



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND APPEAL CASE NO. 28 OF 2018

HEZEKIEL NDEDE OKELLO.....APPELLANT

VERSUS

PAUL OTIENO AGUTU.....RESPONDENT

JUDGEMENT

Hezekiel Ndede Okello, (*hereinafter referred to as the appellant*) has appealed against the decision of Hon. W. K. Onkunya, Senior Resident Magistrate at Kisumu in Case No. 97 of 2018. In that case, Paul Otieno Agutu, (*hereinafter referred to as the respondent*) had sued the appellant claiming that they entered into a sale agreement in respect of land title number Kisumu/Manyatta 'A'/1428 within Kisumu Municipality. The purchase price was Kshs.700,000. Kshs. 100,000 was to be paid upon the signing of the agreement and Kshs.600,000 upon successful transfer to the respondent. The respondent paid Kshs.217,000.

Pursuant to Clause 2 of the aforesaid sale agreement the appellant was to deliver to the respondent:-

- i. Original title deed.**
- ii. Transfer of land duly executed by the vendor.**
- iii. Land control board consent to transfer.**
- iv. Copies of ID and PIN of the vendor**
- v. 3 passport size photos of the vendor.**

It was further agreed by the parties that immediately upon receipt of the aforesaid documents the appellant would proceed immediately with the process of registering transfer in favour of the respondent.

That upon further investigations, the respondent realized that the appellant was never the registered proprietor of the aforesaid parcel of land. To the date of filing thecaes in the lower court despite repeated demands both oral and written the appellant had failed, ignored and/or refused to surrender to the respondent or his advocate the completion documents referred to at Clause 2 of the aforesaid sale agreement by the completion date which was agreed to be ninety (90) days from the date of execution of the agreement.

That in further breach of the aforesaid sale agreement, the appellant had failed to put the respondent into possession of the suit property which was equally claimed by the estate of one Jekoniah Ndinya Acholla.

Due to the appellant's failure to avail the completion documents and also hand over vacant possession of the suit parcel of land to the respondent despite demands the said agreement had been frustrated leading the respondent to rescind the same.

The respondent's claim against the appellant therefore was for the sum of Kshs.217,000 made up as follows:- (a) Refund of purchase price – Kshs.217,000. Interest as per Clause 6 of the agreement.

The respondent further sought interest on the aforesaid sum of money at court rate w.e.f 29th August, 2014 until payment in full.

The respondent prayed specifically for Kshs.217,000 and Interest thereon as per Clause 6 of the sale agreement w.e.f 29th August, 2014 until payment in full plus Costs of the suit and Interest on (a) above at court rates.

The appellant filed a defence denying having presented himself as the mother of the registered owner of the parcel of land. That the

respondent within his personal knowledge and belief entered into sale agreement with the appellant having been informed the conditions and subject of the suit property as made in the Sale Agreement Clause 4(a) of the special condition thereof.

The appellant denied having ever breached the purported agreement but the breach was caused by the respondent who did not comply with the Clause 2 of the special conditions. On without prejudice the respondent instead of complying to the clause of aforesaid agreement, he started to pay the same by meagre instalments of Kshs.2,000, Kshs.10,000, Kshs.5,000 etc to make a total of Kshs.117,000 only.

The appellant averred that the respondent was well informed the suit property was under and engaged in court litigation with a third party and therefore the proceeds the respondent was paying has to be used for the legal battle.

The respondent opted to apply oppression, intimidation and forcibly demanding title deed of the same land from the appellant.

The appellant pleaded that the verifying affidavit in support of the plaint was fatal and defective and therefore did not disclose any cause of action to proceed for trial. He prayed that the respondent be made liable to pay the interest as relayed in clause 6 of the sale agreement.

When the matter was placed before the learned magistrate for hearing, the respondent gave evidence that a land agent known as Faraji agent informed him that there was land owned by Hezekia Ndeda. They signed a sale agreement with Ndeda though Ndeda did not have a title deed. The agreement was signed before an advocate. He paid the appellant Kshs.100,000. The purchase price was Kshs.700,000. He later paid Kshs.117,000. The respondent later came to learn that the appellant had no documents. The respondent conducted a search and found that he parcel of land was registered in the names Jekoniah Ndinya Acholla.

The appellant on his part stated on oath that he wanted to sell the suit land and talked to brokers to get him a buyer. He informed the broker that he had a case in court in respect of the land and that he won the case. The land was in the names of Jekoniah Acholla. There was a pending case and the appellant was to make a follow up. He admitted that the Respondent gave him Kshs.217,000. The learned magistrate heard the case and properly framed the following issues as ripe for determination:-

- 1. Whether there was a valid land sale agreement.**
- 2. Whether the defendant is entitled to orders sought.**
- 3. Whether the defendant was in breach of the sale agreement**
- 4. Who is to bear the costs.**

On the first issue, the learned magistrate found that there was a valid sale agreement dated 29th August, 2014. Both parties executed the agreement.

The basis of the appeal by the appellant is that the learned magistrate did not evaluate evidence presented to him and ignoring the terms and conditions of the agreement.

I have considered the evidence of appellant, submissions on record and do find that this case revolves on the agreement of sale sated 29th August, 2014. There is no dispute that the agreement was valid. However, the appellant was not registered as proprietor but intending to be registered as proprietor of the suit land. The appellant was not the owner of the land but also appeared to be a broker. The respondent paid Kshs.100,000 as agreed and added Kshs.117,000 which was not part of the agreement. The respondent was to pay Kshs.200,000 upon the appellant handing over to the respondent agreement of the following documents:-

- 1. Original title deed.**
- 2. Transfer of land duly executed by the vendor.**
- 3. Land control board consent to transfer.**
- 4. Copies of ID and PIN of the vendor**
- 5. 3 passport size photos of the vendor.**

It is clear that the appellant was in breach of this clause of agreement as he did not hand over the documents. There was no mention of a court case in the agreement and therefore he could not bog down the respondent with the court case.

I do find that the learned magistrate properly considered the evidence on record and arrived at a just decision especially when the appellant stated in the close of his evidence that **"I urge the defendant to be patient. He can thereafter decide whether he want a refund of the money or the land."** This implies that the appellant was willing to refund the money.

The appeal herein is not merited as the appellant as at the time of filing the appeal was not the registered owner of the land and therefore could not transfer the land to the respondent. The appeal is dismissed with costs.

DATED, DELIVERED and SIGNED THIS 22nd DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE