



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

CIVIL APPEAL NO. 76 OF 2014

MANOA SHEMBEKHO :::::::::::::::::::::PLAINTIFF/RESPONDENT

VERSUS

ROSE AYUMA :::::::::::::::::::::DEFENDANT/APPELLANT

JUDGMENT

Being dissatisfied with the decision in the Senior Principal Magistrate's Court Civil Suit Number 526 of 2010 delivered on the 7th July 2014 the Appellant hereby appeals against the said decision on the following principle grounds.

1. THAT the learned trial magistrate erred in fact and in law in deciding in favour of the respondent when the respondent had not proved her case on the required standards.
2. THAT the learned trial magistrate erred in fact and in law in failing to properly analyse the evidence on record thus arriving at a wrong and unjust decision.
3. THAT the learned trial magistrate erred in fact and in law in failing to have regard to the material contradictions disclosed in the respondent's case.
4. THAT the trial magistrate erred in fact and in law in failing to consider the evidence of the appellant in arriving at his decision.
5. THAT the trial magistrate erred in fact and in law in failing to consider the appropriate provisions of the Evidence Act and the detailed submissions of the appellant thereby arriving at a wrong and unjust decision.

The defendant/appellant submitted that this suit was filed at the subordinate court, the plaintiff/respondent sued the defendant/appellant seeking for orders that the court specifically orders that the defendant/appellant transfers the whole of that parcel of land KAKAMEGA/LUBAO/191 to the plaintiff/respondent. In this suit the plaintiff/respondent also sought, inter alia, for an alternative prayer that the defendant/appellant makes a refund of a sum of Ksh. 220,000/= to the plaintiff/respondent being the deposit the defendant/appellant had received from the plaintiff/respondent in the sale of land transaction.

The defendant/appellant filed his papers in which he stated that the parties had entered into an agreement for the sale of this land at a price of Ksh. 270,000/= and that the plaintiff/respondent paid a sum of Ksh. 220,000/= leaving a balance of Ksh. 50,000/=. According to the defendant/appellant the transaction could not proceed further since a caution was placed against this title and that members of the defendant/appellant family objected to the sale.

The defendant/appellant submitted that the parties' counsels continued to negotiate with their respective clients' instructions, the counsels for both parties agreed that the defendant/appellant would refund the purchase price received from the plaintiff/respondent. The defendant/appellant's counsel forwarded a cheque for a sum of Ksh. 70,000/= to the counsel for the plaintiff/respondent's counsel M/s. E.K. Owinyi Advocate's on 28th November 2011. The defendant/appellant also forwarded another cheque for a sum of Ksh. 120,000/= to the plaintiff's/respondent's counsel M/s. Abok Odhiambo & Co. Advocates but the cheque for Ksh. 120,000/= was returned, the plaintiff/respondent has received a refund of Ksh. 70,000/=.

It is the Appellant's submission that this matter was never presented to the Land Control Board and consent to transact granted/given. This would, obviously, not have been granted because a caution had been lodged against this title by a third party. It is trite law that an order for specific performance can only be granted in incidences where it is clear that indeed, the order, once granted will be executed. In this transaction the consent of the relevant Land Control Board was never obtained/granted. The court cannot compel the Land Control Board to issue consent when the land Control Board is not a party to the proceedings. This means, clearly therefore, that the order for specific performance was/is not available in the present case. Other factors would have to be considered before consent is given. This would include hearing the parties that have placed a caution against this title. This would also have to be resolved by either the Land Registrar or a court of law. Needless to add that spousal consent is also essential. The lower court erred when it ordered that once the property is transferred in favour of the plaintiff/respondent the plaintiff/respondent pay Ksh. 50,000/= to the defendant/appellant. In making this order the court did not consider the Ksh. 70,000/= the defendant/appellant had refunded earlier to the plaintiff/respondent as demonstrated above. It is for the above reasons that they submit that this appeal has merit, the decisions of the lower court be set aside and/or be varied and the appeal be allowed with costs.

The plaintiff/respondent's submissions are that the appellant sold to the respondent a piece of land referenced No. KAKAMEGA/LUBAO/191 at the consideration of Ksh. 270,000/= out of which the plaintiff/respondent paid to the defendant/appellant Ksh. 220,000/=. That it was a term of the contract that the appellant would execute all the relevant documents and obtain consent to effect transfer of title to the purchaser and vacate the land 4 months after the date of the agreement but to date has failed to do so. The plaintiff prayer of specific performance was duly issued by Honourable Ong'ondo – J to the terms that the appellant within 45 days from the date of the judgment execute all the necessary documents to effect the transfer of the parcel of land registration No. KAKAMEGA/LUBAO/1912 to the respondent herein in default thereof, the Executive Officer Kakamega Law Courts to execute in place of the defendant. The respondent relied on the following authorities;

1. Pwani Presbytery The Presbyterian Foundation vs. Juma Jefa Mboe and Sidi Chjengo Ngato in the High Court of Kenya at Mombasa Civil Suit No. 139 of 2011.
2. Dilipkumar Chand Shah and Bhupendra Kumar Premchand Shah versus Intercom Insurance co. Ltd High court of Kenya at Milimani Law Courts Civil suit No. 1118 of 1986
3. Riccardo Lizier versus Michael Mwangi Wandia and Margaret Wambui Ndambiri In the High Court of Kenya at Nairobi Land and Environment Law Division Civil suit No. 414 of 2007.
4. Mangi vs. Munyiri & Another Court of Appeal, at Nairobi Civil Appeal No. 143 of 1990
5. Eunice Wairimu Muturi and Washington Muchii Muturi vs. Mavji Ramji Patel in the High Court of Kenya at Nairobi Milimani Law Courts Land and Environmental Division ELC Civil suit No. 586 of 2005.
6. Joachim Von Stackelberg & Another vs. Sylke Obs In the High Court of Kenya at Mombasa Civil suit No. 133 of 2007 [2014] eKLR.
7. Alice Wangui Mwaniki & Another vs Milele Ventures Limited In the Court of Appeal at Nairobi Civil Appeal No. 139 of 2014 [2016] eKLR

This court has carefully considered the appeal and the court record in totality. The court has also considered the relevant provisions of law, the written submissions, and the cited authorities. The defendant/appellant confirms that he received Ksh. 220,000/= from the plaintiff/respondent. He confirms that he was to vacate the suit property to an alternative parcel to which he paid for but he was unable to acquire the said parcel. He states that he refunded Ksh. 70,000/= to the respondent herein vide E.K. Owinyi Advocates and produced the letter of the same as DExhibit 3. He states that the said refund was informed by the appellant's and respondent's several meetings, however, he does not establish evidence of the same. He stated that he attempted to repay Ksh. 150,000/= to which the plaintiff/respondent's advocate on behalf of the respondent declined receipt of the same and the same was refunded. He states that he could only complete the transfer once he received the alternative parcel of land. He confirms that indeed caution was placed by his family members. From the evidence on record I find that there was a land sale agreement and that there was no subsequent agreement to cancel the current land sale agreement (no evidence was adduced to prove this). The duly executed sale agreement marked PExhibit 1 is proof of the binding contract between the appellant and respondent with regard to Land Parcel KAKAMEGA/LUBAO/191. The copy of the sale agreement duly executed by the appellant and the respondent was produced. The respondent through her testimony told the court that she paid the deposit of 220,000/= as agreed in the agreement of sale and the balance was to be given to the appellant once consent was obtained and transfer effected. Subsequently, the appellant, failed to attend to the Land Control Board after signing the relevant forms and likewise he stopped communicating. The appellant thereafter failed to vacate the premises after the 4 months as provided for in the contract and had signed all the relevant documents to effect transfer. The respondent herein, produced in court the application for consent from the Land Control Board as PExhibit 2 that both the appellant and the respondent signed in respect of sale of land KAKAMEGA/LUBAO/191. The respondent denies seeking any refund of the money and is not aware of any money received by E.K. & Company Advocates as a refund. It can be ascertained further, that the appellant did attempt on various occasions to demonstrate intentions to refund the said monies to the respondent in-order to repudiate or rescind the said agreement. The lower court was of the view that specific performance is an adequate remedy is also because, the land was still registered solely under the appellant's name and the land had not been sold or transferred to a third party as captured by the evidence adduced. Despite this, no evidence was tendered to contradict any part of the respondent's evidence of the view that the appellant had agreed to the entering into the sale agreement and any other excuse relied upon to invalidate the agreement could not arise. It was held in the cases of **Aziz v Bhatia Brothers Ltd (2001) EA 7** and **Gitanga Mwaniki & Another v Annuciatnta Waithira Kibue (2013) eKLR** that a party who has performed his part of the bargain may be assisted by the court to enforce the contract against the defaulting party. The defendant/appellant's conduct in this matter had the objective to rescind the transaction and I agree with the lower court that the only remedy would be to grant specific performance. On the issue of the refund of Ksh.70,000/=, the burden of proof on a balance of probabilities duly shifted to the defendant/appellant herein to which he failed to settle.

In **Mwanasokoni v Kenya bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial Court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. I find that the decision by the trial court was judiciously arrived at and will not interfere with the same. I find no basis to interfere with the judgment as it was based on cogent evidence. This appeal is dismissed for lack of merit. The judgment of the Magistrate is hereby upheld. The Appellant to meet the costs of the appeal.

It is hereby ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE