REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO 26 OF 2017

(FORMERLY NAIVASHA HCCA 6 OF 2014)

PHILLIS WANGARI KIMOTHO.....APPELLANT

VERSUS

JOHN MWANGI KAMURI.....RESPONDENT

Being an appeal against the Judgment of the Honorable Ag Senior Resident Magistrate Naivasha

Hon. S MWINZI in the Chief Magistrates Court at Naivasha delivered on 24th June 2014

in

CMCC No. 47 of 1994

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard and decided by *Hon. S MWINZI Ag Senior Resident* Magistrate in the Chief Magistrate's Court at Naivasha, in Civil Case No. 47 of 1994 where the learned trial Magistrate, upon taking the evidence of both parties, delivered his judgment on the 24th June 2014 where he faulted the Plaintiff's claim against the Defendant to the extent that she had prayed for specific performance. However, he had found that the Plaintiff was entitled to the sum of Ksh 4,000/= with interest from the date of filing of the suit.

2. The Plaintiff, being dissatisfied with the judgment of the trial magistrate has filed the present Appeal, as an Appellant, before this court.

3. The grounds upon which the Appellant has raised in her Memorandum of Appeal include:

i. That the learned Magistrate erred in law and fact in believing the whole testimony of the Respondent/Defendant and disregarding the testimony of the Plaintiff/Appellant.

ii. That the learned Magistrate faulted and erred in law and fact by not appreciating the pleadings of the Plaintiff as pleaded in the Plaint.

iii. That the learned Magistrate erred in law and in fact in holding the Defendant had established his case on a balance of probability pursuant to the pleadings and evidence on record.

iv. That the learned Magistrate failed to appreciate the evidence before him by the Plaintiff and the Defence.

v. That the learned Magistrate erred in law and in fact in disregarding the Plaintiff's submissions.

4. The Appellant thus sought for;

i. The judgment of the lower court Naivasha Civil case No. 47 of 1994 delivered and pronounced on 24th June 2014 be set aside.

ii. Cost of the Appeal to be awarded to the Appellant.

5. The Appeal was disposed of by way of written submissions wherein the Appellant filed her submissions on the 27th July 2018 while the Respondent filed his submissions on the 9th October 2018.

The Appellant's case.

6. The Appellant's case as per her 'man made' written submission is to the effect that the parties herein entered into a sale transaction wherein the Appellant offered her land plot No LR 8500 situated at Langas in Eldoret and a sum of Ksh 4000/- in exchange of the Respondent's 2 acre piece of land at Karate scheme which was known as Plot No. 255 but which now had a new registration number being Nyandarua/Karate 933.

7. That the said transaction was reduced into writing before the local chief.

8. That indeed when the Respondent was shown the piece of land in Langas. He took immediate possession of the same wherein he was paid the top up of Ksh 4,000/= before an advocate whose offices were situated in Eldoret. The Appellant also took possession of the land at Karate Scheme plot 255 which she later sub divided, obtained titles and was in the process of disposing of the resultant parcels of land to third Parties.

9. The Appellant being a lay person then proceeded to fault the trial magistrate court in her submissions thus raising new grounds of memorandum in the strict sense. However to my understanding, her submission was to the effect that after entering into the said agreement, parties had taken possession of their respective new parcels of land more than 20 years ago.

10. That the main aim of the agreement entered into by parties who were illiterate on one hand and semi illiterate on the other, respectively, was to put the Appellant into physical possession of Parcel No. Karate Scheme plot 255 on one hand while on the other hand, to give the Respondent Plot No LR 8500 in Langas, Eldoret. That the Respondent had not filed any response to the Petition of Appellant ever since it was filed. The Appellant thus prayed for the trial court's judgment to be quashed.

The Respondent's Case.

11. The Respondent on the other hand, filed a two sentenced submission on the 9th October wherein he held that the trial Magistrate's finding was sound. That the present appeal was an abuse of the court process as it lacked merit and that the same ought to be dismissed with costs.

Analyses and determination

12. I have considered the record, the judgment of the trial Magistrate's Court, the written submissions by the parties herein and the law. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** *I* also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (***See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

13. Vide her plaint dated the 14th January 2014, the Plaintiff had sought for orders that the Respondent be compelled to transfer to her 2 acres of land to be excised from the Respondent's larger parcel of land No. Nyandarua/Karati/993. She had also prayed for costs of the suit.

14. In his defence the Respondent confirmed that indeed parties had entered into a sale agreement wherein he had agreed to sell to the Appellant two (2) acres of land to be excised for his land parcel No *Nyandarua/Karati/993 in* exchange for the Appellant's plot situated in langas within Eldoret.

15. That the agreement had been frustrated by the Appellant who failed to show him the physical location of her parcel of land in Eldoret and when she finally did, he had found that the land had been occupied and developed by a third party.

16. That further, the Appellant's claim was barred by virtue of Limitation of Action Act.

17. The Appellant's evidence in the trial Court was that whereas she was the proprietor of a plot in Langas in Eldoret, the Respondent also had a parcel of land in Karati. That in the year 1984, the Respondent had approached her with a request that they swap these parcels of land.

18. She had agreed to his proposal wherein in addition to her giving out her plot, she was to pay the Respondent an additional sum of Ksh 4,000/= in exchange for the Respondent's 2 acre piece of land at Karate scheme.

19. That they had recorded their agreement to that effect wherein she had given the Respondent the Ksh4,000/= and transferred her land to him. She produced a copy of the agreement as Pf exh 1.

20. The Appellant had further testified that pursuant to the execution of the agreement, which was done in the law firm of M/s M.P Shah Patel, she had performed her part of the agreement and taken possession of 2 acres of the Respondent's parcel of land, but thereafter, the Respondent had refused to obtain the consent from the land Control Board and therefore she could not obtain title to the 2 acres of land.

21. That she subsequently obtained an extract of the green card which she produced as Pf exh 2 and which had confirmed that land parcel No Nyandarua/Karati/993 belonged to the Respondent herein.

22. On cross examination the Appellant had confirmed that save for a sale agreement with the person who had sold her the plot in Langas, she did not have the title deed to the purported land at the time of entering the agreement with the Respondent.

23. The Appellant's daughter was the second witness. She testified that she had accompanied both her mother and the Respondent to the plot in Eldoret wherein the Respondent had liked it and a transfer had been conducted in her presence at the advocate's office in Eldoret.

24. The third witness testified that he had sought out the Appellant after the Respondent had asked him to scout for a buyer for his land in Karati. That he had witnessed the transaction at the Chief's office. Where the Appellant was to swop her land with the Respondent and further that she was to top up ksh 4,000/= for the 2 acre since the purchase price was Ksh 24,000/ while her Eldoret plot was valued at Ksh.20,000/=.That the Appellant had paid Ksh 1,700/=

25. The Respondent's testimony on the other hand was to the effect that after the agreement to swop their properties, he had gone to view the Plot in Eldoret wherein he had discovered that there were constructions therein, constructions which were occupied. That further, the Appellant had no title to the said plot. That is why he had refused to sign documents at the Advocate's office in Eldoret. He also confirmed not having applied for consent from the Land Control Board for reasons that the Appellant had no title to the land in Langas.

26. That he never took possession of the land in Langas but when he went to conduct a search on the same at the Eldoret County council, he had discovered that the said plot was registered in the name of one Mary Njoki and not the Appellant/Plaintiff.

27. Considering the evidence adduced in the trial court the issues raised herein are;

i. Whether the agreement entered into by the parties herein was valid.

ii. Whether the Appellant had title to pass to the Respondent.

iii. Whether the Appellant had performed all her obligations under the agreement and if so, whether specific performance as a remedy was available to him.

Analysis and Determination:

28. I note that this matter was filed in the senior Magistrate's court way back in the year 1994 vide Civil Case No 47 of 1994 wherein interlocutory judgment was entered against the Respondent on the 18th July 1997 with orders that the Respondent herein do transfer to the Appellant two acres of land.

29. Subsequently the Respondent filed an application dated the 23rd September 2002 to stay execution of the judgment and decree and also to inhibit the registration of any dealings with title No Nyandarua/Karati/2701 until further orders of the court.

30. Vide a ruling delivered on the 24th October 2002, the said application was dismissed with costs.

31. Following the said dismissal, the Respondent herein moved to the High Court sitting in Nakuru vide Civil Appeal No. 207 of 2002 wherein he challenged the said ruling and sought that the same be set aside and his Application dated the 23rd September 2002 be allowed.

32. Vide its judgment delivered on the 4th March 2011, the High court found the Appeal merited, wherein it set aside the ex-parte judgment of the trial court and all its consequential orders for want of service, thereby granting the application of the 23rd September 2002. The matter was referred back to the Naivasha Magistrates' Court for hearing afresh.

33. It is worth noting that vide the orders issued in the trial Magistrate's court on the 18th July 1997, the Respondents original parcel of land No. Karati Scheme Plot No.993 was sub-divided giving rise to Karati Scheme Plot No.2700 and 2701 to which the Appellant herein was registered as the proprietor of Karati Scheme Plot No.2701 to which she further sub-divided resulting into plots No. 4844-4863 which she embarked on disposing off through sale.

34. After the successful Appeal the Respondent herein filed an application by way of Notice of Motion dated the 18th January 2012, before the Magistrate's court in Naivasha seeking for injunctive orders against the Appellant herein restraining her from interfering and/or selling these resultant parcels of land being plots No. 4844-4863, wherein vide an order dated the 18th January 2012, interim orders were issued pending inter parties hearing of the said Application.

35. Parties then went to slumber only for the Appellant to file an application dated the 18th April 2013 wherein she sought to have Respondent's Defence dated the 30th January 2013 struck out for having been filed out of time without leave of the court.

36. The Respondent on the other hand filed his Preliminary Objection on the 2nd May 2013 on the ground that the Appellant's suit, having been founded on a contact for sale was statutorily time barred, parties having entered into the contract in the year 1984 and the suit having been filed in the year 1994 which was ten years later.

37. Both Applications were dismissed vide a ruling delivered on the 4th September 2013 wherein parties were ordered to set the matter down for hearing. Subsequently the same was heard giving rise to the present Appeal.

38. On the first issue, as to whether the sale agreement entered into by the parties herein was valid, Section 3(3) of the Law of Contract Act is clear to the effect that:

> *No suit shall be brought upon a contract for the disposition of an interest in land unless—*
>
> *(a) the contract upon which the suit is founded—*
>
> *(i) is in writing;*
>
> *(ii) is signed by all the parties thereto; and*
>
> *(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

39. There is no contest that both parties vide an agreement dated the 20th July 1984 agreed to swap their respective parcels of land, the Appellant's land being Plot No. LR 8500 situate at Langas in Eldoret with 2 acres of the Respondent's land situate at plot No. 255 Karati scheme. That further the Appellant was to add a sum of Ksh 4,000/ over and above the exchange of her plot.

40. I find, like the trial magistrate did, that this contract was a valid contract in the terms of Section 3(3) of the Law of Contract Act

41. That pursuant to the signing of the said agreement and part payment of Ksh 4,000/= the said contract however did not fall through because the Respondent failed to secure the Consent from the Land Control Board for reason the that the Appellant had no title to the said parcel of land in Langas-Eldoret, a fact which was acknowledged by the Appellant herein.

42. It is also not even clear from the evidence before me whether the Appellant was exchanging her parcel of land with 2 acres of the Respondents land from parcel No. 255 Karati Scheme as shown on the agreement, or 2 acres out of LR Nyandarua/Karati/933.

43. That notwithstanding, when the Respondent went to conduct a search on the Appellant's parcel of land, he had discovered that the same was not registered in her name, but in the name of one *Mary Njoki.*

44. This fact was not denied by the appellant who confirmed that although she did not have title to the land in Langas –Eldoret, yet the Respondent herein was to obtain the same from a 3rd party, a fact which was not factored in their agreement.

45. In the case of **Mbururi Matiri & Sons vs Nithi Timber Co-operative Society Limited No.125 of 1987 (unreported)** the Court of Appeal had held unanimously that

> *"a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficiency to the contract".*

46. The Court of Appeal in the case of ***Gurdev Singh Birdi & Anor –vs- Abubakar Madhbuti C.A.*** *No.165 of 1996 held as follows;*

> ***''It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury's Laws of England., Fourth Edition, a Plaintiff seeking the equitable remedy of specific performance of a contract:***
>
> > *'' must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the Plaintiff has failed in literal performance, or is in default in some non- essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.''*

47. A party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.

48. In the case of **Shah -vs- Guilders International Bank Ltd [2003]KLR** the Court in considering the terms of the parties contract stated that;-

> *"The parties executed the same willingly and they are therefore bound by it."*

49. In **Aiman vs Muchoki (1984) KLR. 353** the Court of Appeal held;

> *"In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer".*

50. The present case presents a scenario where the Appellant had purported to sell and/or exchange land to the Respondent knowing very well that she held no title to the same. Referring to a title deed which is in someone's name, without any executed transfer documents cannot and does not pass title and or interest in land.

51. The upshot is that the decision of the trial court was right in principle and correct in law to which I uphold it together with the orders issued therein. This Appeal lacks merit and is herein dismissed with costs to the Respondent.

Dated and delivered at Nyahururu this 11th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE