



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HIGH COURT CIVIL APPEAL NO. 104 OF 2009

(Appeal From the original Bungoma CMCC no 178 of 2006)

JOSEPH MAYENDE WAFULA1ST APPELLANT

ELIZABETH NAFUNA KIYIYL..... 2ND APPELLANT

VERSUS

CHARLES NATILI WEKESARESPONDENT

JUDGMENT

1. This is an appeal from the decision of the trial Magistrate Hon. J.K. Ngarngar in Bungoma CMCC No. 178 of 2006. The Appellants were dissatisfied with the whole decision and listed 10 grounds in his appeal. The appeal proceeded by way of written submissions.

Summary of the case:

2. The Respondent had sued the Appellants in the CM's court seeking to be declared as the proprietor of L.R. No. E. Bukusu/E. Sangalo/2748 and an eviction order to issue against the Appellants plus costs of the suit. The Appellants filed a defence and counter-claim. He argued he was bonafide purchaser and having developed the suitland was entitled to compensation equivalent to the value of the developments.

3. The parties adduced oral evidence before the trial court. The Respondent stated that on 9.1.2004 he sold the Appellants land measuring 50 ft by 100 ft for a consideration of Kshs. 800,000/= . The agreement between them was reduced into writing (Pex 2). As per the terms of that agreement, Kshs. 50,000/= was payable end of March 2004, Kshs. 2500/= at the end of October 2004, Kshs. 25000 at the end of October 2004 and final installment end of September 2004. The Respondent avers the Appellant never honoured the terms of the agreement since he failed to pay money within the timelines set.

4. Subsequently the Respondent did letters dated 19.4.2005 and 9.9.2005 canceling the agreement, produced as pex.3 & 4 respectively. The letters informed the Appellants to pick the money from the law firm of J.S. Khakula Advocates as he did not wish to continue with the sale. The Respondent also produced a title deed for the suit property showing the land is registered in his name.

5. The 1st Appellant testified and also called a witness. He stated that he operates a shop and hotel which he built on the suit plot at Mikongoni area. That on 8.4.2002, the Respondent allowed him to use the land. He confirms entering into agreement of sale with the Respondent on 9.1.2004. He was informed the land was in the name of Wangila Mageche. In clause 4 of the agreement, it was recognized he was already in possession at the time of executing the agreement.

6. The Appellants admit receiving a letter asking them to vacate the land - Pex. 2. When the register for the suit land was opened on 6.4.2005, it showed it as registered in name of Wamalwa Wanyama. He said he paid 1st installment on 18.6.2004 (Dex.2). They advised the Respondent to take back the money in their reply to the demand. Further that they started building on the land before they entered into the agreement. They urged the court to dismiss Respondents suit and allow his counter-claim.

Submissions

7. The Appellants submit the trial Magistrate erred by dismissing the counter claim in its entirety. The trial court ought to have ordered parties to return to their previous positions after the contract was repudiated but instead allowed the Respondent to have his cake and eat it. The Appellants submit further, the trial court erred in finding they had breached the contract when last payment was due by September 2004 as per provisions of clause 3 of their agreement but he had paid the entire sum on 31st August 2004.

8. Further Appellants submit that court cannot re-write contracts for parties. Their contract provided in clause 7 in case of breach, the defaulting party was to pay compensation. The trial court therefore fell into error for finding the transaction was null and void for want of

consent of Land control Board yet the Respondent got his title only on 30.8.2005.

9. It is the Appellants submission that the Respondent having given him possession voluntarily, he is stopped by the provisions of Section 30 (f) and (g) of the Registered Land Act of depriving the Appellant occupation rights. Finally the appellant avers time was not of essence in the agreement. The Appellants developed the suitland under the watch of the Respondent which implied the Respondent granted permission for what was taking place on the land. They relied on case law of **Doge vs. Kenya Cannery Ltd. [1989] KLR 127** to fortify their submissions.

10. The Respondent opened their submissions by relying on case law of **Peter Vs. Sundy [1958] EA 429**, reminding this court that it has not had the opportunity to see the witnesses. The Respondent submits that ground 1 of the appeal cannot succeed and supported this argument with the case of **Omuse Anyapu vs. Lawrence Opuka Kaala Civ. Appeal No. 21 of 1992. (Unreported)**. That there was legal and evidential basis upon which the trial court relied on in reached its finding.

11. Secondly, the Appellants are not candid as clause 3 of the agreement specified the timelines for making payments. They did not contest the trial courts finding at page 114. It is therefore misleading to say the last date of payment was end of September 2005.

12. Respondent submits further that no clause in the agreement precluded a party from repudiating the contract. Parties admitted the transaction was controlled under clause 6 and consent was required to be obtained. To buttress this they relied on case law of **Njamuyu vs. Nyaga [1983] KLR 282**. That in the Lower Court, no evidence was adduced the land was within a municipality. They are therefore barred from doing so by virtue of the provisions of Order 42 rule 4 of Civil Procedure Rules.

13. Finally, it is submitted the Appellants did not seek to acquire the land by prescription or adverse possession. Section 30 (f) and (g) is therefore wholly inapplicable. He urged the court to dismiss the appeal with costs.

14. I have looked at the pleadings filed and considered the submissions offered by both parties. I have also looked at the exhibits produced and read the judgment of the trial Magistrate. I have also considered the grounds of appeal as contained in the memorandum.

15. The evidence and documents confirm there was a sale agreement between the Appellants and the Respondent reduced into writing on 9.1.2004. The agreement confirmed the Appellants were in possession of the land earlier than the agreement, during the proceedings in the lower court, and probably still is given there was stay order obtained pending this appeal.

16. I find three issues I will consider while determining this appeal.

i. Were the Appellants in breach of the agreement?

ii. Did the transaction require Land Control Board consent therefore lack of it made the transaction void?

iii. Were the Appellants entitled to compensation for the developments he had undertaken?

17. On breach, the Respondent's evidence is that the Appellants failed to pay within the agreed timelines therefore were guilty of breach. The Appellants counter this allegation by saying he paid earlier than the time provided for the payment of the last installment. The first installment of Kshs. 50,000/= was due at the end of March 2004. (pex. 1). As per the advocates receipt, Dex 2 the 1st payment of Kshs. 50,000/= was made on 18.6.2004. The 2nd installment of Kshs. 25,000/= was due at the end of October 2004 and the last installment of Kshs. 25,000/= at the end of September 2004.

18. The Appellants combined the last two installments and made a lumpsum payment of Kshs. 50,000/= on 31.8.2004 – a month earlier than the proposed date, (Dex.3). However the Respondents deny ever receiving any payment. The Respondent was also required to facilitate the transfer of the said plot to the purchasers' names.

19. It is well established principle of law that courts do not re-write contracts between parties. The courts role is limited to apply and/or interpret contracts as written by parties. I have read the evidence in-chief of the 1st Appellant and I do not find any explanation why he did not make the first payment by end of March 2004 as agreed. His argument was that the entire purchase price was paid earlier than the last date agreed. The Appellants defence and counter-claim did not blame default on the part of the Respondent.

20. If parties agreed that first payment was due on 31.3.2004, then unless extension of time was mutually agreed, the payment made on 18.6.2004 could not cure a breach that had already taken place. I agree with the trial magistrate's finding that the Appellant was in breach of their agreement. The argument that last payment was done before end of September would amount to selective interpretation of the agreement. In exhibit P3, it is also not clear when the advocates informed the Respondent of the payments.

21. Was this a controlled transaction under the Land Control Act, cap 302? The Appellants submit otherwise. They argue thro' the written submissions (ground 4) that the plot is at Mutolo market indicated in clause 1 of the agreement and is therefore excluded from the provisions requiring Land Control Board under Section 2 of the Act. The Respondent on his part submits that dint of clause 6 of the agreement, the parties invited the Land Control Board Act into play.

22. I have looked at both clauses 1 and 6 of Pex.1. Clause 1 describes *the plot as being situated on Mutolmo market, East Sangalo sub-location of W. Bukusu location*. Clause 6 states *"Both parties undertake to appear before the Land Control Board to facilitate smooth transfer of the plot."* During the trial, the Appellants did not mention exclusion of the Land Control Board in their testimony. In their submissions, they have not disclosed which Municipality/County Council this Mutolmo market falls under. There was no evidence during the trial of any payment made from the plot (business or otherwise) to any municipality as rates. It is therefore difficult to decipher whether

it was a municipal plot or otherwise given lack of evidence.

23. In any event, even if the land was within a county council which (as per Sec. 2 of cap 302), clause 6 would vary that status as parties mutually agreed to submit themselves before the Land Control Board. The relevant law required application for consent was to be obtained within 3 months from date of the agreement. None was made contrary to Sec. 6 of Cap 302. Several decisions have held that lack of the Land Control Board Consent make the sale void ,inter alia, **Karuri vs. Gituru [1981] I KLR 247, Kahia Vs. Nganga [2004] I E.A 75.**

24. I do not find any fault with the trial Magistrate for finding the transaction was void for lack of land Control Board consent when they had voluntarily accepted to submit to that law but instead failed.

25. The Appellants submitted it was wrong for the Respondent to have his cake and eat it as this was the result of the judgment. He urged the court in his counter -claim and this appeal to compensate him for the development on the land. He did the development on presentation made to them by the Respondent. The Plaintiff's exhibit Pex.3 dated 19.4.2005, the Advocate wrote to the Appellants to collect the sum of Kshs. 100,000/= (Purchase price) as the Respondent had declined to collect the money. The Appellant acknowledged this letter vide their letter of 22.9.05 (Dex. 4).

26. It is not clear from the evidence whether the Appellants finally received this money as they have not claimed it in their pleadings and evidence. They submit that the developments were done with the consent of the Respondent. The Respondent denies giving such consent. At the time of drawing the agreement, no mention is made of the nature of developments the Appellants had already put on the land although they say they built the house in the year 2000. The Appellants said the Respondent had allowed him to build and do business there on 8.4.2002 in the presence of Appellants wife and the wife's father. Neither the wife nor the father in-law gave evidence during the trial to support this averment.

27. This means the developments if any, undertaken on the land was done long before the agreement for the sale of land was drawn. I do find that if the Appellant was to be entitled to compensation to the development then such claim would not lie on the strength of the agreement of 9.1.2004. He ought to have proved that the Respondent misrepresented facts to them by calling evidence that the Respondent gave consent. The Respondent on his part said he was working in South Africa and returned to find the Appellants had built on the land without his consent.

28. The Appellants pleaded in paragraph 4 of the amended defence thus **"...at the time of the said agreement the defendants shall contend that the said title did not exist and/or if it did, which is denied, then the same was not in the Plaintiff's name hence the plaintiff had no title to pass at the time of execution of the agreement."**

29. The Appellants are admitting the Respondent had no title to pass as at 2004. How then can they hold him liable for misrepresentation for acts done in 2002 when the Respondent was in a similar status as 2004? Clause one of the agreement also stated the land was in the name of Makenji Wangila. The Appellants given the relationship between them and the Respondent did not clarify whether the said Makenji was also related to them and his part while the buildings were being put up by the Appellants.

30. In the case of **Re estate of Kariuki [2002] 2 KLR 125 at page 127**, Khamoni J, said **"The Applicant was not a purchaser for value without notice as he bought land from a person who was neither the registered owner, trustee nor beneficially entitled and there was no privity of contract between him and the persons entitled to pass title."**

31. In any event if the Appellants were to be entitled to compensation as provided in clause 7 of the agreement, in the absence of specifics of mode of compensation provided within the contract, then it would be inferred the compensation available to them is as provided in law under Section 7 of the Act (cap 302). In this case, the Respondent never received the money as the purchase price. There was nothing the trial court would have ordered him to refund. But the court having found the Appellants to be the one in breach, there was no compensation due to them.

32. Finally their continued occupations of the land were on the basis of consent and later the sale agreement. The Respondent having rescinded that agreement and being the title holder, the consequence is the Appellants to vacate the land. In **Cheruiyot Vs. Bartiony [1988] KLR 422**, the court held:

"(1). validity of sale was the basis the Appellant had put up for his continued occupation. The court finding it invalid, eviction was a consequential relief."

34. For the reasons contained in the body of this judgment, I do find this appeal as lacking in merit and dismiss it.

35. The trial Magistrate spared the Appellants from paying costs in the lower court given the relationship existing between them and the Respondent. I will leave that order as it is. However the Respondent shall have the costs of this appeal.

DATED, SIGNED and DELIVERED this 3rd day of March 2014

A. OMOLLO

JUDGE.