REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. (APPEAL) NO. 9 OF 2015

JAMLECK KIURA MURATHI.....APPELLANT

VERSUS

ANGELIUS GICHOBI KARURI.....1ST RESPONDENT

STANLEY NJOGU J. MARIA.....2ND RESPONDENT

JUDGEMENT

1. This is an appeal against the judgement and decree of Hon. S.K. Mutai (SRM) dated 23rd June 2015 in Embu CMCC No. 8 of 2008. By the said judgement the trial court partially allowed the suit by the Respondents (who were the Plaintiffs) against the Appellant (who was the Defendant) in the said proceedings. The court allowed the Respondent's alternative prayer for a refund of the purchase price in the sum of Kshs.330,000/- plus interest on account of a sale agreement which became void by operation of law.

2. The brief facts of the suit before the Magistrate's court were as stated hereinafter. By a plaint dated 10th January 1998 the Respondents had pleaded that vide two agreements for sale dated 19th February 1996 and 1st October 1996 respectively they purchased a portion of two (2) acres out of the Appellant's *Title No. Kabare/Kiritine/919* (hereinafter the *suit property*) for a total consideration of Kshs.330,000/-. It was further pleaded that despite payment of the full purchase price, the Appellant had failed to transfer the said portion of two acres to them. They consequently sought an order for the Appellant to sub-divide the suit property and transfer the said two acres to them jointly. In the alternative, they sought a refund of the purchase price, interest at 25% thereon and costs of the suit.

3. The Appellant filed a statement of defence dated 26th February 2008 in which the Respondents' claim was denied in its entirety. It was pleaded that the sale agreements were void by operation of law due to lack of consent of the Land Control Board. It was further pleaded that the Respondents' claim was statute barred under the law relating to limitation of actions. It was the Appellant's further defence that the Respondents were in breach of the aforesaid agreements for sale by failing to pay for the value of developments on the suit property in the sum of Ksh.60,000/-.

4. The material on record shows that the suit was fully heard before the Hon. S.K. Mutai who delivered a judgment on 23rd June 2015 by which he declined to order specific performance of the aforesaid sale agreement but he ordered a refund of the purchase price in the sum of Ksh.330,000/-. The trial court also declined to award the penalty of 40% of the purchase price contained in the sale agreements but awarded interest with effect from 19th February 1996 until payment in full.

5. The Appellant being aggrieved by the said judgement filed a memorandum of appeal dated 17th July 2015 raising seven (7) grounds of appeal. The court has noted that most of the grounds overlap and that in reality, there are only 3 grounds, that is,

> *a. That the trial court erred in awarding interest on the purchase price whereas the Respondents had taken possession of the two acres and derived profits therefrom for a period of 18 years.*
>
> *b. That the trial court erred in finding that the failure to obtain the consent of the Land Control Board was due to the Appellant's default.*
>
> *c. That the trial court erred in failing to call viva voce evidence instead of relying on the material on record and the submissions of the parties.*

6. In the opinion of the court, the Appellant was aggrieved essentially because he was ordered to pay interest on the purchase price which the trial court ordered to be refunded to the Respondents. There is no contention in the memorandum of appeal that he was not liable to refund the principal sum. He did not contend that he was entitled to keep both the suit property and the purchase price.

7. When the appeal was listed for directions on 13th March 2017 before me, the Appellant was not represented even though the date had been taken by consent. The court nonetheless directed that the appeal shall be disposed of through written submissions. The Appellant was given 21 days to file and serve his submissions whereas the Respondents were given 14 days upon service to file and serve theirs. The appeal was thereupon fixed for mention on 9th May 2017 to confirm compliance and fix a date for judgment.

8. When the matter was mentioned on 9th May 2017 none of the parties had complied by filing and serving written submissions. The parties thereafter sought and obtained extension of time to comply on four subsequent occasions. Finally, when the matter was fixed for mention on 19th December 2018 none of the parties had filed written submissions. The court, therefore, fixed the appeal for judgement on 9th May 2019.

9. By the time of preparation of this judgment none of the parties had filed submissions. However, the court file indicates that the Respondents filed an application dated 23rd January 2019 seeking dismissal of the appeal for want of prosecution. That application was filed whilst the appeal was pending judgement. The Respondent did not even bother to take a hearing date for that application. The court shall, nevertheless, proceed to render judgment as earlier scheduled.

10. The court is aware of its obligation as a first appellate 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."**

11. In the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** described that jurisdiction at page 429 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…"**

12. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 484 at page 485** 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."**

13. The Environment and Land Court at Eldoret in **ELC Appeal Case No. 8 of 2016 Kapsiran Clan Vs Kasagur Clan [2018] eKLR, the Hon Justice A. Obwayo** summarized the applicable principles as follows;

> **"The appropriate standard of review established in the cases can be stated in three complementary principles;**
>
> **a) First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
>
> **b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**
>
> **c) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."**

14. The court has considered the entire material record in this appeal. The court has paid attention to the proceedings before the trial court and the judgement delivered on 23rd June 2015. The court is aware that the trial court fully considered the implications of the reliefs which were sought by the Respondents in their plaint. The court was also alive to the fact that the sale agreements the subject of the suit before it were void for lack of consent of the Land Control Board. That is why the trial court declined to enforce the said agreements by declining to

order specific performance thereof and declining to award the penalties which were stipulated in the void sale agreements.

15. The court has also noted that the trial court was fully aware of the statutory remedy of a refund of the purchase price for a transaction which has become void under **section 7 of the Land Control Act (Cap 302).** The court appears to have declined to award interest at the rate of 25% which was sought in the plaint. The court appears to have awarded interest at court rates pursuant to its discretion under **section 26 of the Civil Procedure Act (Cap. 21).**

16. **Section 26(1)** of the said Act stipulates as follows:

> **"Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."**

17. It is evident that the award of interest is in the discretion of the trial court. It has not been shown that the trial court misdirected itself on any applicable principle or that it did not exercise its discretion in a judicious manner. It has been held before that an appellate court should not lightly interfere with the exercise of judicial discretion by the court of first instance unless its shown that the court of first instance did take into account all relevant factors or took into account some irrelevant factors in the decision making process in consequence of which it arrived at a wrong conclusion. In the case of **Mbogo & Another Vs Shah [1968] EA 93** it was held, *inter alia*, that;

> **"We now come to the second matter which arises on this appeal, and that is the circumstances in which this court can upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself, I like to put it in the words that, a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision; or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."**

18. The Appellant appears to have taken the view that interest could not be awarded either because the underlying transaction was void or because the Respondents recouped their losses by utilizing the suit property for 18 years. The court is unable to agree with that submission. The Appellant kept the Respondents out of their money for over 18 years. He failed to facilitate the transfer of 2 acres out of the suit property. He cannot be relieved from paying interest on the purchase price simply because he gave them possession.

19. This court is aware that in a fairly recent decision of the Court of Appeal in **Willy Kimutai Kitilit Vs Michael Kibet [2018]eKLR** it was held that a court of law has discretion to award even damages upon a refund of the purchase. The Court of Appeal stated as follows in paragraph 31 of the said judgement;

> **"For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance."**

20. The court, therefore, finds no merit with respect to the first ground for consideration. It has not been demonstrated that the trial court erred in law in awarding interest on the purchase price which the Respondents had paid to the Appellant. It was within the discretion of the trial court to award interest.

21. The second ground of appeal for consideration is whether the trial court erred in finding that the failure to obtain consent of the Land Control Board was due to the default of the Appellant. The court has carefully considered the judgement of the learned trial magistrate in this aspect. There is nowhere in the judgment whereby the trial court found that the Appellant was in default with respect to failure to obtain consent of the Land Control Board. In fact, the trial court was of the opinion that none of the parties to the sale agreements could be liable for breach of contract since the agreements became void by operation of law. In his judgement, the learned magistrate stated as follows;

> **"Similarly, given that the said land sale agreement became void means that no damages are recoverable as stated in the 2 agreements. As a result no party was in breach of the said agreements since they become void by virtue of the law applicable to controlled transactions in a land control area ….."**

22. In the premises, the court finds no merit whatsoever in that ground of appeal. The trial court did not hold that the Appellant was in default with respect to failure to obtain the consent of the Land Control Board. In any event, recovery of the purchase price under **Section 7** of the **Land Control Act** is not dependent upon default of any of the parties to the void agreement.

23. The third ground for consideration relates to the mode of disposal of the suit by the trial court. The Appellant contended that he was not given a fair chance of presenting his case by calling witnesses. He faulted the trial court for relying on the material on record and the written submissions of the parties only.

24. The court has fully considered the record of proceedings before the trial court. The record shows that the advocates for the concerned parties agreed on the mode of disposal of the suit. The record shows that on 20th November 2014 Ms. Wairimu Advocate for the Respondents and Mr. Kahiga Advocate for the Appellant recorded a consent before the trial court whereby they agreed to have the suit

disposed of on the basis of the material on record and written submissions to be filed within one month.

25. The court is of the view that the said consent by the advocates was binding upon the parties they represented. None of the parties can be allowed to resile from it except on the grounds which would ordinarily vitiate a contract amongst the concerned parties. The Appellant has not alleged that the said consent was procured through deceit, undue influence, duress, mutual mistake or other legally recognized vitiating factor.

26. In the case of **Hiran Vs Kassam [1952] 19 EACA 131** it was held, inter alia, that;

> **"The mode of paying the debt, then, is part of the consent. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgements and Orders* (7th Edn); vol 1, p. 124, as follows:**
>
> **"*prima facie,* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them…and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."**

28. It is thus clear that the Appellant has no legitimate complaint on the mode of disposal of the suit. He was bound by the consent recorded by his advocate on record just as much as the trial court was bound by that consent. The trial court was not at liberty to bypass the consent of the parties and call the witnesses for the parties directly. Accordingly, the court finds no merit in the third ground of appeal hence the same is rejected.

29. The upshot of the foregoing is that the court finds no merit in the appeal. The same is accordingly dismissed with costs to the Respondents.

30. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **23RD** day of **MAY, 2019.**

In the presence of Mr. Mureithi holding brief for Ms Wairimu for the Respondents and in the absence of the Appellant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

23.05.19