



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 36 OF 2015

CATHERINE MGENDI.....APPELLANT

VERSUS

UTUMISHI INVESTMENTSLIMITED.....1STRESPONDENT

KENYA POLICE STAFF SACCO SOCIETY LIMITED.....2NDRESPONDENT

JUDGMENT

1. The Appeal herein arises from a judgment delivered by the trial court in **Milimani CMCC No. 6972/2007** dismissing the suit on **10/9/2010**.

2. The plaint filed in the trial court below, the plaintiff pleaded that 1stdefendant was the registered proprietor of **LR No. Kajiado/Kaputiei North/1870** and **LR. No. Kajiado/Kaputiei North.4105**; that the 1stdefendant subdivided parcel No.**Kajiado/Kaputiei North/4105** into **1100 plots** for sale to members of **Utumishi Investments Company, Kenya Police Staff Sacco** and to members of the public; that the Plaintiff at the Defendants instance and request applied for and paid for three plots to wit, **Plots Nos. 215, 216 and 217 at Kshs.62,000.00 each**. She initially paid **Kshs.56,000/= on 19/5/1998, Kshs.80,000/= on 10/2/1999** and the balance of **Kshs.50,000/= on 7/10/2002**; the 1stdefendant, in total breach of the agreement with the plaintiff failed or refused to process and issue the plaintiff with the title documents for the 3 plots *“by unlawfully claiming an additional sum of Kshs.30,000/=”*.

3. The Plaintiff therefore brought the suit in the subordinate court for an order to compel the 1stdefendant to complete the registration of Plot Nos. 215, 216 and 217 in the plaintiff’s name and issue the title documents to the plaintiff or in the alternative, an order directing the Registrar of Lands Kajiado District to approve and complete the subdivisions and issue the plaintiff with the title documents for plots Nos. 215, 216 and 217 on LR No. Kajiado/Kaputiei North/4105. The Appellant also sought costs of the suit.

4. The 1stdefendant filed a defence on 13/9/2007. In the defence the 1stdefendant avers that it was originally the owner of Parcel No. 4105 but the same was subsequently transferred to the Kenya Police Staff Savings & Credit Co-operative Society Limited. Upon that transfer, the Sacco assumed obligation of subdividing land and processing title documents for the purchasers including the plaintiff. On 7/10/2000 Balloting was conducted and the Plaintiff was allocated plots Nos. 215, 216 and 217. After subdivision the Sacco required payment of **Kshs.10,000/=** for each plot to cater for the title processing expenses but the plaintiff refused to pay **Kshs.30,000/=** for her three plots thus delaying the process of registration. The 1stdefendant denied that it had failed to process and issue the plaintiff with title documents and averred that it cannot be lawfully compelled to complete the registration process and issue the title documents to the Plaintiff as that obligation had been transferred to the Sacco.

5. By an amended plaint dated 21/9/2007 the plaintiff enjoined the 2nd defendant in the suit in the trial court and pleaded an additional fact, that the 1st Respondent purported to transfer the suit property to the 2nd respondent on 18/12/1998 without the consent of the plaintiff who already had a vested legal interest on the three subdivisions. Prayer **No (a)** in the plaint was consequently amended to apply to both the respondents.

6. A statement of defence was then filed by the 2nd defendant on 15/1/2008. In that statement of defence the 2nd defendant denied being a company registered under the Companies Act and averred that it was a Co-operative Society registered under Cap. 490; that the Plaintiff and others balloted for their portion after the land was transferred to the 2nd defendant and then subdivided; that the 2nd defendant and the bona fide purchasers met on a number of occasions where it was unanimously agreed that each plot owner would contribute Kshs.10,000/= per plot to cater for processing of title which sum all other purchasers paid except the plaintiff; that the delay in processing titles in the name of the plaintiff has been occasioned by the plaintiff's refusal to pay Kshs. 10,000/= per plot.

7. The suit was heard on 5/5/2010 and on 10/5/2010 judgement was given on 10/9/2010.

8. The Memorandum of Appeal dated 8/10/2010 raises a total of five grounds as follows:-

(1) That, the Learned Magistrate erred in law in dismissing the appellant's suit.

(2) That, the Learned Magistrate misdirected herself and erred in law in making a finding that the respondents were entitled to vary the contract unilaterally charge an additional Kshs.30,000/= and in stating that the appellant should pay the demanded sum.

(3) That, the Learned Magistrate erred in law by failing to consider the appellant's case and uncontroverted deposition that the respondents varied her contract unilaterally.

(4) That, Learned Magistrate erred and misdirected herself in the principles of law applicable in all the circumstances of the case and thereby failed to exercise her discretion judiciously.

(5) That, the Learned Magistrate departed from the pleadings and failed to consider the issues as pleaded by the parties and thereby arrived at a wrong decision.

9. In her judgement, the Senior Principal Magistrate correctly found that the point of contention was whether the review of the purchase price of the plots in question was lawful and whether the same amounts to breach of contract by the respondents. She also found that though purchasers were not consulted regarding the price change, the respondents have explained the circumstances and grounds for the change. She stated that the members of the Central Management Committee (hereinafter called the CMC) of the Kenya Police Staff Savings and Credit Co-operative Society Ltd (Sacco) act on behalf of members who elected them into office and in that regard they have the authority to act in their best interests. The respondents did not, in her view, require to consult the purchasers over the purchase price, and that it was erroneous for the appellant to demand such consultation or consent from her. She further found that a vendor such as the respondent had the right to sell their property at whatever price they so wished and the appellant had the right to purchase it or leave it, but cannot force the vendor to sell it at a particular price. Finally, she found that the respondents had in any case shown justification for the increase and it was fair if the appellant met her part of the bargain. According to that court's decision, the appellant should therefore pay the sum of Kshs.30,000/= as the balance owing from her to the respondents. She dismissed the appellant's suit, but condemned each party to bear their own costs.

10. Though this is an appeal from a Magistrate's Court it is a first appeal and the principle laid down in the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212** applies. In that case the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence,

evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

11. In this court’s view, the only pertinent issues that arise from the instant appeal are as follows:-

- 1. Whether the Learned Magistrate departed from the pleadings and failed to consider the issues as pleaded by the parties and thereby arrived at a wrong conclusion.**
- 2. Whether the Learned Magistrate erred and misdirected herself in the application of principles of law applicable in all the circumstances or the case and thereby failed to exercise her discretion judiciously;**
- 3. Who should pay costs?**

These issues are addressed as hereunder.

(A) Did the Learned Magistrate depart from the pleadings and thus fail to consider the issues as pleaded by the parties thereby arriving at a wrong conclusion?

12. Regarding this issue the Learned Magistrate evidently considered the pleadings. She observed as follows: the 1st respondent was the registered proprietor of **Kajiado/Kaputiei North/4105**. However in her judgment there is no emphasis of when the land was transferred to the 2nd Respondent. She mentions balloting conducted by the 1st Respondent at a meeting called by the 1st Respondent on **8/1/2004** in respect of the 3 plots that were issued to the appellant by the 1st Respondent. The distinctive roles played by the Respondents is not emphasized. It would have been very vital to note that the transaction between the Appellant and the 1st Respondent occurred before the land was transferred to the 2nd Respondent. The amended plaint brought in fresh facts in that the Appellant pleaded that the purported transfer of the suit property to the 2nd respondent was without the consent of the appellant who already had a vested legal interest in the three subdivisions. When the 2nd respondent pleaded in its defence that the balloting was conducted after the land was transferred to the 2nd Respondent, and then subdivided, the issue of when the transfer occurred, whether before the balloting or after the balloting and subdivision, was a crucial one that should have been, but which was not, addressed by the trial court.

13. It is also necessary to state that when breach has been alleged as in the present case the first vital issue in a Defendant’s defence would be whether he admits the breach or not, and not whether there is justification or the breach.

14. Where the Defendant merely pleaded justification this implied that a breach occurred, but it would not necessarily afford a sufficient defence to the breach to enable him avoid liability for the consequences of the breach.

15. Where there was an agreement, no issue should arise as to whether the Defendants can sell their property at whatever price they so wished because their action of selling is pegged on the terms of the agreement.

16. It is clear that the learned trial court departed from the proper issues arising from the pleadings and this partially led to the conclusion she made, that the vendor can sell their property at any price they like, that there was justification for the increase, and that it was only fair for the appellant to meet her part of the bargain.

(B). Whether the Trial court erred and misdirected itself in the application of principles of law applicable in the circumstances of the case and thereby failed to exercise her discretion judiciously?

17. The main questions that arise in respect of this case is whether there was a binding contract between the parties, whether the variation of the contract by the respondents was valid and whether it could affect the contract retrospectively, and whether the refusal of the respondents to transfer the suit land to the appellant amounted to further breach.

18. The basic features of a contract are that there must be an offer and an acceptance. When the offer is made and accepted, the parties are said to be of one mind and a binding contract results. The terms of that contract must be observed by the contracting parties. **Section 120 of the Evidence Act** Cap 80 Laws of Kenya provides:-

“When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.”

19. The trial court below stated as follows concerning the defence evidence:

“From the evidence adduced it is evident that the plaintiff did not participate in any meeting where increase of the purchase price was discussed....The defence witness has confirmed this fact by stating under cross examination that the purchasers were not consulted and neither was their consent sought over the matter. But the defendants have gone ahead to explain under which circumstances the purchase price was changed and what formed the basis for this change.”

20. It is a recognized rule that the court cannot rewrite the contract between parties or uphold a unilateral decision of a party to rewrite a contract after it has been signed by parties. The court must enforce the terms of the contract.

21. The Court of Appeal said as follows in **Civil Appeal No 95 of 1999 National Bank of Kenya Ltd – vs-Pipe Plastic Samkolit (K) Professor Samson K. Ongeri (Tunoi, Shah & Keiwua JJ A):-**

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”

22. In **Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999**, (eKLR) it was held:

“Parties only bind themselves by the terms contracted and executed and not anything else e.g. charging interest rates not in accord with what was covenanted cannot make a total figure a chargee considered having fallen in default and therefore entitling it to exercise its statutory power of sale... Courts are not foras where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”

23. In **Givan Okallo Ingari & Another vs. Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of 2007 [2007] 2 KLR 232(eKLR)** the learned Judge expressed himself as follows:

“The primary complaint is that the defendant has unilaterally and in breach of the express provisions of the charge instrument levied unsanctioned interest rates, penalty charges and default charges on the loan account, which have erroneously increased the plaintiffs’

indebtedness thereby frustrating and/or clogging the efforts of the plaintiffs to redeem the charge property. Such grave accusation needs and/or requires rebuttal from the defendant. However the defendant says that the charges were levied in accordance with the implied terms of the charge document, prevailing customs and trade usage in the banking and financial industry... There is no dispute that the defendant varied the rate of interest without the consent, knowledge and permission of the plaintiffs. There is no evidence that each time there was variation, the plaintiffs were informed. In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement. I have gone through the charge document and there is no provision that allowed the defendant to levy or vary the rate of interest or to charge the rate of interest it so charged on the account of the plaintiffs. In my view if the defendant applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal...

"...The charges debited in the plaintiff's account were done without any legal basis and in my humble view made the account irredeemable. It is my position such debits could only have been made with the consent of the plaintiffs or being a provision in the charge document that allowed the defendant to do so. By engaging in acts outside the contractual document, the defendant made it difficult for the plaintiffs to perform their part of the bargain. The acts of the defendant, in my view amount to muddling the waters that were for the benefit of all parties. This Court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant. To do so would be inequitable...When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document. In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression..."

24. In the light of the above decisions, if the learned trial court had found that there was a binding contract between the appellant and the respondent, the question should necessarily have arisen as to whether such variation of a fundamental term such as price, could affect the appellant's contractual rights retrospectively and whether refusal to transfer the land to the appellant amounted to breach.

25. Subsequently the trial court should have found that contractual terms engendered in the agreement could not be unilaterally altered to suit the respondents or any of them without the appellant's consent.

26. If these issues had been appropriately considered the court would not have arrived at the conclusion that the vendor had the right to sell their property at whatever price they so wished regardless of their prior commitment to the appellants under the terms of the agreement.

27. The court would not also have observed or concluded that the appellant had the right upon such increment to purchase the land or leave it, or that the appellant appeared to be compelling the seller to sell the plots at a particular price. This court's view is that that approach was not correct.

28. What is evident from appellant's evidence in the trial court is that she was not a member of any of the two respondents and that she just happened to learn by chance that the 1strespondent was selling plots in Kitengela. The terms of sale were in the offer. She was interested in residential plots worth Kshs.62,000/= each which sum in her view, and which was correct, covered all administrative costs.

29. She produced the letter of offer as **P. Exhibit 1**. The said letter of offer states that the 1strespondent through the 2ndrespondent purchased two parcels of land in Kitengela in 1995 and undertook the implementation of the subdivision of the two parcels which included **Kajiado/Kaputiei North/4105**.

30. Plots in parcel number **Kajiado/Kaputiei North/4105** were available both to members of the respondents and members of public. Members of public were to pay a higher purchase price for the same type of plots available. The letter of offer expressly stated that the prices included administration costs, stamp duty/legal fees, master plans/deed plans, survey fees, type building plans, land, title deeds, fencing and approved fees for subdivision and type plans payable to council. Only the cost of infrastructure was

not included in the selling price.

31. It is clear that following this representation in the Letter of Offer the appellant paid for three plots in parcel number **Kajiado/Kaputiei North/4105** as evidenced by **P. Exhibit 2(a), (b) and (c)**. She was involved in balloting on **23/1/2004**. She was allocated a Beacon Certificate for the three plots dated **7/10/2000**. A contract between the parties was complete.

32. Going by the court records it is apparent that the appellant had a balance of **Kshs.50,000/=** as at **19/8/2002**. On that date she wrote to the 1st respondent asking why the 1st respondent had by a letter dated **7/6/2002** issued notice to her to pay **Kshs.80,000/=** as the outstanding payment in respect of the three plots. It was in response to that letter that the 2nd respondent wrote on **9/9/2009** informing the appellant that the price for their plots in **Phase II** is **Kshs.72,000/=**.

33. It was after that letter was written that the appellant paid additional **Kshs.50,000/=**, standing her ground that what she paid that was the proper price vide **P. Exhibit 2(c)**. Thereafter, the 1st respondent issued her with notices of repossession upon default of payment of **Kshs.30,000/=**. These are marked as **P. Exhibit 8** and **P. Exhibit 9** respectively, dated **1/5/2006** and **24/4/2010** respectively.

34. The respondents' evidence agreed that the appellant was a non-member. She had paid **Kshs.62,000/=**, but when the land was acquired, the Sacco was to subdivide the land and the price escalated to **Kshs.72,000/=**. She produced minutes (**D. Exhibit 1**) of the C.M.C. Meeting held on **3/3/2000**. **Minute No. 10/2000** showed that the CMC unanimously agreed to the increase of the price of each plot by **Kshs.10,000/=**. The mode of payment was also changed to the 75% cost of plot as deposit and 25% to be paid within 6 months. Sale to non- members was stopped.

35. By virtue of her not being a member, the question necessarily arises as to whether the appellant should have been affected by the change of terms spelt out by the CMC.

36. The CMC represents members of the 1st respondent. There is no evidence that the appellant became a member or subscribed to the internal rules of the 1st or the 2nd respondent.

37. The conclusion is that the appellant and the respondents were independent parties engaged in a contract. The only conditions that bound them were the contractual terms and not any internal rules of the respondents which could otherwise bind members of the respondents to the decisions made by their representatives in the CMC.

38. In its judgement the Trial Court should have distinguished the appellant, a member of the public from others who were members of the respondents and who were hence bound by the Central Management Committee decision. There is no evidence that was brought by any of the respondents to the effect that the appellant participated in the elections that brought the CMC into office. There is no evidence that the CMC was acting in the appellant's best interests. In fact in her case, it was doing the contrary, by increasing her liabilities in respect of a contract of sale under whose terms her rights had crystallised long before the proposed changes.

39. Consequently the question of whether the respondents should have asked for the consent of the appellant does not arise. The contract spoke for itself. It was envisaged in the offer and the acceptance. Any additional term that was not agreed to by both parties was invalid.

40. Contrary to the trial court's finding of error on the part of the appellant, this court finds that it was erroneous for the respondents to demand additional monies in respect of a contract that had been concluded long before the demand. The new terms were invalid and inapplicable to the appellant and she was not bound to abide by those terms. The respondents had no alternative but to sell the plots to the appellant at the price earlier on agreed between the parties under the contract. The costs of registration may have gone up now but that is an additional burden that the respondents have to bear now as they are the authors of their own misfortune. As was stated by **Shah JA** in the case of **Fina Bank Limited –vs-**

Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

41. I therefore find that the Learned Magistrate erred in law in finding that the Respondents were entitled to vary the contract unilaterally and in finding that the Appellant should pay the sums demanded after the agreement was concluded.

(C) Who should pay costs of these proceedings?

42. The Appellant is wholly successful as against the two respondents in this appeal and she shall be awarded the costs of the Appeal. The Appellant will also be awarded the costs in the proceedings before the trial court.

43. For clarity, the final orders of this court against the respondents jointly and severally are as follows:-

(1) The Appellant’s appeal herein wholly succeeds and the judgment and decree of the trial court below dated 10th September, 2010 are hereby set aside;

(2) The respondents shall cause to be effected the registration of Plot Numbers 215,216 and 217 on LR Number Kajiado/Kaputiei North/4105 and consequently furnish the title documents in respect of these plots, duly registered in the appellant’s name to the appellant at no extra cost to the appellant as she has paid the all-inclusive purchase of price Ksh 186,000/=.

(3) The Appellant shall have the costs of this Appeal and also the costs of the trial in NBI CMCC No. 6972 of 2007.

It is so ordered.

Signed at Kitale on this 4th day of October, 2017

MWANGI NJOROGE

JUDGE

Dated, signed and delivered at Nairobi on this 10th day of November, 2017.

K. BOR

JUDGE

Judgement read in open court at Nairobi on this 10th day of November, 2017

In the presence of:

Mr. Bundotich for the 1st Respondent

No appearance for the Appellant.

Court Assistant: Mr. Vincent Owuor

K. BOR

JUDGE