



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO 50 OF 2017

SYMON MANYARA AND

SUSAN WANGECI MANYARA (Both appealing through

Attorney FRANCIS GICHOBI MANYARA.....APPELLANTS

VERSUS

PAULINE MAHUGU t/a

MIANDA INVESTMENTS.....RESPONDENT

(Being an Appeal from the Judgment of the Honourable E N MAINA,

Senior Principal Magistrate, in Nairobi CMCC Number 9100 of 2006 delivered on 8th June 2007)

JUDGMENT

1. This appeal was lodged in 2007 as Nairobi High Court Civil Appeal Number 554 of 2007. In July 2017, Njuguna J issued an order transferring the Appeal to the Environment and Land Court. It is not clear why the appeal took inordinately long to be disposed. The appeal arises from a judgment rendered on 8/6/2007 by Honourable E N Maina (as she then was) in Milimani Chief Magistrate Court Civil Case Number 9100 of 2006. The trial court dismissed the appellants' claim for payment of an amount equivalent to the open market value for some unsurveyed plots in Embakasi on the ground that the appellants had not specifically pleaded and stated the precise amount they were claiming. Further, the trial court declined to grant the appellants' claim for damages on the ground that the material land sale contract was frustrated by lack of subdivision approval by the local authority. The trial court nonetheless made a finding that the appellants purchased 10 plots from the respondent; that the appellants properly sued the respondent and that the appellants had satisfied the court on balance of probabilities.

2. Aggrieved by the disposal orders of the court, the appellants brought the present appeal and urged the court to overturn the trial court's disposal orders and allow the claim on the following grounds as set out in the verbatim:

- a) That the learned trial magistrate erred in law and fact in delivering a judgment that was wholly against the weight of the evidence adduced.*
- b) That the learned trial magistrate erred in law and fact in overlooking the standard of proof required to be met in civil cases when she dismissed the appellant's suit.*
- c) That the learned trial magistrate erred and misdirected herself in law in finding that the plaintiffs must plead specifically to a claim of profit and/or interest.*
- d) That the learned magistrate erred in law in awarding the respondents costs of the suit and dismissing the plaintiff's suit in its entirety when the plaintiff had proved its case on a balance of probabilities.*
- e) That the learned trial magistrate erred in law in failing to do an assessment on quantum of damages even after dismissing the plaintiff's suit.*
- f) That the learned trial magistrate erred in law in dismissing the plaintiff's suit on the grounds of frustration by the city council when the same had not been pleaded by the defendant.*
- g) That the learned trial magistrate erred in law in failing to exercise her discretion judiciously by descending into the arena of*

conflict.

h) That the learned trial magistrate erred in law in delivering a judgment that was not in conformity with the legal requirement of a valid judgment.

i) That the trial magistrate erred in law and fact in condemning the plaintiff to pay costs, even after finding that the plaintiff had proved his case on a balance of probability.

3. The respondent opposed the appeal but there was no cross-appeal. The appeal was canvassed through both written and oral submissions.
4. The appellants submitted that the trial court found that the appellants had paid the respondent for the 10 plots but went ahead to dismiss the appellants' case on the ground that they did not plead special damages. They added that it was the duty of the court to assess the value of the 10 plots and make an appropriate award. The appellants further submitted that the trial court erroneously invoked the doctrine of frustration yet the same had not been pleaded in the respondent's defence. Further, the appellants faulted the trial court for failing to frame issues and set out reasons for its findings. On the issue of costs, the appellants argued that they were properly entitled to costs of the suit.
5. In response, the respondent submitted that the appellants were not entitled to the orders sought in the plaint because they did not acquire proprietary rights or interest in the plots. She further submitted that the appellants had no cause of action because the material contract was void. Lastly, the respondent submitted that the claim for damages would not stand because the contemplated sub division was not approved by the City Council.
6. I have considered the entire record and judgment of the trial court, the grounds of appeal, and the parties' respective submissions. It is noted that at page 2 of the impugned judgment, the trial magistrate made a finding that she was satisfied on a balance of probabilities that the appellants (plaintiffs) had purchased the 10 plots from the defendant and that the defendant was properly sued. That finding has not been challenged by way of cross appeal.
7. What is contested through this appeal is the trial court's decision not to award the three prayers which were set out in the plaint, namely: (i) payment of an amount equivalent to the open market value for all the ten (10) plots; (ii) damages; and (iii) costs of the suit. Consequently, three issues fall for determination in this appeal. The first issue is whether the trial court erred in holding that the appellants' claim for payment of an amount equivalent to the open market value of all the 10 plots was a special damages claim which would not be awarded in the absence of a specific plea in the plaint setting out the exact amount claimed by the appellants. The second issue is whether the trial court erred in holding that the 2nd limb of the appellants' claim (damages) was not payable because the material contract was frustrated by lack of the local authority's approval of the contemplated sub division scheme. The last issue is whether the trial court erred in awarding the respondent costs of the suit. I will make pronouncements on the three issues sequentially in the above order.
8. The material land sale contract was entered into on 9th January 1989 before Section 3 of the Law of Contract Act was amended. At that time, a mere written memorandum was deemed to satisfy the formal requirements for a valid land sale contract.
9. The first issue in this appeal relates to the trial court's holding that the 1st limb of the appellants' claim was a special damages claim and the same would not be awarded because it was not specifically pleaded. The tenor and import of the appellants' claim was set out in paragraph 13 of the plaint as follows"

"13. The plaintiffs claim is for payment of an amount of money equivalent to the value of the ten plots at open market value"

10. This is what was replicated as prayer (a) in the plaint. My interpretation of the appellants' claim is that it was what in common law is a form of general damages called purchaser's claim for loss of bargain. **The Right Honourable Sir Robert Megarry and Sir William Wade** in their work **"The Law of Real Property, 8th Edition, Page 694** have the following exposition on this kind of claim;

a) The General Rule.

An action for damages is the primary remedy under the law of contract, though it is less important in relation to contracts for the sale of land than specific performance. The measure of damages is the loss to the claimant from the non-performance of the contract. A vendor, for example can recover the difference between the price agreed to be paid and the net value of the property left on his hands, giving credit for any deposit paid by the purchaser. A purchaser can claim for the loss of a bargain, i.e the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. But the court may order such damages to be assessed at some other date where justice so requires; this may be the date of the hearing if the property has risen in value meanwhile. Where the purchaser claims damages for his loss of bargain he cannot in addition recover his costs, e.g. for investigation of title. If he is to be placed in the position in which he would have been had the contract been performed, he would necessarily have incurred those costs.

Damages may be assessed on a "costs of cure" basis where the claimant can establish that his loss consists of or includes the cost of doing work that in breach of contract the defendant failed to do. Thus where a vendor of land fails to carry out work that he contracted to do to the property prior to sale, the claimant may recover the cost of that work if either he does it himself or he can show that he intends to do so. However, the court may refuse to award damages assessed on this basis if to do so would be unreasonable: the question in every case is to determine the loss that the claimant has actually suffered.

11. Damages in the nature of loss of bargain are general damages to be assessed by the court at the time of rendering a determination. In the present suit, the trial court was presented with uncontroverted evidence by a registered and practicing land valuer showing that each of the 10 plots was valued at Kshs 180,000. Together, the value of the ten (10) plots was Kshs 1,800,000. In my view, the trial court erred in failing to assess the first limb of the appellants' claim at Kshs 1,800,000 yet uncontroverted evidence had been presented to the court. She

misapprehended the appellants' claim to be a special damages claim and erroneously declined to grant it despite having come to the finding that the appellants had proved a land sale contract and demonstrated that the respondent was not able to complete the sale contract. My finding on the first issue therefore is that the trial court erred in holding that the first limb of the appellants' claim was a special damages claim which would not be awarded if the amount was not stated in the plaint.

12. The second issue is whether the trial court erred in holding that the second limb of the appellants' claim was not available because the contract was frustrated by the local authority's non-issuance of sub division approval. Without saying much, the claim for damages under prayer (b) would not lie in addition to the claim for damages under prayer (a). The first limb of the claim is deemed to place the appellants in the position in which they would have been had the contract been performed. The second limb would therefore not lie, whether or not there was frustration by the local authority.

13. Having come to the above findings, it follows that the appellants are entitled to costs both in this appeal and in the trial court.

14. In light of the above findings, I make the following disposal orders in this appeal:

a) The order made by Honourable E N Maina on 8/6/2007 in Milimani Commercial Courts CMCC Number 9100 of 2006 dismissing the appellants suit is set aside.

b) Prayer (a) of the prayers set out in the plaint is allowed and the payable amount is assessed at Kenya Shillings One Million Eight Hundred Thousand (Kshs 1,800,000) only.

c) The said sum of Kshs 1,800,000 shall attract interest at court rate from 8/6/2007.

d) Prayer (b) of the plaint is declined.

e) The appellants shall have costs of both this appeal and the suit from which the appeal arose.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF MAY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Badia for the Appellants

June Nafula - Court Clerk