REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 7 OF 2017

MARY RITA MURANGI IRERI.....APPELLANT

VERSUS

AGNES IGANDU NYAGA.....1ST RESPONDENT

MERCY GICUKU NYAGA.....2ND RESPONDENT

(Being an appeal against the Judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 19h June 2017 in Embu CMCC Case No. 170B of 2011)

JUDGEMENT

A. INTRODUCTION

1. This is an appeal against the judgement and decree of Hon. M.N. Gicheru (CM) dated 19th June 2017 in *Embu CMCC No. 170B of 2011 – Agnes Igandu Nyaga & Mercy Gicuku Nyaga vs Mary Rita Murangiri Ireri.* By the said judgement, the trial court allowed the Respondents' suit for removal of a caution registered against *Title No. Ngandori/Kirigi/8980* (the *suit property*) by the Defendant and a permanent injunction restraining the Appellant from interfering with the suit property. By the same judgement, the court declined the Appellant's counterclaim for specific performance of an agreement for sale of the suit property but allowed her alternative claim for a refund of the purchase price. Costs of the suit were awarded to the Respondents.

2. The material on record indicates that by a plaint dated 29th September 2011 the Respondents sued the Appellant in *Embu CMCC No. 170B of 2011* seeking the removal of a caution registered against the suit property by the Appellant and a permanent injunction restraining the Appellant from interfering with the suit property. The Respondents pleaded that they were joint owners of the suit property and that the 1st Respondent had entered into a sale agreement dated 3rd August 2008 for the sale of her share of 0.23 ha out of the suit property for a consideration of Kshs. 115,000/-. It was further pleaded that the Appellant had without lawful justification cautioned the entire suit property hence the suit.

3. By her defence and counterclaim dated 19th October 2011 and amended on 16th January 2012 the Appellant admitted the existence of a sale agreement with the 1st Respondent but denied that the purchase price was only Kshs. 115,000/-. She further pleaded that she had lawfully cautioned the suit property in order to protect her interest therein as a purchaser. By her counterclaim, the Appellant prayed for specific performance of the sale agreement for the suit property and in the alternative a refund of the purchase price together with interest thereon from the date of default.

4. Vide a reply to the amended defence and amended counterclaim dated 23rd January 2013 and amended on 27th September 2013, the Respondents stated that the 2nd sale agreement purportedly dated 6th May 2011 was fraudulent and falsified. They pleaded 3 particulars of fraud against the Appellant with respect to the said sale agreement. It was contended that the Appellant had unilaterally altered the terms of the original sale agreement by fraudulently inserting page one of the agreement dated 6th May 2011 to page 2 of the agreement dated 3rd August 2010 to make it appear that the Respondents were party to the agreement of 6th May 2011. They also denied receiving Kshs. 250,000/- as the purchase price and pleaded that they received only Kshs. 65,000/-.

5. The material on record indicates that when the suit came up for trial on 20th March 2017 the Respondents called two witnesses and closed their case. The Appellant, however, did not testify as she sought more time to file her documents and witness statements. The suit was thereupon stood over to 10th April 2017 for hearing of the Appellant's case. On 10th April 2017, however, the Appellants case was not heard but the parties recorded a consent to the effect that the trial court shall deliver judgement on the basis of the evidence adduced and the documents and statements to be filed by the parties.

6. By its judgement dated 19th June 2017 the trial court found for the Respondents and allowed their suit as prayed in the plaint and awarded them costs of the suit. The trial court believed the Respondents' evidence that there was only one agreement dated 3rd August 2008 for the sale of a portion of the suit property and that the 1st Respondent had been paid a total of Kshs. 43,000/- and not Kshs. 250,000/- as claimed by the Appellant. The court also found that the sale agreement dated 6th May 2011 was not genuine since one of the witnesses who was said to have witnessed it had disowned it.

7. The trial court further declined to allow the Appellant's prayer for specific performance because it found that the sale agreement in issue was unenforceable for lack of consent of the Land Control Board under the **Land Control Act (Cap. 302).** However, the court ordered a refund of the purchase price together with liquidated damages in the sum of Ksh. 64,500/- together with interest at court rates from the date of the agreement until payment in full.

B. GROUNDS OF APPEAL

8. Being aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 7th July 2017 raising the following twelve (12) grounds of appeal:

i. That the honourable learned magistrate erred in law and fact by shifting the burden of proof in this case to the Defendant.

ii. That the honourable learned magistrate erred in law and fact by failing to find and hold that the Plaintiffs case was a non-starter, mala fides and bad in law as it sought to shield the Plaintiffs from performing their contractual obligations.

iii. That the learned magistrate erred in law and in fact by failing to appreciate the celebrated maxim of equity that holds "he who seeks equity must do equity" and failing to find and hold that the honourable trial court is a court of equity and the Plaintiffs had not approached the honourable court with clean hands.

iv. That the learned magistrate erred in law and fact by failing to uphold the Defendant's counterclaim.

v. That the learned honourable Chief Magistrate erred in law and fact by failing to appreciate that the 1st Plaintiff by her own admission attested to the fact that she was in breach of her contractual obligations.

vi. That the honourable learned magistrate erred in law and fact by failing to appreciate that the burden of proof in the instant suit at all times lay with the Plaintiffs.

vii. That the learned trial magistrate erred in law and fact by failing to find and hold that the agreement dated 6th May 2011 was in fact prima facie evidence of the existence of a contract where the 1st Plaintiff acknowledged receipt of Kshs. 250,000/- from the Defendant.

viii. That the learned magistrate erred in law and fact by failing to find and hold that the allegation by the Plaintiffs that the said agreement was a forgery was unsubstantiated as they had failed to produce such evidence of fraud despite being given the chance to on three different occasions.

ix. That the learned trial magistrate failed in law and fact by failing to find and hold that the amount received by the Plaintiffs was Kshs. 250,000/-, despite various agreements filed by the Defendant in support of her case made between her and the Plaintiffs.

x. That the honourable learned trial magistrate erred in law and fact by pegging his judgement on the failure by the advocate who drew and attested the agreement to testify in the matter whereas his testimony could not be procured without undue difficulty as the said advocate had left practice.

xi. That the learned trial magistrate erred in law and fact by failing to find and hold that the caution subject to the suit in the subordinate court had been lodged to protect the Defendant's interests as a purchaser which interests the Plaintiffs sought to defeat.

xii. That the learned honourable trial magistrate erred in law and fact by failing to consider the totality of the documentary evidence adduced by the Plaintiffs which would have led the trial court to arrive at a different, fair and just conclusion.

C. DIRECTIONS ON THE HEARING OF THE APPEAL

9. When the appeal was listed for directions on 1st July 2020 it was directed that the appeal shall be canvassed through written submissions. The Appellant was granted 30 days to file and serve her submissions whereas the Respondents were given 30 days upon the lapse of the Appellant's period to file and serve theirs. The record shows that the Appellant filed her submissions on or about 29th September 2020 whereas the Respondents filed theirs on or about 25th September 2020.

D. THE ISSUES FOR DETERMINATION

10. The court has perused the grounds set out in the Appellant's memorandum of appeal as well as the material on record. Although the Appellant raised twelve (12) grounds of appeal the court is of the opinion that the following issues would effectively determine the appeal:

a) *Whether the trial court erred in law and fact in allowing the Respondents' suit.*

b) *Whether the trial court erred in law and fact in declining the Appellant's prayer for specific performance.*

c) *Whether the trial court erred in law and fact in rejecting the Appellant's sale agreement dated 6th May 2011.*

d) *Whether the trial court erred in law by failing to properly evaluate the evidence at the trial.*

e) *Who shall bear costs of the appeal.*

E. THE APPLICABLE LEGAL PRINCIPLES

11. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

> **"…Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."**

12. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** rendered the applicable principles as follows:

> **"…It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion…"**

13. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 424** at page 429-430 as follows:

> **"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."**

F. ANALYSIS AND DETERMINATION

a) Whether the trial court erred in law in allowing the Respondents' suit

14. The court has considered the material on record and the submissions of the parties on this issue. The Appellant contended that there was a valid sale agreement between the parties hence the Respondents ought not to have been allowed to resile from it. It was contended that the Respondents' suit was *mala fides* and that they had not come to equity with clean hands. It was further submitted that the trial court erred in law in directing the removal of the Appellant's caution since it was lawfully registered to protect her purchaser's interest in the suit property.

15. The material on record indicates that there were 2 sale agreements which were in controversy. Whereas the Respondents relied upon the sale agreement dated 3rd August 2008 involving a portion of the suit property being sold for Kshs. 115,000/-, the Appellant relied upon another sale agreement dated 6th May 2011 for the sale of the entire suit property for Kshs. 250,000/-. It, therefore, fell upon the trial court to determine which of the two agreements was genuine or authentic.

16. The Respondents never disputed the existence of an agreement with the Appellant. The main points of contention were:- which sale agreement was genuine? what was the portion (size) of the suit property sold? and what was the agreed purchase price?. Upon evaluation of the conflicting evidence the trial court came to the conclusion that the genuine sale agreement was the one dated 3rd August 2008. The trial court further found that the Respondents had changed their mind on the sale and the court took the view that it could not compel them to

complete the transaction. The court finds no error of law or fact on the part of the trial court in believing the evidence of the Respondents and their witnesses. This court must bear in mind that it never heard nor saw the witnesses who testified at the trial. The trial court's findings as to which side was telling the truth is entitled to due weight.

17. Be that as it may, this court's own evaluation of the evidence tendered at the trial leads to the same conclusion which the trial court reached. The court is satisfied that the genuine sale agreement was the one produced by the Respondents dated 3rd August 2008. The sale agreement dated 6th May 2011 which was produced by the Appellant was disowned by the person who was said to have witnessed its execution before an advocate. The advocate who purportedly attested the signatures on the said agreement was never called as a witness.

18. The court is further of the opinion that the trial court was right in allowing the Respondents' suit because, in any event, both sale agreements were null and void and unenforceable for want of consent of the Land Control Board. There is evidence on record to demonstrate that the Respondents had failed to attend the Land Control Board for the purpose of consent to transfer. In the circumstances, there was no valid purchaser's interest which could be protected by a caution under **Section 71** of the **Land Registration Act, 2012.**

19. **Section 71 (1)** of the said **Act** stipulates as follows:

> **"(1) A person who—**
>
> **(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;**
>
> **(b) is entitled to a licence; or**
>
> **(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,**
>
> **may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge."**

20. On the other hand, **Section 6** of the **Land Control Act (Cap. 302)** stipulates as follows:

> **"(1) Each of the following transactions that is to say—**
>
> **(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**
>
> **(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;**
>
> **(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."**

21. The effect of lack of the consent of the Land Control Board has been considered in many decided cases such as **Wamukota v Donati [1987] KLR 280; Kariuki v Kariuki [1983] KLR 225; Simiyu v Watambamala [1985] KLR 852;** and **David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR.** The effect of lack of consent generally renders the transaction unenforceable except where trust has been established. In the instant case, the issue of trust was never pleaded or established at the trial.

22. The court is thus of the opinion that the sale agreement dated 3rd August 2008 remained valid for a period of only 6 months from the date hereof after which it became null and void hence unenforceable. Accordingly, the Appellant had no enforceable purchaser's interest in the suit property by the time she lodged her caution on 19th July 2011. Accordingly, the court finds no merit in the Appellant's first grievance.

b) Whether the trial court erred in law in declining the Appellant's prayer for specific performance

23. The court has considered the material on record and the submissions of the parties on this issue. The record shows that although the trial court declined to grant an order for specific performance, the Appellant's alternative prayer for a refund of the purchase price paid was granted. The Appellant contended that the trial court erred in law in failing to grant specific performance of the agreement. The Appellant relied upon the case of **Reliable Electrical Engineers v Mantrac Kenya Ltd [2006] eKLR** in support of its claim for specific performance. The Appellant quoted the following passage from the said judgement:

> **"Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles.**
>
> **The jurisdiction of 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 the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will**

however not be ordered where there is an adequate alternative remedy."

24. The Respondents, on the other hand, submitted that the equitable remedy of specific performance was not available to the Appellant since the underlying contract was invalid, null and void for want of consent of the Land Control Board. The Respondents therefore supported the holding of the trial court on specific performance.

25. The court is of the opinion that the Appellant's own authority (the case of **Reliable Electrical Engineers**) sufficiently settles the question of specific performance. The law is clear that the remedy is discretionary and that it can only be granted where there is in existence a valid and enforceable contract amongst the disputing parties. The remedy may also be declined where there is an adequate alternative remedy such as damages. The evidence on record reveals that the sale agreement in issue became null and void upon expiry of 6 months from the date it was executed. There is no material on record to demonstrate that the alternative remedy of a refund of the purchase price together with liquidated damages was not an adequate remedy. It is pertinent to note that the Appellant had prayed for such alternative remedy in her counterclaim.

26. The court has noted that the Appellant has raised a new issue in her written submissions which was not raised in her pleadings or at the trial. The issue of **trust** was also not raised in the memorandum of appeal which enumerated 12 grounds of appeal. The Appellant contended that the failure to obtain consent of the Land Control Board for the transaction was not fatal and that the trail court ought to have implied a constructive trust in favour of the Appellant.

27. The Appellant cited the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** and **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** in support of her appeal. In both cases, the Court of Appeal found that the purchasers had voluntarily sold the suit properties and put the respective purchasers in possession for long periods of time. It should be pointed out, however, that those two cases are clearly distinguishable from the instant appeal in that there was no part performance and the Appellant was never given possession of the suit property. Since the issue of trust was never pleaded and canvassed before the trial court and it was not included in the memorandum of appeal, it shall not be necessary for the court to adjudicate thereon.

c) Whether the trial court erred in law and fact in rejecting the Appellant's sale agreement dated 6th May 2011.

28. The Appellant faulted the trial court for rejecting her sale agreement dated 6th May 2011 in favour of the Respondents' agreement dated 3rd August 2008. The Appellant faulted the trial court for wrongfully shifting the burden of proof to her and for failing to properly evaluate the evidence tendered at the trial. The Appellant further faulted the trial court for making reference to her failure to call the advocate who drew and attested the agreement dated 6th May 2011.

29. The court has considered the material on record and the trial court's evaluation of the relevant evidence on record. The trial court stated as follows:

> **"It was upon the defendant to prove that she paid the plaintiffs Kshs. 250,000/-. She has not done so. When the case was filed on 30th September 2011 the amount mentioned in the plaint as the purchase price was Kshs. 115,000/-.**
>
> **When the defendant filed her defence and counterclaim on 21st October 2011 she made no mention of Kshs. 250,000/- yet according to the disputed agreement she had already paid the money on 6th may 2011. At paragraph 9 of the counterclaim the purchase price is not disclosed.**
>
> **The only witness to the disputed agreement of 6th May 2011 Peter Njiru has disputed it. The advocate who executed the agreement was not called as a witness. Neither did he record a statement.**
>
> **For the above reasons, I find that the payment of Kshs. 250,000/- by the defendant is not proved on a balance of probabilities."**

30. The court finds no fault with the evaluation of the evidence tendered at the hearing by the trial court. It would have been a natural and logical thing to do for the Appellant to specify the purchase price she paid especially after specifically denying in her defence that the purchase price was Kshs. 115,000/-. The trial court was also entitled to point out and consider the fact that the witness to the agreement dated 6th May 2011 had disowned it and that the advocate who purportedly drew and attested the signatures thereon was not called as a witness.

31. The court has further noted that the Respondent and her witness (PW2) were not challenged on the sale agreement dated 6th May 2011 at the trial. In fact, no single question was put to them on that agreement during cross-examination by the Appellant's advocate. This court's own evaluation of the evidence on record leads to the inevitable conclusion that the sale agreement dated 6th May 2011 was for rejection. It was not a genuine sale agreement since the contents of first page thereof had obviously been altered. The evidence of PW1 and PW2 (whom the trial court believed) showed that the contents of the original agreement (dated 3rd August 2018) were radically different from the second sale agreement dated 6th May 2011 even though the 2nd page thereof remained the same.

32. It is strange that the Appellant was all along reluctant to file a copy of the said agreement despite the Respondents having pointed out the omission in their reply to defence and defence to counterclaim. The Appellant filed a copy of the said agreement on 29th March 2017 after the Respondents had closed their case on 20th March 2017 and after the parties had by consent agreed to have the Appellant's witness statements and documents filed at a later stage. That is what prompted the Respondents and PW2 to file further statements on 21st April 2017 to discount the contents of the sale agreement dated 6th May 2011. The Appellant was certainly trying to steal a match on the

Respondents by concealing the agreement of 6th May 2011 until after the Respondents had closed their case.

d) Whether the trial erred in failing to properly evaluate the totality of the evidence on record

33. The court has already sufficiently dealt with this issue in the preceding paragraphs. The court is of the opinion that the trial court did not err in law or fact in evaluation of the evidence tendered at the trial on all the decisive issues. In deed, this court's own evaluation of the evidence on record leads to the conclusion that the trial court did not err at all and that the court arrived at the right decision on both the suit and the counterclaim.

e) Who shall bear costs of the appeal

34. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful parties should not be awarded costs of the appeal. Accordingly, the Respondents shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL ORDER

35. The upshot of the foregoing is that the court finds no merit whatsoever in the appeal. Accordingly, the same is hereby dismissed in its entirety with costs to the Respondents. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **15TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams in the presence of Ms. Mboi Muthoni for the Appellant and Ms. Beth Ndorongo for the Respondents.

Y.M. ANGIMA

JUDGE

15.10.2020