



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 1 OF 2019

PATRICK LUNGALIA

(Suing as the personal representative of the Estate of

GEORGE LUNGALIA SHIVEKA).....APPELLANT

VERSUS

VINCENT KILOPO.....1ST RESPONDENT

SIMON MATAIYWA.....2ND RESPONDENT

JUDGMENT

BACKGROUND

1. This is an appeal that arose from the decision of Hon V.O. Adet, SRM, Kapenguria delivered on **13/12/2018** in **Kapenguria PM's Court Environment and Land Case No. 1 of 2018**
2. The facts of the dispute in the court below were as follows: the appellant (who is now the appellant) being a personal representative of one *George Lungalia Shiveka*, deceased, filed a suit against the respondents (who are now the respondents), on the **29th January, 2018**. In the plaint he claimed that the 1st respondent sold land to the deceased in the year **2000** and the deceased erected his home on the land and lived there till his demise and was buried thereon in **2006**. The 1st respondent then sold the land to the 2nd respondent without involving the appellant in any manner. The appellant sought an order rescinding the sale agreement between the 1st and 2nd respondents and a declaration that the plot belongs to the deceased. He also sought a permanent injunction restraining the respondents from interfering with the suit land.
3. On **31/1/2018**, the respondents entered appearance to the suit, and filed a joint defence on the **1/2/2018** through the law firm of Ms. Samba & Co. Advocates. Subsequently an amended joint defence and counterclaim was filed on **15/2/2018** in which the respondents denied the claim and sought an order of eviction of the appellant and his family and anyone claiming under the deceased from title number **West Pokot/Siyoi "A"/3619** which they identified in their pleading as the land reference number of the plot. The respondents claimed that the agreement between the 1st respondent and the deceased was terminated by reason of the deceased's failure to pay the full consideration stipulated in the agreement and that further the agreement was void for want of the land control board consent. It was further stated that the 2nd respondent was rightfully developing the said plot having lawfully purchased the same from the 1st respondent in **2004**. The respondents further averred that the suit lacked material particulars of the identity of the land and that there was no privity of contract between the appellant and the 2nd respondent. The respondents averred in the counterclaim that the 1st respondent was at all material times the registered owner of the suit land and that the occupation of the same by the appellant was trespass and in contravention of **section 22** of the **Land Control Act**.
4. The appellant responded to the amended defence and counterclaim on **22/2/2018**, denying the counterclaim. He admitted that the 1st respondent was the registered owner of the land but his ownership had ceased immediately he sold it to the deceased. He maintained that if there had been any breach then the 1st respondent should have notified him of the same he also averred that no person interfered with the suit land during the lifetime of the deceased, and that the respondents were guilty of fraud. He stated that the 2nd respondent was the person guilty of trespass.
5. On **27/2/2020** this court gave directions for the appeal to be heard by way of written submissions. The respondents filed their submissions on **28/5/2020** while the appellant filed no submissions. I have considered the grounds of appeal and the evidence on the record and the filed submissions.
6. In its judgment the magistrate's court considered the evidence of the parties and took exception to the appellant's failure to refer to the suit

land by an appropriate land reference number. The court identified the issues arising for determination as follows:

- a. Whether there was a contract between the deceased and the 1st respondent;**
- b. If so whether the terms of the contracts were fully complied with to enable the deceased acquire title to the said piece of land;**
- c. If so, whether the 1st respondent had capacity to deal with the parcel of land the subject of the contract.**

7. The court noted that the 1st respondent and the appellant were in agreement that a contract had been executed as claimed in the plaint. He then made an observation, which in my view is erroneous, that all the parties were in agreement that the balance of the purchase price was never paid. I state that it is an erroneous statement since it is clear from the appellants evidence that he stated that he was not aware whether the balance was paid or not. The learned trial magistrate proceeded to find that the agreement was executed on **23/8/2000** and the same was to be completed on **25/1/2001**; that the deceased was in breach of the agreement for failure to pay the balance as agreed, and that by his conduct he repudiated the contract and died before honouring the same, and by the time of filing the suit his estate had not pursued the completion of the contract. Relying on the case of **Ongocha Vs the City Council of Nairobi 1982 KLR 151**, he found that where a party was guilty of a fundamental breach, then such a contract had to come to an end. The trial magistrate observed that though the agreement was silent on the manner of obtaining the consent of the LCB, had the deceased completed his part of the contract then the 1st respondent would have probably applied for the LCB consent. He found that the 1st respondent never transferred any interest to the deceased for the reason that the contract was not completed since the basics of a conveyancing process were not undertaken and therefore the 1st respondent was at liberty to deal with the land as he wished, leaving the deceased's estate to pursue a refund if it wished.

The Appeal

8. In a Memorandum of Appeal dated **11/1/2019** and filed in court on **17/10/2019** through Ms. R.E. Nyamu & Co. Advocates the appellant herein being dissatisfied with that judgment appealed to this court against the decision on the following grounds:

- 1. The Learned Trial Magistrate erred in law and fact by failing to analyze the facts and evidence of the case presented to him.**
- 2. The Learned Trial Magistrate erred in law by allowing the counterclaim by the respondents when the said counterclaim had not been proved on a balance of probabilities as required in law.**
- 3. The Learned Trial Magistrate erred in law and fact by allowing the 1st respondent's counterclaim on a title that had extinguished as against the 1st respondent.**
- 4. The Learned Trial Magistrate erred in law and fact in allowing a counterclaim which was essentially time barred.**
- 5. The Learned Trial Magistrate erred in law by dismissing the appellant's suit based on facts not pleaded and proved by any party.**
- 6. The Learned Trial Magistrate erred in law and fact by not considering the appellant's case and as a result arrived at a wrong conclusion.**

9. The appellant prays that:

- (a) The judgment of Hon V.O. Adet, SRM, in Kapenguria SPM's Court Environment and Land Court case No. 1 of 2018 be set aside and the respondents' counterclaim therein be dismissed.**
- (b) The appellant's prayers in the plaint in the Kapenguria SPM's court Environment and Land Court Case No. 1 of 2018 be allowed as prayed.**
- (c) The respondents be condemned to pay costs of this appeal and costs in the lower court.**

DETERMINATION

10. As stated in *Selle -vs- Associated Motor Boat Co. Ltd. [1965] E.A. 123*, this Court as the first appellate court should evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

11. **PW1, Patrick Lungalia** testified on **9/8/2018**. He adopted his written statement filed on **29/1/2019** as his evidence-in-chief. In his evidence, he stated that he was a witness at the execution of the agreement between the deceased and the 1st respondent and that the deceased developed the plot; that the consideration was **Ksh 40,000/=**; that he was not aware whether any other amount was paid to the 1st respondent beyond the **Ksh 20,000/=** deposit. However, he maintained that he had never received any letter requesting for the balance and on the date of burial of the deceased the vendor did not complain. The deceased had **3** children and at the time of his demise the plot was reputed to be his. The 2nd respondent later claimed the plot. On cross examination he did not know whether the parties went to the land control board.

12. **DW1, Vincent Kilopo** testified on the same date as **PW1**. He adopted his written statement as his evidence-in-chief in this case. He admitted the agreement. He stated that he sold the deceased the suit land for **Ksh 40,000** and the deceased paid **Ksh 20,000/=** and failed to pay the balance. The parties also never went to the land control board. He waited for the balance until **2014**. Then he sold the same land to the 2nd respondent. Upon cross-examination he admitted that he never sent a demand letter or any notice to vacate the land and that the deceased's remains were interred on the suit land.

13. **DW2, Simon Mataiywa** testified on **9/8/2018**. He adopted his written statement on **23/4/2018** as his evidence-in-chief in this case. He stated that he did not know the deceased and that he purchased the suit land from the 1st respondent.

Issues for Determination

14. The issues that arise in this appeal are as follows:

(a) Whether the Learned Trial Magistrate erred in law and facts by failing to analyze the facts and evidence of the case presented to him and failed to consider the appellant's case and as a result arrived at a wrong conclusion.

(b) Whether the counterclaim was proved on a balance of probabilities as required in law and whether the Learned Trial Magistrate erred in law by allowing the counterclaim by the respondents.

(c) Whether the Learned Trial Magistrate erred in law by dismissing the appellant's suit based on facts not pleaded and proved by any party.

(d) Who should bear the costs?

15. The issues are discussed as hereunder:

(a) Whether the Learned Trial Magistrate erred in law and fact by failing to analyze the facts and evidence of the case presented to him and failed to consider the appellant's case and as a result arrived at a wrong conclusion.

16. The first issue that naturally arose from the pleadings in the trial court is whether there was any breach of contract on the part of the deceased. From the plaint it is clear that the appellant's case is that the deposit was paid, but he was unsure whether the balance had been paid. The appellant appears to be pushing the narrative that the only logical presumption that could arise from the 1st respondent's conduct is that the balance had been paid by the deceased, and that if it was not paid, then the 1st respondent was obliged to notify the appellant of the default which he did not do. Therefore the learned magistrate obviously erred in his judgment in holding that all parties were in agreement that the balance had not been paid.

17. It must be remembered that no evidence can be obtained from the deceased now and that appellant being a personal representative of the deceased, may not know the details regarding all the dealings between the parties to the agreement. The 1st respondent never called upon the deceased during his lifetime to answer to the claim that he had not paid the balance. I think it would be inequitable to call upon the appellant at this time to account for the payment of the balance of consideration. He is therefore quite candid when he states that he is not aware whether the balance was paid. However he appears to rely solely on the conduct of the 1st respondent.

18. The learned trial magistrate's observation to the effect that parties were in agreement that the balance was not paid therefore made the appellant's case take on a very different trajectory whereby no proof of non-payment was required of the 1st respondent despite his apparent conduct; that is the conduct which had signified to the appellant either acquiescence or that payment had been effected by the deceased.

19. To get a proper perspective of the issue of possible acquiescence, this conduct of the 1st respondent must be considered against the date and the terms of the agreement. The parties agree that the agreement executed on the **23/8/2000** and that the date of completion was **25/1/2001**.

20. The 1st respondent avers that he sold the land to the 2nd respondent in **2004**; however, the appellant avers in the reply to the amended defence and counterclaim that if the land was resold in **2004** during the lifetime of the deceased who died in **2006** and the 2nd respondent only emerged to take up possession of the land in **2009**, then that may be taken to be evidence of fraud on the part of the respondents.

21. The 1st respondent is on record as stating that he last made enquiries regarding the balance in **2014**, **8** years after the demise of the original buyer. He does not state that he enquired of any information regarding the agreement from the appellant.

22. The trial magistrate should also have considered the evidence of the appellant that no dispute was recorded over the land during the lifetime of the deceased, and that the appellant was not informed by the 1st respondent that the land would be resold. This would have enabled him come to a finding or findings which would in turn have enabled him to establish whether there was acquiescence on the part of the 1st respondent and also whether at law the failure to issue a notice to the appellant was fatal to any attempts to rescind the agreement on the part of the 1st respondent and therefore he erred in not doing so. If he had done so he would have appreciated the fact that the appellant's claim was founded on the belief, right or wrong, that the interest in the land had passed to the deceased and the contract between the deceased and the 1st respondent had never been rescinded, and that the 1st respondent therefore had no interest in the land to dispose of to the 2nd respondent.

(b) Whether the counterclaim was proved on a balance of probabilities as required in law and whether the Learned Trial Magistrate erred in law by allowing the counterclaim by the respondents.

23. In dealing with this issue the inevitable question that arises is whether the 1st respondent had capacity to dispose of the suit land to the 2nd respondent. The counterclaim was for an order of eviction of the appellant and his family and anyone claiming under the deceased's estate. What is not in doubt is that that counterclaim was premised upon the fact that the 1st respondent was the registered proprietor of the suit land and that the agreement between the 1st appellant and the deceased had been rescinded.

24. The 1st respondent had admitted that he had sold the land to the deceased. By delaying in evicting the deceased and his family from the land between 2001 when the cause of action may have been deemed to have accrued and 2018 when this suit was filed the question arises as to whether he was not culpable of acquiescence. In my view, at this juncture the appellant's claims that no notice was issued to him that the land would be resold to the 2nd respondent becomes relevant.

25. If the agreement gave the deceased vacant possession upon its execution, the deceased and any person claiming under him rightfully entered onto the land under the terms of the agreement. Judging by its terms, time was clearly of the essence in the contract; however, in this court's view there is no clear evidence of breach on the part of the deceased. What is evident is that there is a long interregnum between the date of sale to the deceased and the appearance of the 2nd respondent during which nothing appears to be recorded about the contract. Save the date, there was no provision for the manner of payment of the balance of consideration in the agreement. Should this court assume that nothing ever occurred in furtherance of the contract on the part of both parties? In my view that should not be the automatic assumption. As stated before in this judgment no evidence of acts, whether recorded in writing or otherwise, of furtherance of the contract may be obtained from the deceased and not much can be expected from the appellant who is now in the shoes of the deceased.

26. Noting that the deceased stayed on the suit land for 5 years after the date of completion without any attempts at his eviction and that the 2nd respondent only took possession in 2009, the burden of proof must shift to the 1st respondent to establish that that the deceased's prolonged occupation of the land was not as a result of the deceased's compliance with the terms of the contract. Evidence of the failure to pay for the land may be by way of production of correspondence or notice of breach and a notice to complete which the 1st respondent does not have. It is therefore evident that if the deceased was in breach, the 1st respondent never gave the deceased any notice of completion or any notice of rescission of the contract for breach, for those documents would have formed part of the respondent's evidence at the hearing.

27. In Gatere Njamunyu vs. Joseck Njue Nyaga [1983] eKLR the Court of Appeal was of the view that:

"The principle to be acted upon in such a case is stated in 9 Halsbury's Laws (4th Edn) p 338, para 482, ie:

"Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties."

Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. 9 Halsbury's Laws, para 481 (ibid)." emphasis mine.

28. Time was of essence in the agreement dated 23/8/2000. However, in this court's view, any finding for the respondents on the counterclaim in the magistrate's court necessitated a prior finding that the agreement had been rescinded by the 1st respondent by reason of breach, that breach being occasioned by the deceased only, and that the 1st respondent therefore still had interest in the suit land and that the appellant and others with him on the land were trespassers. Rescission should only have been deemed as having occurred after due consideration of whether the procedure of terminating the contract had been complied with. This procedure is the issuance of a notice of breach and a notice to complete. These should have been served upon the deceased, and if that was not done, on the appellant who subsequently stepped into his shoes and should have been clear evidence of breach on the part of the deceased, or the appellant, as the case may be.

29. In this court's view the only action of the 1st respondent concerning the suit land was manifested to the appellant in 2018, which was an unreasonable period of time for the purposes of the time frames given in the contract.

30. This court is of the opinion that a seller is accountable for each and every day, week month and year during which he fails to take any action to effectively rescind an agreement and he may not be permitted to wake up after an inordinate delay as in this case, long after the demise of the purchaser, and claim that he rescinded the contract on an unknown date and proceed to dispose of the subject land without notice to the personal representative of the deceased.

31. In my view the appellant may be forgiven for having assumed all along that the full consideration had been paid for the suit land. In the circumstances, the issuance by the 1st respondent of the notices earlier stated became all the more necessary.

32. Having not made such considerations, the learned trial magistrate could not have arrived at a proper conclusion in the matter. He therefore erred in granting the counterclaim.

(c) Whether the Learned Trial Magistrate erred in law by dismissing the appellant's suit based on facts not pleaded and proved by any party.

33. I have perused the judgment of the trial court and come to the conclusion that the trial magistrate did not base his decision on facts not pleaded by any of the parties and this ground has no merit.

34. CONCLUSION.

(d) What order should issue?

In the final analysis I find that the appeal has merit. I therefore issue the following orders:

- a. The judgment and decree of the lower court dated 13/12/2018 in Kapenguria PM's Court Environment and Land Case No. 1 of 2018 is hereby set aside.**
- b. The appellant's claim in in Kapenguria PM's Court Environment and Land Case No. 1 of 2018 as contained in the plaint dated 29/1/2018 is hereby allowed in terms of prayers (a), (b) and (c).**
- c. The respondents shall pay to the appellant the costs of this appeal and the costs of the suit in the lower court.**

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 30th day of June, 2020

MWANGI NJOROGE

JUDGE, ELC, KITALE.