viii. The Learned Magistrate misdirected himself in holding that the Parties in the said transaction had by their conduct varied the terms of the said Agreement.

ix. The Learned Magistrate erred both in Law and fact in misdirecting himself in his assessment analysis, interpretation and evaluation of the evidence adduced in Court and hence arrived at a wrong conclusion.

x. The Learned Magistrate erred both in Law and fact in failing to determine all issues placed before him for determination and / or arising from the pleadings and the evidence.

xi. The Learned Magistrate erred in Law in basing his decision on extraneous factors.

xii. The decision in its entirety is against the evidence adduced before the trial court.

xiii. The Learned Magistrate erred in Law and fact in failing to dismiss the Appellant's suit in its entirety.

xiv. The Learned Magistrate erred in Law and fact in failing to award costs to the 2nd Respondent in a case where costs were deserved in favour of the 2nd Respondent.

xv. The entire decision is contrary to law and a misapprehension of the Law.

The Respondent sought for the following Orders:

a. The Appellant's suit in the Lower Court be dismissed with costs.

b. The above mentioned decision be varied, set aside or reversed.

c. The 2nd Respondent be awarded costs of the Appeal

The Appellant and Respondents filed their respective submissions to canvass the Appeal.

Submissions

Appellant submitted that the trial Court was wrong to find that the 1st Defendant was not a necessary party to this suit as he was the registered owner of the suit land despite having donated a power of attorney to the 2nd Defendant. He further submitted that since the trial court held that parties had by their conduct and through their action altered the terms of the agreement and hence should have been held to their bargain. To buttress this point, he relied on the decision of **Masha Vs Tol Limited (2003) EA 593 (SCU)**. He insisted that the issue of the Land Control Board Consent was not pleaded by the parties nor framed for determination. Further, no party led evidence on it. He contends that the Court should have found that the consent of the Land Control Board was obtained in furtherance of the intention of the parties. To support these averments, he relied on the decision of **Mumias Outgrowers Company Limited V Regina Achieng Okoth & Others Civil Appeal No. 27 of 2016**. He further submitted that even if the court found that the transaction was void, it will have been saved by the Constitutional and equity principles. He relied on the case of **Willy Kimutai V Michael Kibet (2018) eKLR** to buttress this argument. He further submitted that on the issue of refund of Kshs. 200,000/= since the Respondents have had the monies from 2002, the appropriate remedy would have been to award interest from the date of filing the suit. He sought for the Cross Appeal to be dismissed.

The Respondents submitted that the Order for specific performance is not available as a matter of right and referred to the case of **Gurdev Singh Birdi V Marinder Singh Gatora as Trustees of RAMGHARIA INSTITUTE OF MOMBASA Vs ABUBAKAR MADHUBUT (1997) eKLR; Sisto Wambugu V Kamau Njuguna Nairobi Civil Appeal No. 10 of 1982**. He further submitted that the Appellant did not strictly adhere to the terms of the agreed instalments. He contended that the Appellant did not adduce evidence of having obtained the consent of the Land Control Board. Further, that the transaction was hence null and void since no consent was obtained. They relied on the decisions of **Civil Appeal No. 40 of 1978 Elizabeth Cheboo Vs Mary Cheboo Gimnyigei** to support this averment. They disagreed with the Appellant and averred that the issue of consent of the Land Control Board was indeed raised by the respective parties during the hearing. He further submitted that it was not within the authority of the Court to revoke a Power of Attorney donated to another. They reiterated that the Order for the Registrar to execute Deed is not maintainable in law. They further submitted that the trial court properly found that the Appellant was not entitled to any prayers sought in the Complaint but on the finding that the 2nd Respondent should refund the purchase price of Kshs. 200,000/= should be overturned.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Cross Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Who between the Appellant and the Respondents was in breach of the Sale Agreement dated the 6th August, 2002.
- Whether the Appellant was entitled to orders of specific performance.
- Whether the Appeal or Cross Appeal is merited

As to who between the Appellant and the Respondents was in breach of the Sale Agreement dated the 6th August, 2002.

It is not in dispute that the Appellant and the 2nd Respondent entered into a Sale Agreement dated the 6th August, 2002. It is further not in dispute that the 1st Respondent who was the registered proprietor of the suit land donated a Power of Attorney in respect to the transaction which is the subject of this Appeal. What is in dispute is that the Appellant paid Kshs. 200,000/= out of Kshs. 300,000/= being the purchase price but the 2nd Respondent declined to effect the transfer of the suit land to him claiming the Sale Agreement had been rescinded. At this juncture, I wish to first make reference to certain clauses in the Sale Agreement which is subject of the dispute herein. **‘Clause (1) provided as hereunder:’ That the Purchaser shall buy and the Vendor shall sell the said parcel of land at a total consideration of the sum of Kshs. 300,000/= which said amount will be payable by the Purchaser to the Vendor in the following manner:-**

a. An initial deposit of Kshs. 60,000/= shall be paid to the Vendor on/ or before the signing of this Agreement (receipt of which the vendor hereby acknowledges).

b. The balance of Kshs. 240,000/= to be paid to the Vendor in equal monthly instalments of Kshs. 50,000/= until payment in full.

Clause (5) It is hereby declared and agreed that the completion date shall be immediately after the Registration and issuance of a Title Deed in the name of the Purchaser or payment of the final instalment whichever is earlier.

Clause (6) The said property is sold in vacant possession but subject to the terms and conditions upon which the same is at present held by the Vendor BUT OTHERWISE free from all encumbrances and the Purchase shall take vacant possession of the same immediately. ‘

Clause 9. In the event the sale of this property is frustrated by any occurrence except default on the part of the Purchaser, the Vendor shall refund all the money paid to him by the Purchaser as well as the equivalent of 15% of the sale price being liquidated damages.

I note these were the key provisions governing the terms of the Sale Agreement. Based on the said terms I will proceed to analyze the evidence which was presented before the lower Court on who breached the said terms but before I do so, I wish to make reference to the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609**, where it was held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

In applying these principles to the dispute herein, I note the 1st Respondent donated a Power of Attorney in respect to the transaction herein. From a perusal of the Power of Attorney I note the 2nd Respondent was allowed to undertake the transaction in respect to the suit land including executing instruments on his behalf. I hence concur with the trial Magistrate’s findings that when the 1st Respondent donated the Power of Attorney to the 2nd Respondent, he diverted his interest including being sued and to sue over the suit land. I hence do not find that the Learned Magistrate erred by exonerating the 1st Respondent from this suit and will proceed to uphold this finding.

On perusal of the Sale Agreement, even though there was no indication of the completion date but on reading clause (1) the parties had indeed agreed that the balance of the purchase price was to be paid in monthly instalments of Kshs. 50,000. Based on the date of the Sale Agreement, it means the last date for payment of the balance of the purchase price should have been January, 2013 because as at November, 2012 when the Purchaser had paid a total of Kshs. 200,000, there was a balance of Kshs. 100,000 which was to be paid in two monthly instalments of Kshs. 50,000. Clause (6) required the Appellant to immediately take possession of the suit land but from the evidence adduced in the lower court, it emerged that he had not taken possession. As for the issue of payment of the purchase price, the 2nd Respondent as DW1 testified that the Appellant was not adhering to the payment of Kshs. 50,000 per month as indicated in the Sale Agreement. It was his testimony that he used to be paid in piecemeal. Vide a letter dated the 24th November, 2002, the 2nd Respondent wrote to the Appellant demanding to be paid the remaining balance once. I have reproduced a portion of the said letter which is the genesis of this dispute: **‘When you are ready, I would like you to pay me my balance only once. I won’t take the handouts you have been dishing to me. Write one cheque – Banker’s Cheque and I will sign the documents for the transfer of land. I will sign the documents at your lawyers office only, and I will also pick the cheque from there. This issue is now closed.....NB: I would like to receive my cheque on or before the final date of completion. Check the details in the Agreement. ‘**

I note from this excerpt that the 2nd Respondent actually commenced to vary the terms from the monthly payment to being paid at once. Further, he preferred being paid on or before the final date of completion, which date had not been expressly indicated in the Sale Agreement. The Appellant however as PW1 did not confirm in his evidence whether he made any other payments after receiving the said letter but it later emerged that he sought for the 2nd Respondent to pick the balance of Kshs. 100,000 sometime in 2013 but they were informed that the contract had been rescinded. I opine that parties are bound by the terms of their contract but at this juncture, I find that it is actually the 2nd Respondent as the vendor who had commenced varying the said terms by failing to put the Appellant in possession of suit land and demanding for the remaining balance at once. I note vide a letter dated the 24th April, 2003, the 2nd Respondent through Rinkaya & Company Advocates proceeded to issue a completion notice. While testifying in court, DW1 stated in court that the suit land had already been sold to a third party and he never went to the Land Control Board to procure a consent to transfer. The Appellant as PW1 claimed to have obtained consent of the Land Control Board but never presented a copy in court while the 2nd Respondent denied participating in the said process. I note this issue was not pleaded and hence find that the Trial Magistrate actually erred by holding that the agreement for sale was void by applying the provisions of the Land Control Act.

In the case of **Gurdev Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti, where the Court of Appeal in Civil Appeal**

No. 165 of 1996, held that the underlying principle in granting the equitable relief of specific performance is that, "the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action'

***Thrift Homes Ltd V. Kenya Investment Ltd 2015 eKLR*, the court stated that, "specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction".**

Further in the case of *Lamare vs Dixon 1873 L.R. 6HL 414* it was held that, "the court will not grant specific performance if the person is in breach of a particular undertaking then the court will not entertain his request that the other party be compelled to complete his part of the contract."

Based on my analysis above, while relying on the abovementioned decisions and also anchoring my determination on the principles enshrined in Articles 2, 4 and 10 of the Constitution in respect to social justice and equity, I find that since the 2nd Respondent continued to receive the purchase price but never put the Appellant in possession of the suit land as required; proceeded to vary the terms of the Sale Agreement by demanding a one off payment of the balance while not clear on when he would sign the documents; and disposing off the land to a third party, I find that he was indeed entitled to refund the purchase price he received to the Appellant. I hence find that the Learned Magistrate did not err by ordering him to refund the said purchase price. Since the 2nd Respondent had already sold the land to a third party, I find that the learned Magistrate was right in declining to make an order for specific performance. However, it is trite that in a contract, a party should not maintain a position of advantage over the other, and at this juncture since the 2nd Respondent received part of the purchase price and having disposed off the land, it is only just and equitable if he is directed to refund the Kshs. 200,000 with interest from the date of filing the lower court suit until payment in full. In the circumstance, I find the Appeal merited but the Cross Appeal unmerited. I will further proceed to make the following final Orders:

- i. This Appeal be and is hereby allowed.
- ii. The Cross Appeal be and is hereby dismissed
- iii. That Judgment and Order issued on the 21st January, 2015 be and is hereby reviewed with the 2nd Respondent directed to refund to the Appellant Kshs. 200,000 plus interest at court rates from the date of filing the suit until payment in full.
- iv. That the costs of the Appeal is awarded to the Appellant.

Dated Signed and Delivered via email this 28th Day of May, 2020

CHRISTINE OCHIENG

JUDGE