



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

CIVIL APPEAL NO.82 OF 2015

JACOB MURIUNGI MUREA.....APPELLANT

=VERSUS=

SALOME NJOKI NJUGUNA.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate Hon. Rachel Ng'etich delivered on 23rd October, 2015 in Milimani Chief Magistrate's Court Civil Case No. 4036 of 2009)

JUDGMENT

1. The appellant was a tenant of the respondent in a house erected on LR No. Nairobi/Block 134/771 (suit premises). The appellant had been a tenant of the respondent since 1998. On 5th June 2006, the appellant entered into a sale agreement with the respondent in which the respondent agreed to purchase the suit premises at a consideration of Kshs.1,375,000/-. A deposit of Kshs.275,000/- was paid on execution of the agreement. The balance of the purchase price of Kshs.1,100,000/- was to be paid on handing over of the completion documents.
2. It was a further term of the agreement that the appellant was to discontinue paying monthly rent if completion documents were not handed in within 30 days. When the 30days agreed lapsed, the respondent had not handed in completion documents. On 24th July 2006, the respondent wrote to the appellant and indicated that she had withdrawn from the sale. The appellant wrote a letter to the respondent on 26th July 2006 giving a 21 days completion notice. The respondent did not comply. A demand notice was written on 31st August 2006 intimating that the appellant was going to file a suit for specific performance. The appellant filed a suit against the respondent in 2009 seeking among other orders an order of specific performance. This suit was dismissed on 23rd October 2015 triggering this appeal.
3. The appellant's case was that he had entered into a sale agreement with the respondent for purchase of the suit premises. The appellant was ready and willing to complete the transaction but that it is the respondent who failed to meet her part of the bargain.
4. The respondent's case is that she had intended to sell the suit premises to the appellant who was her tenant. She received 275,000/- upon execution of the agreement on 5th June 2006 but barely one and half months later, she changed her mind and wrote to the appellant indicating that she was no longer interested in selling the suit premises. It was the respondent's contention that she allowed the appellant to stay without paying rent until the deposit which he had paid was exhausted.
5. After conclusion of the hearing before the lower court, the trial magistrate held that though the respondent was in breach of the sale agreement, she was entitled to change her mind. The trial magistrate proceeded to dismiss the appellant's claim for specific performance and made orders which were not prayed for by either party to the dispute.
6. The appellant being dissatisfied with the judgment preferred an appeal to this court in which he raised six grounds of appeal. This being a first appeal, this court is entitled to evaluate the evidence which was presented before the lower court and reach its own conclusion but of course giving allowance to the fact that the court did not see the witnesses testify.
7. The parties agreed to dispose of the appeal through written submissions. The appellant filed his submissions on 31st January 2018. The respondent filed her submissions on 2nd February 2018. The first ground of appeal is that though the trial magistrate made a finding that the respondent was in breach of the sale agreement, the respondent was nevertheless at liberty to change her mind. The appellant faults the trial magistrate on this. The appellant's counsel in their submissions argue that there was no clause in the agreement providing for rescission and that the conduct of the appellant was not one which would amount to repudiation of the contract as to free the parties from the contract. In support of this contention, they relied on the case of **Beatrice Muthio Nzioka –Vs- Charles Akello On'wen [2014] eKLR** where Justice Nyamweya quoted paragraph **242 of Halsbury's laws of England Volume 42 4th edition** which states that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the

purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position.

8. The respondent is trying to support the finding of the magistrate in as far as ground one is concerned argued in her submissions that the trial magistrate took into account the conduct of the parties before arriving at the finding that the respondent was at liberty to rescind the contract.

9. I have perused the agreement which was signed by parties herein. I have also gone through the evidence adduced before the trial court. The parties had not agreed on conditions which would have led either party to opt out of the contract. In the absence of that clause, the court has to consider whether the appellant's conduct amounted to conduct which would suggest repudiation of the contract. The appellant had paid Kshs.275,000/- as deposit. He had agreed to pay the balance of the purchase price upon completion documents being given. He had taken a loan from his Sacco and was ready to clear the balance. When the respondent wrote to him intimating that she did not wish to proceed with the sale, he wrote a letter giving 21 days notice to complete. This is not conduct of a person who was not keen on carrying on with the contract. As there was no clause in the agreement as to what would lead to either party opting out of the agreement, I find that the respondent was wrong in purporting to rescind the sale agreement. In this regard, the trial magistrate was wrong in finding that even though the respondent was in breach, she had the liberty to change her mind.

10. The second and third grounds of appeal are that the trial magistrate erred in law and fact in making a finding that the appellant was not entitled to an order of specific performance as he failed to ask for a refund of his deposit as per the Law Society conditions of Sale. I have gone through the evidence adduced in the lower court as well as the judgment of the trial magistrate. The issue for determination as regards these two grounds is whether the trial magistrate was correct in making a finding that the appellant was not entitled to specific performance and that he was only entitled to seek refund of deposit. In her judgment, the trial magistrate refers to clause 4(f) of the Law Society conditions of sale. The trial magistrate was referring to the completion notice issued by the appellant on 26th July 2006. We do not have clause 4(f) in the Law Society Conditions of Sale 1989 edition. What the trial magistrate may have been referring to is Clause 4 paragraph 7(f) which deals with issuance of completion notice. This clause gives the options available to a purchaser. The clause is clear that a purchaser who has issued a completion notice may without prejudice to his other remedies opt for a refund of the deposit paid. In the instant appeal, the record is clear that the appellant did not opt for refund. He instead opted to file a suit for specific performance. He was not under any obligation to call for his deposit when he had other remedies. The respondent's argument that the appellant is guilty of laches has no basis. As will also become clear in one of the grounds of appeal yet to be dealt with, the appellant was free to bring his claim three years after the breach of the agreement and the doctrine of equity cannot be called to aid in denying him that right.

11. The respondent in supporting the trial magistrate's finding declining to order specific performance relied on the case of **Amina Abdul Kadir Hawa –Vs- Rabinder Nath Anand & another [2012] eKLR**. This is a decision of Justice Nambuye as she then was. In this decision Justice Nambuye as she then was had considered the circumstances of the case and found that it was not appropriate to order specific performance. In reaching this decision the Judge considered the circumstances when an order for specific performance could be declined.

12. In the instant appeal, the circumstances giving rise to the suit before the lower court do not warrant this court to decline to order specific performance. It is the respondent who unilaterally decided to rescind the agreement. The appellant had been a tenant of the respondent since 1998. The appellant entered into the agreement while he was in the suit premises. He had developed a sentimental attachment to the suit premises such that the issue of him going for another property would not be appropriate. Even though the case has taken long to determine, the order for specific performance would not amount to unjust enrichment on the part of the appellant. The respondent had made up her mind to sell the suit premises as of June 2006 when prices were low. She cannot now raise the issue of rise in prices to justify non grant of an order of specific performance. It is clear that the trial magistrate was wrong in failing to order for specific performance.

13. In ground four and five, the trial magistrate is faulted for blaming the appellant for bringing his action 3 years after the breach and blaming him for not paying rent. The issues which arise for determination from these grounds is whether the trial magistrate was wrong in blaming the appellant for bringing his claim three years after the breach of agreement or for not paying rent. On the issue of rent, the agreement entered between the appellant and the respondent was clear that the appellant was to stop paying rent if the respondent did not provide completion documents after 30 days. The appellant stopped paying rent after 30 days. This was in accordance with the agreement. It was therefore wrong for the trial magistrate to blame the appellant for non payment of rent.

14. On the issue of the appellant bringing this suit three years after the breach of the agreement, the trial magistrate was wrong in blaming the appellant for this. The law is clear that in claims founded on contract, the limitation period is six years. The appellant was therefore within the limitation period and should not have been blamed for that. The trial magistrate's mind was clearly blurred by the issue of nonpayment of rent and the period taken to file the suit. These two issues are the ones which made the magistrate to decline to order for specific performance. I find that she was wrong in her findings.

15. The last ground of appeal is that the trial magistrate erred in law and in fact in granting prayers which were not sought by either party. The judgment of the trial magistrate is clear that she awarded refund of Kshs.275,000/- paid as deposit by the appellant. This amount was to attract interest at court rates from the date of payment until refund. The trial magistrate also ordered that the respondent was entitled to rent to date. Such rent was to be calculated by the Executive Officer of the Court as was the case with interest due on the deposit. It is clear that neither the appellant nor the respondent pleaded for such prayers which the trial magistrate granted. It is trite law that parties are bound by their pleadings. In the case of **Captain Henry Candy –Vs- Caspar Air Chartered Limited [1956] EACA 139 at 140 Sinclair J cited Scrutton L.J. in Blay –Vs- Pollard and Morris [1930] 1 KB 682** where he stated as follows:-

“Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment.”

16. Neither the appellant nor the respondent raised the issue of refund of deposit or payment of rent in their pleadings. The two issues were never the subject of the evidence given by the parties during the hearing. There was not even a suggestion from either party that they had left the issue for determination by the court. It was therefore wrong for the trial magistrate to proceed to make those awards. There was no

counter-claim by the respondent for rent due. In any case the agreement had clearly stated that the appellant was to stop paying rent if the respondent failed to provide completion documents within 30 days. There was no basis upon which the trial magistrate would have ordered for refund under prayer (f) of the amended plaint which read as follows:-

“ Any other relief the court may deem fit to grant”. This prayer which is in almost all claims filed does not give a trial court a right to make awards when the evidence does not support such award or when such awards have not been asked for by the parties.

17. I have demonstrated hereinabove that the most appropriate remedy which the trial court should have granted is an order for specific performance. In the case of **Manoor –Vs- Baram [2003] EA 580 at 581** it was held as follows:-

“The courts have long considered damages as an inadequate remedy for breach of contract for sale of land, and more readily decree specific performance to enforce such contract as a matter of course”

18. In conclusion therefore I find that the appellant’s appeal has merits. I allow the same in its entirety. I proceed to set aside the judgment of the trial court and in place thereof make the following orders:-

a. An order of specific performance compelling the respondent to deliver to the appellant’s advocate all completion documents enumerated in paragraph 11 of the Sale agreement dated 5th June 2006 and any other documents necessary to transfer LR No. Nairobi/Block 134/771 to the appellant within 30 days of service of the decree.

b. A permanent injunction restraining the respondent by herself, her servants or agents howsoever and however from selling, leasing, charging offering for sale or in any way dealing with the property known as Nairobi/Block 134/771.

c. An order for specific performance directing the respondent to effect the transfer of all that property known as Nairobi/Block 134/771 to the appellant within 30 days or in default the Deputy Registrar of this court is hereby authorized to execute transfer on behalf of the respondent.

d. The costs of this appeal and the costs in the lower court shall be borne by the respondent.

Dated, Signed and delivered at Nairobi on this 28th day of June 2018.

E.O.OBAGA

JUDGE

In the presence of :-

M/s Kiamba for appellant

Court Clerk: Hilda

E.O.OBAGA

JUDGE