REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT AT KAKAMEGA

ELCA CASE NO. 28 OF 2017

BENEDICT MUYULA POMBO.....APPELLANT

VERSUS

SUSAN WERE MAKOKHA.....RESPONDENT

JUDGEMENT

The appellant herein being aggrieved and dissatisfied the judgment of Hon. J.M. Githaiga, Esq, Principal Magistrate in Kakamega Chief Magistrate Court Civil Suit No. 124 of 2009 delivered on 5th July, 2011 appeals against the said judgment on the following grounds:-

Grounds of Appeal:-

1. The trial magistrate erred in law and fact in holding that the appellant to pay the balance of the purchase price, when the acreage on the ground did not tally with the acreage in the title, hence the said land could not fetch the agreed purchase price.

2. The trial magistrate erred in law and fact in holding that the appellant do pay the balance of the purchase price when the respondent had in writing complained that the land on the ground was less than the one indicated in the title and the same had been encroached on.

3. The trial magistrate erred in law and fact in failing to hold that the sale was complete upon the Land Control Board consent being obtained, hence the respondent was obliged to specifically perform her part of the contract.

4. The trial magistrate erred in law and fact in blaming the Land Registrar, contrary to the evidence on record.

5. The judgment was against the weight of evidence on record.

The appellant prays that the appeal be allowed with costs and the trial court's judgment set aside and the said judgment be substituted with one allowing the appellant's claim.

The Appellant submitted that, there is no dispute that the parties herein entered into a contract of sale of land and the purchase price was Ksh. 581,250. The land in question LR. NO. Butsotso/Esumeyia/2351 measured approximately 3HA or 7.5 acres. The acreage stated is as revealed by the search certificate. The purchase price was Ksh. 581,250 as per the agreement. Pursuant to that, the appellant paid Ksh. 360,000/= to the respondent, and Land Control Board Consent was obtained on 8th February, 2007. From the purchase price, it is clear that an acre was being sold at Ksh. 77,500. On the ground, the land in question only measured 4 acres. This was confirmed by the respondent in a letter dated 15th June, 2007. It was therefore wrong for the trial magistrate to decline the appellant's prayers in the plaint.

On ground two of the appeal, the trial magistrate erred in law and fact in holding that the appellant should pay the balance of the purchase price. This is so because the respondent had in writing complained to the Land Registrar that the land on the ground was less than the one indicated on the title. Further, the respondent had executed the transfer forms which had a passport photograph. It is their submission that upon Land Control Board Consent being obtained and the respondent signing transfer forms, the property in the land in question passed to the plaintiff. The respondent having admitted that the land on the ground was 4 acre, then she was entitled to Ksh. 310,000 (4 x ksh. 77,500). The District Surveyor had informed the Land Registrar in a letter dated 29th September, 2008 that the suit land measured 1.6 Ha (4 acres). The surveyor requested the Land Registrar to amend the records to tally with the position on the ground. The respondent having admitted that the land is 4 acres and the said acreage being confirmed by the surveyor, the respondent was not entitled to Ksh. 581,250. That purchase price was based on 7.5 acres (3HA). The appellant is therefore entitled to a refund of Ksh. 50,000/= which is the excess paid. (Ksh. 360,000 – Ksh. 310,000) and the trial court ought not to have blamed the Land Registrar on the issue of acreage.

This court has considered the appeal and the submissions therein. I have perused the record of appeal and briefly, the appellant's claim against the respondent in the trial court was for specific performance, refund of the purchase price paid in excess and surrender of the original

title in respect of LR. NO. Butsotso/Esumeyia/2351. That claim was not allowed and the court found out that the plaintiff should pay the outstanding amount or the respondent or refund the purchase price so far paid. On specific performance of a contract, Judge Maraga as he then was, in the case of Reliable Electrical Engineers Ltd & Another v Kenya Petroleum Refinery Ltd (HCC 190 of 2005), held that :

> *"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 enforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source."*

There is no dispute that the parties herein entered into a contract of sale of land and the purchase price was Ksh. 581,250. The land in question LR. NO. Butsotso/Esumeyia/2351. I have perused the sale agreement produced by the both the parties. They are identical accept for clause 9 in the Appellant's exhibit which is hand written. I concur with the Trial Magistrate that, the same has not been counter signed and hence the court cannot rely on this clause 9 that states as follow;

> *"The purchaser undertakes to resurvey (ref No.5) the said property at own cost prior to transfer and if any disputes arise thereof, will in consultation with the vendor sought an amicable solution to the same which may involve the vendor filing a boundary suit."*

Clause 9 has been inserted between clause 4 and 5. Be that as it may, the sale agreement talks of the purchase price was Ksh. 581,250 and he land in question LR. NO. Butsotso/Esumeyia/2351. There is no mention of 7 or 4 acres in the agreement. The appellant ought to have exercised due diligence and confirm that the acreage in the search certificate was the one on the ground. I find that the learned Principal Magistrate did not err in law in the judgement.

In **Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE