



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA 10 OF 2019

BENSON KAMAU MUTURA.....APPELLANT

VS

JAMES MURIMI KAHINGA.....RESPONDENT

(Being an Appeal from the judgement delivered by Hon B OCHIENG Acting CM in CMCC NO 32 OF 2010 at Murang'a on the 10/10/2014).

JUDGMENT

1. The Appellant being aggrieved by the said judgement filed a memo of Appeal on the following grounds; That the learned trial magistrate erred in law and fact;
 - a. By holding that the plaintiff had proved his case on a balance of probabilities.
 - b. Not taking into account the evidence of the Defendant
 - c. Failing to determine the cause of the accident
 - d. Failing to determine that the Respondent was the one that was in breach of the contract.
2. He sought for the following orders;
 - a. That the Appeal be allowed
 - b. That the whole judgement delivered on the 10/10/2014 be set aside
 - c. The plaintiff's suit be dismissed with costs to the Appellant
 - d. The costs of this Appeal be awarded to the Appellant in any event.
3. The suit in the lower Court arises from a sale agreement between the two parties in 2006 wherein the Appellant agreed to sell to the Respondent ½ of plot No LOC10/MUKANGU/594/39/1 at the purchase price of Kshs 120,000/-. It was the case of Respondent that he paid the purchase price in full but the Appellant failed to transfer the suit and to him and therefore sought specific performance that is to say an order to transfer the ½ share of the suit land or in the alternative refund of the consideration together with interest at Court rates from the 10/5/2006 till payment in full.
4. While resisting the Respondent's claim the Appellant admitted the agreement of sale but insisted that it is the Respondent that failed to meet the cost of the subdivision of the suit land and further denied any breach of contract. Further he contended that it is the Respondent's breach of the terms of the agreement aforesaid that led to the escalation of the rates payable to the Municipal Council of Muranga. He stated that the Respondent is therefore disentitled to any reliefs and further that the breach led to rescission of the agreement and that the suit property is no longer available for sale and that the purchase price stood forfeited.
5. At the trial of the suit the Respondent led evidence and reiterated the contents of the plaint. In particular that he entered into an agreement for sale on the 10/5/2006 for which he paid the purchase price in full. That he paid the consideration in cash in the presence of his Advocate a Mr L.N Kinuthia Advocate.
6. The Appellant on the other hand led evidence and admitted executing the agreement of sale aforesaid. That upon execution they

proceeded to the county council to establish how much rates was outstanding however they differed with the Advocate at the county office wherein the Respondent and his Advocate left and they have never met again. That he paid all the outstanding rates in respect to the suit land. That it is the Respondent that breached the agreement of sale. Further, he stated that he did not receive the purchase price of Kshs 120,000/- despite acknowledging the same in the agreement of sale. That he is not ready to refund the sum of Kshs 120,000/- to the Respondent.

7. After hearing the matter, the learned Acting Chief Magistrate determined that the Appellant should refund the Respondent the sum of Kshs 120,000/-, hence the current Appeal.

8. The Appeal is opposed. The parties agreed to canvass the Appeal by way of oral arguments on the 15/10/19.

9. In respect to ground No 2, the Appellant submitted that he did not receive any monies from the Respondent. Further that the trial magistrate did not consider his evidence as tendered in Court. That the Respondent ran away before paying the outstanding rent on the suit land. In respect to ground No 3 where he alluded to an accident, the Appellant hilariously informed the Court that the Respondent ran away and this is what he described as an accident. On ground No 5 he stated that the learned Magistrate failed to find that the Respondent was in breach of the contract.

10. The Respondent submitted that the Appellant acknowledged the receipt of the purchase price in the sum of Kshs 120,000/- at the time of the execution of the agreement, which agreement was signed before an Advocate. That it was part of the Appellants obligation to settle the outstanding rent arrears due to the county council. That the Respondent was to pay for the transfer fees as well as half share of the subdivision costs. That after receiving the purchase price the Appellant disappeared forcing the Respondent to sue him in 2010. That the Appellant did not deny the agreement of sale nor receiving the purchase price as seen in para 3 of the defence but instead blames the Respondent for breach for failing to pay the council rates, which was not part of the agreement for sale. It was his submission that the Appellant cannot keep the money as well as the plot. That the Appellant failed to initiate the subdivision which the Respondent was to meet the 50% costs of the same in accordance with the agreement of sale. That it is the Appellant that breached the agreement and not the Respondent.

11. In a rejoinder the Appellant submitted and refuted that he sold the land to educate his son who in any event has completed university.

12. Being the first appellate Court, I must caution myself in the words of the Honorable Judges in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** regarding the duty of first appellate Court:-

“This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

13. I have analyzed and considered the evidence adduced by the parties in the lower Court and the material placed before this Court on Appeal. The key questions are; whether the Appellant received the purchase price; who breached the agreement of sale; whether the Respondent is entitled to a refund of the purchase price; whether the learned magistrate considered the evidence of the Appellant in the trial of the case; who meets the cost of the appeal?

14. In answer to the 1st issue, I have seen the agreement of sale which is duly executed by the parties and under para 1 the Appellant acknowledged receipt of the purchase price in full.

15. Further the agreement provided that the Appellant was to pay the rent and rates due to the County Council of Muranga which stood at Kshs 10,178/- at the signing of the agreement. The Respondent was to pay for the transfer fees while the subdivision cost was to be shared equally between the Appellant and the Respondent. The Appellant undertook to execute all the documents to effectuate the agreement of sale.

16. It was a term of the agreement that if the agreement is frustrated by unforeseen events after its execution, the Appellant was to refund the full purchase price to the Respondent.

17. It is the case of the Appellant that he was not paid the purchase price. The Respondent's case in the lower Court was for transfer of the land he purchased or in the alternative the full refund of the purchase price. The Respondent led evidence that he paid the purchase price in cash to the Appellant in the presence of an Advocate. The Appellant in his defence did not refute the receipt of the payment. Instead he explained that the Respondent was in breach of the agreement in failing to pay the Respondent failed to pay the transfer fees and subdivision costs. That he had paid the rates in the sum of Kshs 10,178/- due to the county Council and Respondent refused to pay Kshs 16000/- being the subdivision and transfer fees to enable the transaction to progress. That he changed his mind from selling the suit land as he has now settled his son on the suit land.

18. In his defence dated the 8/10/2010, the Appellant did not deny receiving the purchase price at all. He admitted the contents of the agreement of sale. Under para 6 he categorially states that due to the breach of contract by the Respondent, the Respondent forfeited the amount paid under the contract. What amount was this that the Appellant was referring to if not the purchase price. As at this time the only monies which had been paid and acknowledged in the agreement was the purchase price in the sum of Kshs 120,000/-.

19. In the affidavit of the Appellant dated 17/10/12 in which the Appellant was responding to the notice of motion dated the 23/8/12 in which the Respondent sought orders for summary judgement in the sum of Kshs 120,000/-, the Appellant under para 6 that stated the Respondent forfeited the money paid due to his breach of contract and further under para 5 and that the Respondent is not entitled to any refunds as per the contract. No where did the Appellant refute payment of the purchase price. Indeed, he acknowledged that the purchase price was paid to him and his argument was the Respondent was not entitled to the refund. His argument that he did not receive the purchase price is misleading and is an afterthought.

20. It is the finding of the Court that the Appellant received the full purchase price in the sum of Kshs 120,000/- as acknowledged under para 1 of the agreement of sale.

21. Respecting issue No 2, the question is whether there is a breach of agreement, if yes by whom? The parties entered into a simple agreement which they reduced in writing. The obligation of the Respondent was to pay the purchase price which was paid in full on the signing of the agreement and an acknowledgement factored in para 1. The Appellant was to pay all the rent and rates outstanding to the county council of Murang'a in the sum of Kshs 10,178/-, which amount was settled the same day the agreement was signed on the 10/5/06. Further the Respondent was to meet the costs of transfer fees and 50% of the subdivision costs. There is no evidence that these were paid and or demanded from the Respondent and that he declined to pay.

22. The case of the Appellant is that the Respondent is in breach of the contract by causing the escalation of the rent due to the County Council and that he disappeared and resurfaced when he filed suit against him in 2006. It is evident from the record that the Purchase price was paid in full by the Respondent and the Appellant acknowledged it. That there is no evidence that the Respondent failed to meet his obligations under the contract which was to pay for the transfer fees and the 50% costs of subdivision fees.

23. It is the finding of the Court that the Appellant breached the contract especially para 6 where he agreed to execute all the documents necessary to effect the transfer in the name of the Respondent. According to the witness statement of the Appellant he did not transfer the suit land to the Respondent because he settled his son on the suit land. It can be concluded that this may be the motivation for the breach of contract. Whichever reason he cannot have the purchase price and the suit land.

24. In answer to issue No 3 above, the parties had a simple default clause which stated that in the event the agreement is frustrated by unforeseen events after execution the agreement and the plot is not transferred to the purchaser the vendor will refund the purchase the full purchase price to the purchaser. The Appellant cannot be allowed to turn around and claim that he did not receive any monies and therefore cannot refund the purchase price. The Respondent led overwhelming evidence that he paid the full purchase price and performed his part of the agreement. The Appellant seems to have conjured a breach of contract on the part of the Respondent based on alleged nonpayment of some outgoings.

25. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993**, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609**, the Court held as follows:

“The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable.”

26. It is the finding of the Court that the Respondent is entitled to the refunds as determined in the lower Court.

27. In respect to the 4th issue, I have reviewed and considered the evidence adduced in the trial and the judgement of the Learned Hon Acting Chief Magistrate and fail to fault her evaluation of the evidence and the conclusion she arrived.

28. In the end the Appeal fails and it is dismissed with costs. The judgement of the Hon Learned Magistrate is upheld in it's entirety.

29. The Appellant shall pay the costs of the Appeal and of the suit in the lower Court.

30. **It is so ordered.**

DATED DELIVERED & SIGNED AT MURANG'A THIS 19TH DAY OF DECEMBER 2019.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Appellant is present in person

Mureithi HB for Kirubi for the Respondent

Irene and Njeri, Court Assistants