Bell Atlantic Communications Ltd v Rwingo (Environment and Land Appeal 1 of 2023) [2024] KEELC 296 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 296 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 1 OF 2023

NA MATHEKA, J

JANUARY 31, 2024

BETWEEN

BELL ATLANTIC COMMUNICATIONS LTD ..... APPELLANT

AND

EPHRAIM MAINA RWINGO ..... RESPONDENT

JUDGMENT

1. The Appellant being dissatisfied with the above stated decision appeals to this Honourable Court on the following grounds;

    1. That the Learned Trial Magistrate erred in law and fact in failing to allow the Appellant's claim despite the overwhelming evidence which showed that the Appellant had established its claim on the required standard.

    2. That the Learned Trial Magistrate erred in law and fact in failing to find that Appellant had fully discharged its obligations under contract and that the Respondent was under statutory and contractual obligation to deliver title and vacant possession of the Appellant's property.

    3. That the Learned Trial Magistrate erred in law and fact in failing to find that title in respect of the suit property had passed to the Appellant and the Respondent had no option but to grant the certificate of title and vacant possession to the Appellant.

    4. That the Learned Trial Magistrate erred in law and fact in failing to appreciate the real issues before him thereby arriving at a wrong decision.

    5. That the learned Trial Magistrate erred in law and fact by relying on issues that were not pleaded to dismiss the Plaintiffs claim.

6. That the learned Trial Magistrate erred in law and fact in failing to find that the Sale Agreement signed between the Parties placed the obligation to obtain the Consent to transfer upon the Respondent and the Appellant could not be penalized due to the Respondents breach.

7. That the Learned Trial Magistrate erred in law and fact in failing to properly evaluate and consider all the evidence placed before him thereby arriving at a wrong decision.

8. That the Learned Trial Magistrate erred in law and fact by disregarding the Appellant's evidence on record thereby arriving at a wrong decision.

9. That the learned Trial Magistrate erred in law and fact by holding that the agreement for sale had been frustrated and that there were squatters on the suit property when there was no such evidence on record.

10. That the Learned Trial Magistrate erred in law and fact by arriving at a biased decision.

11. That the Learned Trial Magistrate erred in law and fact by failing to allow the Appellant's claim.

2. The Appellant prays as follows;

   a. That the Appeal herein be allowed as prayed.

   b. That the Judgment dated 7th December 2018 delivered by the Subordinate Court dismissing the Appellant suit in Mombasa Chief Magistrate Civil Suit No.1104 of 2010 Bell Atlantic Communications Ltd Versus Ephraim Maina Rwingo be set aside and be substituted with an Order allowing the Appellant's suit as prayed in the Plaint dated 28th April 2010.

3. This court has considered the evidence and the submissions therein. It is a finding of fact that the Defendant by a search dated 29th January 2014 is the owner of title No. MN/1/3254. Section 24 (a) of the *Land Registration Act* stipulates as follows;

> "subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....."

4. In the case of *Willy Kipsongok Morogo v Albert K. Morogo* (2017) eKLR the Court held as follows;

> "the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the *Land Registration Act*."

5. While in the case of *Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 Others* (1997) eKLR, where the Court of Appeal held that;

> "Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder."

6. Further, in Civil Appeal No. 246 of 2013 *Arthi Highway Developers Limited v West End Butchery Limited* and Others, the Court of Appeal expressly stated thus:

> "Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject

to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

7. Be that as it may, Section 26 of the *Land Registration Act*, No.3 of 2012 provides that;

> "26.(1)
>
> The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

8. In the case of *Elijah Makeri Nyangw'ra –v- Stephen Mungai Njuguna & Another* (2013) eKLR the court held that:

> "the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme."

9. Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows: -

> ....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

10. For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

11. Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to

these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions".

13. PW1 testified that the Appellant and the Respondent entered into a sale agreement on the 13th December 2006 for the purchase of half undivided share in title No. LR M.N/1/3254. The transfer was duly submitted at the Land Registry Mombasa and was registered on 23rd May 2007. Despite paying the full purchase price the Respondent has denied the Appellant his share. DW1 testified that he is still the registered owner of the suit land. He admits that he entered into a sale agreement with one Benson Kamau in December 2016. The completion was 90 days and he was required to have subdivided the land and to deliver the original title of the subdivision. That the Lands office refused the subdivision and did not give clear reasons DEx12(a). There was also a squatter who refused to vacate but has since moved. That the money was refunded by Sachdeva Advocates DEx12C. DW1 was categorical that he never signed any agreement with the Appellant, never signed any transfer documents and the PIN number in the transfer was not his.

14. I have perused the documentary evidence on record and find that there is no agreement signed by the Appellant. PW2, testified he was the branch Manager of the Appellant Company. No authority or resolution of the Company to sign was produced and no director signed the said agreement. Be that as it may, the Respondent was to subdivide the land and obtain the titles within 90 days which he states he could not do.

15. The issue for determination is whether the doctrine of frustration applied herein. The doctrine of frustration, is a complex one in the law of contract. It provides a vent for each party to bear the loss or gains of a contract which cannot be performed at a particular point in time. The Court of Appeal recently in *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another* (2014) eKLR stated as follows;

> "This now leads us to the issue of whether the agreement was genuinely frustrated.

16. In *Halsbury's Laws of England*, Vol. 9(1), 4th Edition at paragraph 897:-

> "As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

17. In the case of;- *Davis Contractors LTD v Farehum U.D.C*, (1956) A.C 696, Lord Radcliffe at page. 729 held:

> "...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".

18. In this appeal, we must remind ourselves that this Court is not minded to interfere with the findings of fact by the trial court unless they are not based on evidence or are a misapprehension of the evidence or that the trial magistrate is shown to have acted on a wrong principle in arriving at the findings. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* (1982-88) 1 KAR 278.

19. We will begin with the issue of whether the failure by the Respondent to subdivide the property frustrated the agreement. In this regard the learned magistrate found that the agreement had been frustrated when he stated that;

> "the defendant pleads frustration attempted to request for permission before the commissioner of lands but the request was delayed in the following manner:-
>
> > "Please note that subdivision is not recommended because the road net works as per the plan were not networked. The owner showed rental plan and provide for interlinkages/networking with other roads in the neighbourhood the location plan is also not acceptable"
> >
> > (Letter dated 21/12/2009)
> >
> > This lack of consent meant that the defendant could not fulfill his part of the bargain. This is a statutory requirement rendering the agreement void. (See Section 20 of the Registration of Titles Act).
> >
> > The other font which frustrated the contract was squatters who needed alternative land."

20. From the evidence it is not in dispute that a sale agreement existed between the Appellant's Manager and the Respondent. It is also not in dispute that an amount of Kshs. 2,500,000/= was paid by the Appellant for the purchase of the suit property. What was in dispute was whether there had been a denial of the sub division and if so, whether as a result of this, the sale agreement was frustrated, thereby discharging the Respondent from the obligations under the agreement.

21. The learned Judge found these was no consent from the Commissioner of Lands and concluded that the contract had been frustrated. This leads us into the issue of whether the contract was indeed frustrated. The case of *Davis Contractors Ltd v Farehum U.D.C. (1956) AC 696* sought to provide guidance on when a contract can be held to have been frustrated. In that case Lord Radcliff stated thus;

> " ...frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. "Non haec in foederi veni" It was not what I promised to do...There... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for."

22. For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In *Maritime National Fish v Ocean Trawlers [1935] AC 524.,* self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.

23. In Davis Contractors Ltd v Farehum U.D.C. (supra), it was stated thus,

24. The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self induced ." (Emphasis ours).

25. In Howard & Company (Africa) Ltd v Burton (1964) EA 157 this Court concurred with Lord Sumner in *Bank Line Ltd v Arthur Capel & Company* (26) [1919] AC p. 425 who stated that;

> "It is now well established that the doctrine of frustration cannot apply where the event is alleged to have frustrated the contract arises from the "act or self-election of the party" who seeks to invoke it. Reliance cannot be based on a self-induced frustration".

26. In the circumstances, it is evident that, in the appellant's case, the alleged failure to complete the subdivision frustrated the contract as this is a requirement in law.

27. The next consideration, was whether an unforeseeable event occurred leading to the frustration of the agreement. According to the judgment, it was also the presence of squatters that was identified as the intervening event that further frustrated the agreement. In setting out what constitutes a foreseeable event in *Ewan Mckendrick's, Contract Law, Eight Edition, para 14.15 page 251,* it is stated that;

> "An event is foreseeable and will prevent frustration of the contract only where it is one which 'any person of ordinary intelligence would regard as likely to occur' (see Treitel, 2007, para. 19-078, and contrast Hall 1984). In other words, the question would appear to be one of fact and degree and much will depend on the extent to which the event in question was foreseeable by the parties. As Rix LJ stated in
>
> The Sea Angel [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [127], 'the less that an event , in its type and its impact, is foreseeable, the more likely it is to be a factor which , depending on other factors in the case may lead on to frustration."

28. The Respondent was the registered owner of the suit property, and his intention at all times was to sell half share of the suit property when he signed the agreement. It was not conceivable that the Commissioner of Lands would withhold consent to subdivide the land. His actions were unforeseeable, and capable of being considered an event that would have frustrated the contract.

29. Another consideration is whether, the intervening event resulted in something so radically different from that originally contemplated by the parties.

30. In Howard & Company (Africa) Ltd v Burton (supra) this Court stated thus,

> "We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see Davis ; per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it then the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old

situation which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought, is not sufficient to bring about frustration. It must be positively unjust to hold the party bound."

31. In the instant case, what was contemplated in clause 5 of the agreement dated 13th December 2006 was that the completion date would be 90 days from the date of signing the agreement or earlier by agreement.

32. In associating myself with the cited decisions, the legal provisions cited above as well as the evidence adduced, I find that the trial magistrate did not err in arriving at his decision to dismiss the case with costs to the defendant. Consequently, I find this appeal is unmerited and I dismiss it with costs.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.

N.A. MATHEKA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR