REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL CASE NO. 6 OF 2016

(Formerly Eldoret Hcca No. 88 of 2011)

PIUS FRANCIS OMWERI NYABERI…….……...APPELLANT

VERSUS

SHADRACK K. KIPTUGEN……..RESPONDENT

JUDGMENT

The appellant, ***Pius Francis Omweri Nyaberi*** has come to court on appeal against ***Shadrack K. Kiptugen*** herein known as the respondent seeking to set aside the decision of the Lower Court and thus judgment be entered in favour of the appellant for the sum of Kshs.665,000/= plus costs and interest. The appellant also seeks costs of the appeal and the suit in the Lower Court. The genesis of this matter is a claim by the appellant that at all material times, the respondent was the registered owner of the whole of those parcels of land known as L. R. No. 9930/8 and 9930/10 respectively situated in North of Eldoret Municipality within Uasin Gishu District. The appellant claimed in the Lower Court that by an agreement dated 29.5.2006, the respondent sold to the appellant two parcels of land each measuring 22 acres making a total acreage of 44 acres in land reference Nos. 9930/8 and 9930/10 for a sum of Kenya Shillings Four Million One Hundred and Eighty Thousand Only (Kshs.4,180,000) of which the appellant made a down payment of Kenya Shillings Six Hundred Sixty Five Thousand Only (Shs.665,000) which was equivalent to seven acres of the said parcels of land.

The respondent in breach of the terms and conditions of the said agreement went ahead and transferred the said parcels of land to Lavington Security Guards Limited and Charles Chemase Cherono respectively, parties who were strangers to the said agreement.

That the claim against the respondent was a refund of the sum of Kshs.665,000/= being the amount received by the respondent from the plaintiff as part payment of the consideration in respect of the said agreement which failed and was being claimed as a debt in respect of section 7 of the Land Control Act, Cap. 302, Laws of Kenya. The appellant further claimed interest at the rate of 30% per annum as from 29.5.2006 on the partly paid consideration of Kshs.665,000/= as the express terms and conditions of the sale agreement in question that the respondent had defaulted.

The respondent filed defense and counterclaim whose gist was that on 29th day of May 2006, or thereabouts, he entered into a sale of land agreement with the appellant wherein, the appellant undertook to purchase the above parcels of land at a total consideration of Kshs.4,180,000/= (Kenya Shillings Four million one hundred and eighty thousand only) as stated, partly in paragraph 4of the plaint, however, the respondent denied that the appellant made a down payment of Kshs.665,000/= (Kenya Shillings six hundred and sixty five thousand only) as stated and the appellant was put to strict proof thereof.

That it was an agreed term between the respondent and the appellant that the appellant would make regular payments directly to Agricultural Finance Corporation to offset the loan advanced to the respondent, wherein, the title document of the said land parcel had been charged. That the appellant made very minimal deposits to the respondent's account No. [particulars withheld] Kenya Commercial Bank and thereafter went underground. That the respondent tried to convince the appellant to finish the said purchase price, to enable the financial institution release the title document, duly discharged so that he could transfer the ownership to the appellant but the appellant declined. That the appellant having breached the agreement left the defendant exposed to the danger of his land being auctioned since he had relied on the appellant. That after several efforts, he managed to get a serious buyer to whom he sold the land and saved it from being auctioned. That the respondent thus averred that it is the appellant who breached the terms of the agreement prompting the respondent to sell the land to another person. The respondent denied that the appellant was entitled to any refund and averred that it was the appellant who breached the agreement and was to pay a penalty of 30% of the purchase price. The respondent denied that the appellant was entitled to any interest.

In the counterclaim, the respondent claimed that vide a sale agreement dated 29th day of May, 2006, he sold a land to the appellant for a consideration of Kshs.4,180,000/= (Kenya Shillings Four Million One Hundred and Eighty Thousand Only). That the appellant was to deposit the amount by way of installment to the defendant's account or directly to the financers herein, Agricultural Finance Corporation. That the appellant deposited some money in the respondent's account and refused to deposit the remaining balance.

That the purchase price was Kshs.4,180,000/= (Kenya Shillings Four Million One Hundred and Eighty Thousand Only), 30% therein is Kshs.1,254,000/= (Kenya Shillings One Million Two Hundred and Fifty Four thousand Only), which amount the respondent was at an appropriate time to demand from the appellant.

The respondent averred that he formally informed the appellant that he had cancelled the Agreement due to breach of contract by the appellant and further was to proceed and sue the plaintiff for breach of contract. The respondent ultimately prayed for a declaration that the appellant was the one who breached the sale agreement between himself and the respondent dated 29.5.2006 and that the respondent was at liberty to pursue the appellant in a separate claim of compensation.

After considering the evidence on record and submission of both counsels, the learned trial Magistrate rightfully found that the issue for determination was whether the respondent had breached the terms of the agreement as discerned from PEx1 or whether it was the appellant who was in breach of the agreement. The learned trial Magistrate found that the terms of the agreement were clear that the full purchase price was Kshs.4,180,000/=. The appellant paid Kshs.665,000/= as down payment for sale of 44 acres of land comprised in parcel No. 9930/8 and 9930/10. The balance of the purchase price was to be paid in 6 months' time. The learned Magistrate found that if the money was to be paid in 6 equal instalments, the appellants should have been required to pay monthly instalment of Kshs.568,833.30.

The honourable court found that PW2 did not say that the appellant left any money with him to pay the balance of the purchase price. The respondent had claimed that the PW2 had never called him to collect the balance of the purchase price.

The court found that the appellant claimed that he had looked for the respondent to pay him the balance but the respondent avoided him and refused to pick his calls and therefore, he went back to his advocate who drafted agreement but the respondent declined to go to the said advocate. In summary, the appellant claims to have left the money with his advocate and the respondent refused to visit the offices and take the money.

The honourable court further found that the appellant was aware that the respondents said suit parcels of land were charged to Agricultural Finance Corporation. and that even if the appellant's lawyer, PW2 was not aware of the charge to Agricultural Finance Corporation, he had a duty to conduct a search and establish the status to his client. The learned Magistrate also found that there was evidence that the

respondent was under intense pressure to dispose off the land to offset the loan. When the advocates for the appellant were writing to the respondent, the due date of the agreement had already lapsed over five months and it cannot be established on the face of denial by the respondent that the plaintiff made any efforts to liquidate the balance of the purchase price. The court found that there was no term in the agreement that the respondent refunds the purchase price save a penalty of 30% for breach of agreement. The suit was dismissed with costs to the defendant.

The appellant, dissatisfied with the decision of the court appealed to this court on grounds that the honorable Magistrate erred in law and fact in holding that the appellant had not proved his case to the required standards. The grounds of appeal are that the honorable Magistrate erred in law and fact in holding that the agreement dated 29.5.2006 relating to Agricultural land could be enforced 6 months after it was executed and that the honourable Magistrate erred in law and fact in failing to hold that the sale agreement became null and void 6 months after it was executed by operation of law and hence there was no agreement/contract capable of being breached by the appellant. The honourable Magistrate erred in law and fact in failing to hold that the transaction entered into between the appellant and the respondent having become null and void by virtue of the Land Control Act, then the appellant was estopped from making further payments pursuant hereto and his only remedy lay in pursuing a refund of the sum paid to the respondent. That the honourable Magistrate erred in law and fact in holding that the respondent/defendant was at liberty to pursue recovery of Kshs.1,254,000/= from the plaintiff/appellant. That the honourable Magistrate erred in law and fact in holding that the defendant/respondent is not under any legal obligation to effect a refund of Kshs.665,000/= to the appellant/plaintiff.

Moreover, that the honourable Magistrate erred in law and fact in holding that the plaintiff/appellant was aware that the land the subject matter of the agreement and suit was charged to Agricultural Finance Corporation. That the honourable Magistrate erred in law and fact in holding that the advocate who drew the agreement was under a duty to conduct a search at the Lands office to establish the status of the land before preparing the agreement. That the honourable Magistrate erred in holding that the sale between the defendant/respondent and 3rd parties Lavington Security Guards and Charles Chemase Cherono took place on the date when the land was transferred into the names of third parties.

The appellant further contends that the honourable Magistrate erred in law in holding that the appellant had failed to prove that the defendant frustrated/breached the contract entered into between the appellant and the respondent and that the honourable Magistrate erred in law and fact in failing to hold that the agreement was frustrated by the law and that upon the expiry of 6 months after the Agreement was entered into the agreement could not be enforced in the absence of consent of the Land Control Board sanctioning the sale transaction. Furthermore, that the honourable Magistrate erred in law and fact in holding that there was a transaction capable of being breached in the absence of consent of the Land Control Board.

According to the appellant, the honourable Magistrate erred in law and fact in holding that the appellant's/plaintiff's case would only have succeeded if he had paid the full purchase price by 29.11.2006. That the honourable Magistrate erred in law and fact in holding that in the absence of a clause providing for a refund no refund was payable to the appellant/plaintiff. That the honourable Magistrate erred in law and fact in failing to apply the applicable law into the agreement entered into between the appellant and the respondent.

That the honourable Magistrate erred in law and fact in allowing respondent/appellant to hold onto the deposit despite the same being unconscionable and illegal and despite the Land Control Act specifying the appellant's remedy. That the honourable Magistrate's decision is as a whole unjust, legally untenable and wrong.

The appellant submits that it is the respondent who breached the agreement by disposing the land 2 months before the agreed deadline for the payment of the balance. The land had been sold to 3rd parties as at 29.11.2006. Moreover, that the transactions could not be completed due to the provisions of the Land Control Act, Cap. 302, Laws of Kenya as the land related to the Agricultural land and therefore, the consent of the Land Control Board of the area was relevant. Moreover, the appellant argues that the

contract did not make time of essence. Therefore, the appellant was entitled to a refund plus 30% of the purchase price.

The appellant further argues that the Magistrate erred by holding that the respondent was entitled to pursue a claim of Kshs.1,254,000/= from the appellant as the claim would have been null and void. Moreover, by holding that the appellant's advocate had a duty to do a search to ascertain the status of the land was baseless as he had not been instructed by his client to do so.

Lastly, the appellant argues that the Magistrate erred in holding that since the transfer of the land was registered or effected on the 22.12.2006, then the sale to the 3rd parties took place on 22.12.2006 as the transfers are dated 28.9.2006 and 29.9.2006. The transfer forms and requisition for valuation were submitted to the Lands Office on 7.11.2006.

The respondent on his part argues that the agreement was clear that time was of essence as mentioned in the agreement of parties.

On the issue of the Land Control Board, the respondent argues that the parties were aware that it was a condition precedent. Moreover, that the appellant should have worked hard to clear the amount due before obtaining the consent of the Land Control Board. Moreover, he argues that the issue was not the consent of the Land Control Board but breach of agreement.

It is not in doubt that on the 29th day of May, 2006, the respondent agreed to sell to the appellant Land References No. 9930/8 and 10 within Kuinet Trading Centre. It was agreed that the purchase price was Kshs.4,180,000/= for the 44 acres. The appellant received and the respondent paid Kshs.665,000 only, which the appellant acknowledged by signing the agreement. The sum already paid was equivalent to 7 acres. The balance of Kshs.3,515,000/= was to be paid in six months. The appellant was to give the respondent possession immediately and the latter was free to commence development on the suit land. The appellant was to obtain the consent of the Land Control Board to facilitate transfer of the land to the purchaser. Last but most importantly, the person in default or in breach of the agreement was liable to pay a penalty sum of 30% of the purchase price.

On 13.4.2010, the property was charged to the Kenya Commercial Bank Ltd for Kshs.1,300,000/=. On the other hand, L. R. No. 9930/10 registered as I.R. 62724 was registered in the name of Willie Ndungu Mwiru for term of 950 years from 1.9.1958 until 21.11.1995 when the same was transferred to Shadrack K. Kiptugen for Kshs.813,000/=.The same was immediately charged to Agricultural Finance Corporation for Kshs.2,083,000/=. On the 22.12.2006, the charge was discharged and the property transferred to Lavington Security Guards for Kshs.1,100,000/=.

The aforementioned facts indicate that the properties were not available for sale as they were encumbered and that there was no discharge of charge. The agreement dated 29th May 2006 was signed by both parties and attested by Elijah Momanyi Mogona. As this was being done, the two parcels in dispute had been charged to Agricultural Finance Corporation. There was no discharge of charge.

Precisely, land reference No. 9930/8 was registered as title No. I.R. 62722 for a term of 950 years from 1.9.1958 in the names of Winnie Mwembu Muriu. On 21.11.1995, a transfer was registered in respect of Shadrack K. Kiptugen for Kshs.813,200/= and a charge to Agricultural Finance Corporation was registered on 21.11.1995. A discharge of charge was registered on 22.12.2006 and the land transferred to Charles Chemase Cherono for Kshs.1,100,000/= on the said date. The parties are silent in the agreement on the issue of the loan, however, the appellant had a duty to do due diligence and conduct an official search to ascertain the position of the land but this was not the issue for determination before the Lower Court as the issue before the said court was who breached the agreement and what were the consequences.

It is crystal clear that the plaintiff breached the agreement by failing to pay the balance of the purchase price. Though the consent of the Land Control Board was a condition precedent, it was not agreed that the balance of the purchase price was to be paid either before or after the obtaining of the consent of the

Land Control Board. However, the same is statutorily underpinned to being obtained within 6 months from the date of the agreement. Since the parties were silent on the issue, this court cannot re-write the contract for the said parties and fill such loopholes. The terms of the agreement did not include the refund of the purchase price and the Honourable Magistrate rightly found so.

I do agree with the learned Magistrate that the appellant having failed to pay the balance price as at 29.11.2006 and having failed to prove that the defendant frustrated his efforts to fulfill his part payment as there is no evidence of any attempt to make part payment, his case was not proved on a balance of probabilities.

The upshot of the above is that the appeal is found without merit and is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE