



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 82 OF 2016

JAMES NGANGA KARANJA.....APPELLANT

VERSUS

GRACE MUKAMI NDUNGU.....1ST RESPONDENT

STANLEY MAINA GATUBUI.....2ND RESPONDENT

JUDGMENT

1. This appeal is against the decision of Hon. E.Michieka SRM made on 23rd May, 2016 in Kikuyu Senior Principal Magistrate's Court Civil Suit No. 302 of 2013 (hereinafter referred to as "the lower court"). The appellant filed a suit against the 1st respondent in the lower court seeking; an order directing the executive officer of the court to sign the relevant documents to facilitate the transfer of all that parcel of land known as Dagoretti/Kinoo/2021(hereinafter referred to as "the suit property") to the appellant, an order directing the 1st respondent to perform and/or complete the contract entered into between the appellant and the 1st respondent in respect of the suit property and, in the alternative, an order that the 1st respondent does compensate the appellant for the loss of the suit property at the market value of the suit property and the developments thereon.

2. In his amended plaint filed in the lower court, the appellant averred that at all material times, the suit property was registered in the name of the 1st respondent's husband, Johnson Ndungu Nganga (deceased). The appellant averred that on 20th May, 2010, he entered into an agreement of sale with the 1st respondent as a legal representative of the estate of the deceased under which the 1st respondent agreed to sell to him the suit property at a consideration of Kshs. 400,000/- on terms and conditions that were set out in the said agreement. The appellant averred that whereas he fulfilled his part of the said agreement of sale by paying to the 1st respondent the full purchase price, the 1st respondent refused and/neglected to execute the necessary documents to facilitate the transfer of the suit property to the appellant. The appellant averred that after the 1st respondent obtained grant of letters of administration in respect of the estate of the deceased, the 1st respondent caused the suit property to be registered in her name as trustee of her six (6) children.

3. The 1st respondent filed a defence to the appellant's claim in the lower court and a counter-claim against the appellant. In her defence, the 1st respondent averred that the agreement of sale between her and the appellant was subject to the succession proceedings relating to the estate of the deceased. The 1st respondent averred further that her children did not consent to the transaction and that she had no legal capacity to enter into the agreement with the appellant. The 1st respondent averred that pursuant to the orders that were made in the succession proceedings aforesaid, the suit property belonged to her children. The 1st respondent averred that the said agreement of sale dated 20th May, 2010 between her and the appellant was null and void and that she was always ready and willing to refund to the appellant the payments that she received from him under the said agreement for sale. The 1st respondent averred that she had no capacity to transfer to the appellant the suit property that did not belong to her. In her counter-claim, the 1st respondent reiterated the contents of her defence. The 1st respondent reiterated that the agreement dated 20th May, 2010 between her and the appellant was null and void. The 1st respondent averred further that she had approached the appellant with a view to refunding to him the payments that she had received from him as purchase price but the appellant had refused to accept the refund.

4. The 1st respondent averred that the appellant had no proprietary interest in the suit property and that he had refused to hand over possession of the same to the 1st respondent. The 1st respondent averred that the appellant was occupying the suit property illegally and was frustrating the 1st respondent's dealings with the property. The 1st respondent sought judgment against the appellant for; a declaration that the agreement for sale dated 20th May, 2010 between the 1st respondent and the appellant was null and void, an order that the appellant vacates and hands over possession of the suit property to the 1st respondent and an injunction restraining the appellant from entering, utilising and/or in any other way interfering with the suit property.

5. From the record, the appellant did not file a defence to the 1st respondent's counter-claim. The 2nd respondent was added to the suit later as an interested party. The 2nd respondent's interest in the suit before the lower court did not come out clearly from the pleadings and

proceedings of the lower court. In his evidence in the lower court, the 2nd respondent stated that he purchased the suit property together with the appellant. He did not however come out clearly whether he was supporting the appellant's claim or not.

6. The lower court case was heard and judgment delivered on 23rd May, 2016 by Hon. E.Michieka SRM. The lower court entered judgment for the appellant against the 1st respondent in the sum of Kshs. 400,000/- being a refund of the purchase price that the appellant had paid to the 1st respondent for the suit property together with interest thereon at court rate from the date of judgment until payment in full. The court also allowed the 1st respondent's counter-claim against the appellant. In its judgment, the lower court framed three (3) issues for determination. The first issue was whether the appellant was entitled to specific performance of the agreement for sale dated 20th May, 2010 that the appellant entered into with the 1st respondent. The second issue was whether the appellant was entitled to the alternative relief that he had sought namely, compensation for the loss of the suit property equivalent to the value of the property and the developments thereon. The third issue was whether the 1st respondent was entitled to the reliefs sought in her counter-claim.

7. On the first issue, the lower court found that as at the time the 1st respondent entered into the agreement of sale dated 20th May, 2010 with the appellant, the suit property was registered in the name of the 1st respondent's deceased husband and that the grant of letters of administration in respect of the deceased's estate that was issued to the 1st respondent and her daughter had not been confirmed. The lower court also found that the 1st respondent's daughter who was a co-administrator of the estate of the deceased did not consent to the sale of the suit property to the appellant. The lower court held that since the suit property belonged to the deceased and not to the 1st respondent and the 1st respondent's co-administrator of the estate of the deceased did not consent to the transaction, the sale was void and unenforceable by an order of specific performance. The lower court held further that since the grant of letters of administration in respect of the estate of the deceased that was issued to the 1st respondent and her daughter had not been confirmed as at the time the 1st respondent entered into the agreement of sale dated 20th May, 2010 with the appellant, the 1st respondent had no legal capacity to sell the suit property. The lower held that the agreement of sale between the 1st respondent and the appellant was also void and unenforceable on this account. In support of this holding, the lower court cited section 55 of the Law of Succession Act, Chapter 160 Laws of Kenya and the case of Gitanga Mwaniki & Another v. Annunciata Kibue[2013]eKLR. The lower court held that since the agreement for sale dated 20th May, 2010 was void, the appellant was not entitled to an order of specific performance.

8. On the issue whether the appellant was entitled to compensation for the loss of the suit property equivalent to the value of the property and the developments thereon, the lower court made a finding that the appellant had paid to the 1st respondent a sum of Kshs. 400,000/- as purchase price for the suit property. The court made further finding that there was no evidence placed before the court by the appellant as to the developments that the appellant had carried out on the suit property and the market value of the property. The court held that there was no basis upon which it could award the appellant the market value of the suit property. The lower court faulted the appellant for adducing evidence in the form of a valuation report through written submissions. The lower court held that since the agreement of sale between the 1st respondent and the appellant was void ab initio, the fairest order to make in the circumstances was to put the parties back to the position in which they were prior to the contract.

9. On the last issue, the lower court found that the appellant did not file a defence to the 1st respondent's counter-claim. The lower held that the 1st respondent had proved the counter-claim to the required standard and was entitled to the reliefs sought. It is the foregoing findings and holdings by the lower court in its judgment delivered on 23rd May, 2016 which are the subject of this appeal.

10. In his memorandum of appeal dated 15th June, 2016, the appellant challenged the decision of the lower court on 4 grounds namely;

- (a) That the lower court erred in law and fact by failing to consider and appreciate the serious triable issues that were raised by the appellant in his pleadings.
- (b) That the lower court erred in law and fact by failing to appreciate the evidence that was tendered by the appellant.
- (c) That the lower court erred in law and fact by failing to appreciate the current market value of the suit property in its judgment.
- (d) That the lower court erred in law and in fact by failing to appreciate the conduct of the 1st respondent in relation to the dispute that was before the court thereby arriving at a wrong decision.

11. On 27th March, 2019, the court directed that the appeal be heard by way of written submissions. Following that direction, the appellant filed his submissions on 21st January, 2020 while the respondents filed their submissions on 14th January, 2020. On ground one of appeal, the appellant submitted that the lower court erred in failing to find that the suit property was sold to the appellant by the 1st respondent's deceased husband and that the agreement of sale dated 20th May, 2010 was intended merely to commit the 1st respondent to perform the agreement that the appellant had entered into with her deceased husband. The appellant submitted further that the lower court failed to appreciate the fact the appellant had developed the suit property and that the 1st respondent's children were aware that the deceased had sold the suit property to the deceased. The appellant submitted further that the lower court failed to appreciate that the agreement that the appellant entered into with the 1st respondent covered the issue of the 1st respondent's capacity to enter into the said agreement. The appellant submitted that the deceased had sanctioned the sale of the suit property to the appellant and that the 1st respondent was legally and contractually bound to complete the transaction. The appellant submitted further that the lower court failed to appreciate the fact that the appellant was a purchaser of the suit property for value. The appellant submitted that the 1st respondent as the administrator of the estate of her deceased husband was duty bound to fulfil the deceased contractual obligations.

12. On ground four of appeal, the appellant submitted that the evidence on record showed that the 1st respondent was hell bent on receiving money from the appellant by false pretenses. The appellant submitted that the conduct of the 1st respondent bordered on criminality. The

appellant submitted that the lower court should have investigated the conduct of the 1st respondent before reaching the determination that it reached. On grounds two and three of appeal, the appellant urged the court to note that the appellant had sought specific performance and in the alternative compensation for the loss of the suit property at the market value of the property. The appellant submitted that the valuation report that it had produced in the lower court was part of the court record and the court should have been guided by the same. The appellant submitted further that the 1st respondent should not be allowed to unjustly enrich herself at the expense of the appellant. The appellant urged the court to deal with the 1st respondent firmly for justice to be seen to be done.

13. In her submission in reply, the 1st respondent submitted that the lower court appreciated all the triable issues that were raised in the pleadings and considered all the evidence that was tendered by the parties. The 1st respondent submitted that the appellant's case was based on the agreement of sale dated 20th May, 2010 between the appellant and the 1st respondent which the 1st respondent entered into as an administrator of the estate of her deceased husband. The 1st respondent submitted that the lower court was right in nullifying the said agreement of sale because the 1st respondent who had not obtained a confirmed grant had no legal capacity to enter into the contract. The 1st respondent cited sections 55 and 82(b) of the Law of Succession Act, Chapter 160 Laws of Kenya. On the issue of compensation for loss of the suit property at the market value of the property, the 1st respondent submitted that although the appellant made the claim, the appellant did not tender any evidence in support thereof and as such the lower court did not err in refusing to make the award. The 1st respondent submitted that the appellant's appeal lacked merit and should be dismissed.

14. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, the case of Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle v Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

15. An appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or they were based on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter v Sunday Post Ltd. [1958] E.A 424 and Makube v Nyamuro[1983] KLR 403.

16. After carefully reviewing the evidence that was placed before the lower court, I am unable to disturb its findings on the issues that were before it for determination. The appellant's case as pleaded in the lower court was that; the suit property was owned by the 1st respondent's deceased's husband; he purchased the suit property from the 1st respondent as a representative of her deceased husband for valuable consideration and after paying the full purchase price in the sum of Kshs. 400,000/-, the 1st respondent proceeded to register the suit property in her name as a trustee of her children. The appellant sought specific performance of the agreement of sale dated 20th May, 2010 between him and the 1st respondent and in the alternative, compensation for the loss of the suit property at market value of the property. The lower court was called upon to determine whether the appellant was entitled to an order of specific performance of the agreement for sale between the parties and in the alternative compensation for the loss of the suit property.

17. From the evidence on record, I am unable to fault the lower court for its finding that the sale agreement dated 20th May, 210 between the appellant and the 1st respondent was void for breach of sections 55 and 82(b)(ii) of the Law of Succession Act and for want of consent of the co-administrator of the estate of the deceased. It was common ground that the suit property was registered in the name of the 1st respondent's deceased's husband, Johnson Ndungu Nganga. It was also common ground that the grant of letters of administration in respect of the estate of the deceased was issued on 25th March, 2009 to the 1st respondent and one, Catherine Njoki Ndungu. It was also common ground that the agreement of sale of the suit property was made between the 1st respondent and the appellant on 20th May, 2010 and that Catherine Njoki Ndungu was not a party to the agreement. It was also common ground that as at the time the 1st respondent entered into the said agreement of sale of the suit property to the appellant, the grant that had been issued to her and Catherine Njoki Ndungu had not been confirmed. The said grant of letters of administration was not confirmed until 21st September, 2010.

18. I am in agreement with the lower court that the 1st respondent was barred by section 55 of the Law of Succession Act from selling the suit property before confirmation of the grant that was issued to her and Catherine Njoki Ndungu. I am also in agreement with the lower court that since the court had appointed the 1st respondent and Catherine Njoki Ndungu as joint administrators of the estate of the deceased, the 1st respondent could not act alone in the sale of the suit property. Although the appellant has submitted that the children of the 1st respondent including Catherine Njoki Ndungu consented to the sale of the suit property, no evidence was placed before the lower court or this court of that consent. The agreement of sale dated 20th May, 2010 is very clear that it was between the appellant and the 1st respondent. In his evidence in chief, the appellant told the court that he purchased the suit property from the 1st respondent. There is no mention of Catherine Njoki Ndungu or any of the children of the 1st respondent in the agreement. Catherine Njoki Ndungu gave evidence in the lower court and told the court that although she was aware of the agreement between the appellant and the 1st respondent, she did not consent to the same. Clause 2 of the agreement of sale between the appellant and the 1st respondent did not save the agreement from being void as contended by the appellant. That clause made the agreement subject to the outcome of the succession proceedings. In the succession proceedings, the suit property was not given to the 1st respondent but to her children. The 1st respondent was therefore not able to perform the agreement of sale between her and the appellant. In any event that clause did not cure the failure to make the co-administrator of the deceased's estate a party to the said agreement of sale.

19. Due to the foregoing, I am in agreement with the lower court that the agreement between the appellant and the 1st respondent for the sale of the suit property was null and void the same having been made in breach of the law and for want of consent of Catherine Njoki Ndungu who was a co-administrator of the estate of the deceased. A void agreement of sale cannot be enforced through an order of specific performance. The lower court was right in declining to make an order for specific performance. In **Chitty on Contract, 30th edition, volume 1 at paragraph 27-003 the authors have stated as follows:**

“The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be

ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”

20. On compensation, I am once again in agreement with the lower court that the appellant placed no evidence before the court on the basis of which the court could have determined the market value of the suit property. After realising the deficiency in the evidence that he had tendered in this regard, the appellant instead of moving the court to re-open the case to allow him to adduce further evidence purported to produce evidence in the form of a valuation report in the written submissions. The lower court rightly rejected that maneuver which was irregular and unprocedural. In the absence of a valuation report showing the value of the suit property and the developments thereon, there was no way the lower court could have assessed the market value of the suit property. In the circumstances, I would not blame the lower for awarding the appellant only a sum of Kshs. 400,000/- that he had paid for the suit property together with interest.

21. Due to the foregoing I find no merit in the appeal before the court. The **appeal fails wholly. The same is dismissed with each party bearing its own costs of the appeal and of the lower court suit.**

Delivered and Dated at Nairobi this 9th day of July 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Appellant

Mr. Nganga for the Respondents

Ms. C. Nyokabi-Court Assistant