



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO. 16 OF 2019

REBECCA WANGUI KAMAU.....APPELLANT

VS

PETER KIBICHO KAGIRI.....1STRESPONDENT

NANCY WANJIRU MAINA.....2NDRESPONDENT

(Being an Appeal against the entire judgement by the Hon E M Nyagah PM

on the 16/7/19 in CMCC No 52 of 2012).

JUDGEMENT

1. In the lower Court the Appellant filed suit against Peter Kibuchi Kagiri, the 1stRespondent seeking orders for judgement against him in the sum of Kshs 126,500/- together with costs and interest. His case is that in the month of October 2006 the 1stRespondent agreed and undertook to sell to him the suit land parcel No LOC11/MARAGI/5293 at the price of Kshs 100,000/-. In pursuance to the said agreement, an agreement of sale was executed by the parties on the 23/10/2006 which contained the covenants between the parties. It was a term of the agreement that the subject plot being sold was parcel 5427 a subdivision of parcel LOC11/MARAGI/5293. Vacant possession was due upon the payment of the balance of the purchase price and in default the party in default would pay liquidated damages of 50% of the amount received by the vendor. By the time of signing the agreement of sale on the 23/10/2006 Kshs 15,000/- had been paid to the 1stRespondent leaving a balance of Kshs 85,000/- payable on or before the 6/11/2006.

2. It is the case of the Appellant that she paid the full purchase price to the 1stRespondent who defaulted in transferring the land to her and refused and or failed to refund the full purchase price. The Appellant states that she was refunded Kshs 23,500/- leaving a balance thereto.

3. In his statement of defence the 1stRespondent avers that the suit is defective, scandalous and discloses no cause of action against him. That the suit property had been bought from a third party for the sum of Kshs 80,000/- and resold to the Appellant and further that he did not receive the purchase price in the sum of Kshs 100,000/- from the Appellant and that if it was received it was done from a party who had no interest in parcel LOC11/MARAGI /5293.

4. With the leave of the Court the 1stRespondent took out third-party proceedings against one Nancy Wanjiru Maina (2ndRespondent) on the 12/2/2013 claiming an indemnity in full or contribution to any judgement that may be entered against him in respect to the Appellant's claim. The gist of the 1stRespondent's claim is that the third party was aware or ought to have known that the title documents in respect to parcel LOC11/MARAGI/5293 were not authentic and that the transaction could not be completed without a clean title and charged that the third party was liable to the Appellant for any loss and or damages thereto. An undated agreement between the third party and the 1stRespondent was attached in which the parties agreed to sell the parcel LOC11/MARAGI /5293 to the 1stRespondent at the sum of Kshs 80,000/- of which it is expressed that Kshs 10,000/- was paid to the third party leaving a balance of Kshs 70,000/-. It would appear the completion period for the agreement was 12/11/2005.

5. The 2nd Respondent entered appearance but failed to file a statement of defence and an interlocutory judgement was entered against her on the 17/10/14.

6. The case of the Appellant and the 1stRespondent proceeded to full hearing and on the 16/7/19 the Hon learned Magistrate delivered judgment and held that the 2nd Respondent should be liable and entered judgement for the Appellant against the 2nd Respondent in the sum of Kshs 126,500/-

7. Aggrieved by the said judgment the Appellant appealed and set out 7 grounds of Appeal; that the learned Magistrate erred in law and fact by entering judgement against the 2nd Respondent instead of the 1stRespondent whilst there was no negligence proved; the Magistrate was faulted in failing to appreciate the law on contracts in land as opposed to the tort of negligence where third parties come in; the Magistrate misdirected himself in respect to third party relationship leading to the judgment against the 2nd Respondent instead of the 1st Respondent; further that he failed to consider the evidence of the Appellant in particular that the 1stRespondent is the one who received the purchase monies from the Appellant and in failing to award the Appellant costs of the suit.

8. The Appeal is based on the grounds as thus; the Appellant had no contractual duty with the 2nd Respondent in the sale of the land; liability cannot be apportioned in contract; the prayers in the plaint were specifically for refund of the purchase monies which were paid to the 1stRespondent and not the 2nd Respondent.

9. The Appellant submitted that the purchase price was received by the 1stRespondent and not the 2nd Respondent and therefore he is liable to refund the monies. There was no contract between the 2nd Respondent and the Appellant. Relying on the case of **Sango Bay Estates Limited & Others Vs Dresdner Bank AG (NO.2) 1971 EA 307** held as follows;

“in a third party proceeding it is for the Defendant to satisfy the Court that there was a proper question to be tried as to liability of the third party. In other words, the Defendants in the instant case must satisfy the Court that they have a right of indemnity against GHH and that that right arises out of the contract between Sango Bay and GHH. In the absence of such a contract they must fail.”

10. That in this case there was no question to be tried between the 2nd Respondent and the Appellant.

11. The 1stRespondent opposed the Appellant's Appeal and submitted that judgement in default had been entered against the 2nd Respondent in favour for the Appellant and there is no need for her to complain.

12. I have reviewed the pleadings in the lower Court, the record of Appeal and the written submissions of the parties and the key question for determination is whether it is the 1stRespondent or the 2ndRespondent who is liable for the refund of the purchase price in favour of the Appellant.

13. In the case of **United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd –Vs- East African Underwriters (Kenya) Ltd [1985] eKLR** the Court of Appeal developed the principle further urging Appellate Court's to resist the temptation of readily substituting the discretion of their members for that of the trial Court. He stated: -

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

14. It is on record that the 1stRespondent sold parcel No LOC11/MARAGI /5293 to the Appellant and acknowledged payment of the purchase price in the sum of Kshs 100,000/- .He failed to transfer the land to the Appellant and blamed the 2nd Respondent whom he had purchased land for onward selling to the Appellant for the default. He however admits that he refunded Kshs 23,500/- leaving a balance unpaid.

15. It is not in contestation that the transaction collapsed due to the fact that the land was not available for transfer to the Appellant. The issue is that judgment in default has been entered against the 2nd Respondent as indemnity against any liability by the 1stRespondent. The 1stRespondent also refunded part of the purchase price thus rescinding the agreement for sale.

16. The 3rd party proceedings have been admitted where the 1stRespondent applied and was given leave by the Court. The 2ndRespondent was served with the 1stRespondent's claim for indemnity. She entered appearance but did not file a defence. The case proceeded to conclusion so much so that judgment ought to have been entered against the 1stRespondent in the lower Court. It was not done. Upon judgment the 1stRespondent's application and the grant of it to seek indemnity crystallized. Upon this event the 2ndRespondent became responsible for payment of the Appellant's claim in the judgement entered against the 1stRespondent.

17. The 1stRespondent is sued for the recovery of a purchaser price in the lower Court. He has applied to Court and shown that the reason he has not paid is because of the conduct of the 2ndRespondent in failing to avail the land for transfer to the Appellant. The 2ndRespondent/Defendant has not controverted the claim. It is admitted.

18. The Learned Magistrate entered judgement against the 2ndRespondent without pronouncing judgement against the 1stRespondent/Defendant first. He should have entered judgment against the 1stRespondent/Defendant as prayed. The Hon Magistrate reached the right decision but wrongly in that he failed to enter judgement against the 1stRespondent for which he stood indemnified by the 2ndRespondent.

19. It is the finding of the Court that the 1stRespondent is fully indemnified on account of the judgment against the 2ndRespondent. There is therefore judgment against the 2ndRespondent/Defendant to the extent of the sum claimed by the Plaintiff from the 1stRespondent. The 2ndRespondent is liable to the Plaintiff under the indemnity to pay the Plaintiff's claim as prayed in the plaint.

20. In the end, the judgement of the lower Court is varied and replaced with the judgement that the 1st Respondent is liable to refund the sum of Kshs 126,500/- in favour of the Appellant. Further that the 2nd Respondent shall indemnify the 1st Respondent to the full extent of the liability. The 1st Respondent shall pay the Appellant upfront and seek indemnity from the 2nd Respondent.

21. The costs of the suit in the lower Court and the Appeal are in favour of the Appellant.

22. **It is so ordered.**

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 12TH DAY OF MAY 2020

J G KEMEI

JUDGE