REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 56 OF 2008

CHARLES GICHANA ANGWENYI…..……..… APPELLANT

VERSUS

JOSEPHAT MWANGI MORACHA……...RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate at Kisii Hon. C. G Mbogo delivered on 5th May 2008 in CMCC No. 899 of 2006)

JUDGMENT

1. This appeal arises out of the judgment delivered on 5th May 2008 in Kisii CMCC No. 899 of 2006 by C. G. Mbogo SPM. The learned trial magistrate after hearing both the plaintiff and the defendant on the plaint, the defence and counter claim entered judgment in favour of the plaintiff and dismissed the counter claim by the defendant. The defendant who is the appellant herein was ordered to pay the respondent an aggregate sum of kshs. 1,376,080/= together with interest and costs of the suit.

2. The suit in the lower court arose out of an agreement for sale dated 4th December 2006 where the appellant was the vendor and the respondent was the purchaser. The respondent as per the agreement was to purchase the appellant's land parcel **LR No. Kisii Municipality/Block III/471** measuring 0.0319Ha. for the consideration of kshs. 2,150,000/=. The respondent paid an initial deposit of kshs. 900,000/= on execution of the agreement and the balance was to be paid by instalments of Kshs.250,000/= as specified under Clause 2 (a) (ii) – (iv) of the sale agreement. The respondent as per Clause 3 of the agreement had been shown and had viewed the property and was satisfied with its condition before he executed the agreement except that the exact boundaries of the parcel of land were to be determined and fixed by a surveyor of the purchaser's choice, upon payment of the last instalment on or before 30th March, 2007.

3. The respondent's position before the lower court was that when he got the surveyor to delineate the subject plot he was purchasing, it turned out the extent of the plot that the appellant had pointed out to him was, according to the respondent, much larger than the size and extent of the plot identified to him by the surveyor. On that account he asserted that the appellant misrepresented to him what the actual size of the property was and that led him to negotiate and agree the consideration for the property as per the agreement. The respondent contended that the misrepresentation by the appellant was material and as a consequence operated to vitiate the agreement rendering the same null and void. On that account, the respondent claimed a refund of the sum of kshs. 900,000/= paid as part of the consideration, special damages in the sum of kshs. 46,080/= and 20% of the purchase price being on account of penalty for breach of the agreement for sale. The respondent in addition to himself, called 3 witnesses including the advocate who drew the agreement between him and the appellant and the surveyor with whom he visited the site to take the measurements of the plot the subject of the sale. The appellant was the sole witness for the defence.

4. After hearing the evidence and submissions on behalf of the parties, the learned trial magistrate held that the respondent had proved his case on a balance of probabilities and entered judgment against the appellant on the following terms:

(a) A refund of kshs. 900,000/=

(b) Special damages of kshs. 46,000/=

(c) Damages as per penalty clause in the agreement.

(d) Costs and interest of the suit.

The appellant has appealed to this court against the said judgment and has set out the following grounds of appeal.

1. The learned trial magistrate failed to take into account and fully consider the cumulative weight of the evidence tendered before him due to either incompetence or external considerations.

2. The learned magistrate erred in fact and in law and misdirected himself fundamentally in arriving at a verdict without any admissible evidential value to support and/or justify the verdict.

3. The learned trial magistrate erred in law by failing to state the findings and reason for the decision for dismissing the counterclaim.

4. The learned trial magistrate erred in law and misdirected himself fundamentally in holding that the appellant refund the part of the purchase price of kshs. 900,000/= when the agreement was not terminated and still in force.

5. The learned trial magistrate erred in law and in fact in not holding that the oral testimony of the respondent herein could not change the nature of a written contract.

6. The learned trial magistrate failed to give the written agreement of sale and other documents accepted and relied on by both parties its true construction accordingly including the plain meaning of the words, sentences, figures and diagrams contained therein.

5. The appellant seeks an order setting aside the trial magistrate's judgment and substitution thereof of an order dismissing the respondent's claim before the lower court and judgment for the appellant on the counterclaim. The appeal was admitted by **Musinga, J**. on 18th March 2009 and directions on the disposal of the appeal were given by **Okong'o J.** on 3rd June 2015 when he directed that the appeal be argued by way of written submissions. Both the appellant and the respondent have filed their respective written submissions.

6. As a general principle of law this being a first appeal, this court is obligated to review and reappraise the evidence tendered before the lower court in order to determine whether the trial court appropriately evaluated the evidence adduced before it and to determine whether on the basis of the evidence and the law, the decision reached by the trial magistrate was justified. The appellate court will however be cautious in interfering with any findings of fact the trial magistrate may have made noting that the appeal court does not have the benefit of seeing the witnesses testify to be in a position to access their demeanour during examination.

7. The case before the learned trial magistrate was founded on the agreement of sale dated 4th December 2006. The respondent/plaintiff's claim was that the parcel of land that the appellant/defendant had contracted to sell him under the agreement turned out to be smaller when the surveyor who testified as PW3 had placed beacons. The respondent contended that the plot the appellant had showed to him was

much bigger than the one identified by the surveyor. The respondent asserted there was misrepresentation and on that account sought the rescission and/or repudiation of the agreement and refund of the deposit paid, special damages and penalty for breach of the contract.

8. The appellant/defendant for his part contended that it is the respondent/ plaintiff who was reneging on the agreement by failing to fulfill the terms thereof. The appellant maintained there was no misrepresentation as he had merely shown the respondent the general location of the parcel of land as borne out by Clause 3 of the agreement and that the actual dimensions and beacons of the plot were to be determined and fixed by a surveyor of the purchaser's choice. The appellant by the counterclaim sought to be discharged from further performance of the agreement and damages for repudiation of the agreement by the respondent.

9.The facts of the case before the trial magistrate were fairly straight forward. It is not disputed that the appellant and the respondent entered into the sale agreement dated 4th December 2006. Clause 2 of that agreement provided that the appellant who was the vendor had agreed to sell to the respondent who was the purchaser **"the entire plot and/or parcel of land measuring 0.0319Ha."** for the consideration of kshs. 2,150,000/= which was payable in the manner set out under Clause 2 (a) (i) to (iv) thereof. The respondent paid a deposit of kshs. 900,000/= on execution of the agreement and further sums of kshs. 250,000/= were to be paid on or before 7th December 2005 and on or before 30th December 2006 with the balance of kshs. 750,000/= being payable in three equal monthly instaments of kshs. 250,000/= each with effect from 30th January 2007 upto 30th March 2007 when the last instalment was to be paid.

10. Clause 3 of the said agreement for sale provided as follows:-

> **3. The purchaser has already had opportunity to view the land and is satisfied with the conditions thereof including accessibility save that the exact boundaries of the said land purchased by the purchaser herein shall have to be determined and fixed by a surveyor of the purchaser's choice, upon payment of the last instalment on or before 30th March 2007 whichever is the earliest.**

I have reproduced the above clause of the agreement as it is the clause invoked by the respondent to claim the appellant misrepresented to him the size and extent of the plot the subject of the sale. In his evidence, the respondent admits that he and the appellant visited the site of the subject plot and the appellant showed him the approximate dimensions of the plot on the ground but no beacons were identified on the ground. Both the respondent and the appellant agreed that a surveyor would later identify and fix the beacons for the plot. PW2, Peter Ongwacho was present when the appellant and the respondent visited the plot site and the appellant pointed out the plot to the respondent. He stated in his evidence that the appellant did not point out any beacons and that was left to the surveyor to identify and mark. PW2 was present when the appellant and the respondent negotiated the price, agreed and entered into the sale agreement. He was also present when the respondent visited the plot with the surveyor later and the beacons of the plot were marked.

11. The respondent in his evidence stated that the plot as identified on the ground by the surveyor was smaller than the one he was shown by the appellant and it is on that account he decided not to proceed with the transaction and seek a refund of the amount he had paid to the appellant including the amount he had paid towards land rent and rates. The respondent in evidence stated:-

> **"I know where the plot is situated. I visited the site before we negotiated the purchase price. The defendant showed me the size of the plot on the ground and I was satisfied. He did not show me the plot's beacons. We agreed that a surveyor should visit the site to ascertain the size of the plot.**
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> **I took the surveyor to the plot on 7th December 2006 where he erected beacons. It was then I realized that the size of the plot had reduced because part of what the defendant pointed out to me belonged to an access road ……**

When I realized that the plot was not equal to the size the defendant has showed me, I wrote to the advocate who prepared our agreement to notify him that I could not pay the balance."

The respondent's letter to the advocate dated 11th December 2006 produced as "PEx2" interalia stated:-

"…I wish now to stop this agreement simply because the parcel of land shown on the ground has been proved less than what was shown to me. This has been proved by the surveyor who surveyed this parcel of land and found it to be less than what I was shown by the seller, Mr. Charles Gichana."

The net effect of the respondent's said letter **"PEx2"** was that he was repudiating the contract of sale. The issue that fell to be determined by the lower court is whether the respondent was entitled to repudiate the agreeement on the grounds that he purported to do so. The trial magistrate correctly framed as one of the issues the following issue:-

"Whether or not the defendant misrepresented to the plaintiff regarding the size of plot number Kisii Municipality/Block III/471."

12. When the appellant and the respondent first visited the plot, the appellant stated he showed the respondent the plot, the map and a copy of the lease. The appellant testified that when the respondent failed to pay the instalment of kshs. 250,000/= on 7th December 2006 as he was supposed to under the agreement he wrote the letter dated 11th December 2006 **(DEx1")** to the respondent seeking to know why he had not paid and cautioning him that he was in breach of the agreement and would be liable under the penalty clause. The appellant stated that the respondent wrote **"PEx2"** after he received the appellant's letter **(DEx1")**. The appellant denied he showed the respondent a plot that was smaller, than what the surveyor identified. The appellant insisted he showed the respondent the location of the plot on the ground and the size of the plot was as indicated in the sale agreement and the lease documents. The trial magistrate in determining the issue affirmatively stated as follows;

"It will also be appreciated the correct size of the plot was indicated in the agreement but one can infer that indeed the defendant showed the plaintiff a bigger portion than what the actual size of the plot was on the ground. In my view, that would amount to misrepresentation."

13. On the basis of the evidence tendered before the trial magistrate the parcel of land that the respondent had contracted to purchase under the agreement of sale dated 4th December 2006 measured 0.0319Ha. The sale agreement acknowledged this fact and so did the search certificate **("PEx5")** and the survey plan produced by the respondent as **"PEx8"**. PW3 the surveyor who placed the beacons as per his report produced by the respondent as **"PEx7"** also confirmed the measurement of the plot to be 0.0319Ha. The plot was vacant and from the evidence of both the appellant and the respondent they did not identify any beacons when they both visited the site of the plot. The appellant is not said to have taken any measurements or placed any markings to delineate the extent of the plot that he showed to the respondent. They left that task to the surveyor. The plot from the evidence was in vacant possession and the appellant could only have shown the respondent the general location and layout of the plot and not the actual size. The appellant did not misrepresent that the plot was larger than 0.0319Ha. which was the area that was shown on the title documents and which the surveyor verified. The size of the property was predetermined and was clear from the documentation. The agreement by the respondent was to purchase the property that was described in the agreement and on the title documents and the survey map. That is the property that the appellant showed the respondent and it is the property that the surveyor verified and fixed the beacons. If the appellant had showed the respondent a plot at a different location that would have justified the respondent's claim for misrepresentation but that was not the case.

14. In my view and taking into account the totality of the evidence the appellant did not misrepresent any facts respecting the property to the respondent. The respondent did not prove any misrepresentation on the part of the appellant. The payment of the instalments as provided for in the agreement of sale was not dependent on the surveyor verifying and pointing out the beacons of the property. Clause 3 of the sale agreement infact anticipated that the surveyor would determine and fix the beacons upon the last

instalment of the kshs. 250,000/= being paid on or before 30th March 2007. The respondent did not offer any explanation as to why he did not pay the instalment of kshs. 250,000/= which fell due on 7th December 2006 yet the agreement required him to do so. The respondent by writing the letter dated 11th December 2006 **(PEx2")** appears to have been reacting to the appellant's letter of the same date **"DEx1"** to find a justification to walk out of the agreement. The trial magistrate having regard to the evidence tendered before him had no basis and/or justification for finding and holding that the appellant had made a misrepresentation to the respondent respecting the size of the plot he was selling to the respondent. The size of the plot was 0.0319Ha as per the documents and the surveyor confirmed the plot size on the ground.

15. The letter dated 11th December 2006 **"PEx2"** by the respondent to the advocate was transmitted to the appellant. By this letter the respondent intimated that he was not going to honour the agreement arguing that the plot had turned out to be smaller than the one that the appellant had shown him. It is noteworthy that the respondent and the surveyor (PW3) went to the site in the absence of the appellant and it is not clear why the respondent did not invite the appellant to be present during the visit of the surveyor. As I observed earlier in this judgment, it was not indicated that the appellant had made any markings to delineate the extent of the plot he showed the respondent. The evidence was to the effect that they could not identify any beacons and consequently the appellant would not have been in a position to show the respondent the exact measurements of the plot and that was why it was agreed a surveyor would have to identify and fix the beacons. The size of the plot could not be otherwise than was provided in the title documents and as was delineated on the survey map. The appellant could not change that and the respondent was fully aware the plot's size was 0.0319Ha and that it was served by the accesses depicted on the survey map. The reason the respondent gave for backing out of the agreement was not plausible and on the evidence the trial magistrate ought to have found the respondent had no valid reason for not performing the agreement. In my view the respondent was the party who was in breach of the agreement.

16. Having held that the respondent was the party in default it follows therefore he ought not to have been awarded damages on the basis of the penalty Clause 12 of the agreement. These damages properly belonged to the appellant who by his letter of 11th December 2006 **(DEx2")** had put the respondent on notice that he was in breach of the agreement of sale as he had failed to pay the instalment of kshs. 250,000/= which fell due on 7th December 2006. That the respondent had opted to repudiate the agreement was exemplified by the fact that the respondent instituted the suit in the lower court on 22nd December 2006 when he filed the plaint. That was notwithstanding that Clause 12 of the agreement pursuant to which he claimed damages for default required a service of one month's notice on the defaulting party. The clause was in the following terms:-

> **12. In any case of breach or default of whatsoever nature the party at fault shall pay/refund the consideration and pay the innocent party 20% of the purchase price as the penalty for default. Provided however, that the innocent party shall give a written notice of the default for a period of one calendar month to the defaulting party.**

17. The evidence on record does not show the respondent did serve the appellant with any notice as required under the subject clause and therefore the trial magistrate had no basis to award him damages under the clause when the evidence shows he had not complied with the same. On the contrary, the notice given by the appellant to the respondent vide the letter dated 11th December 2006 **(DEx1)** was in compliance with Clause 12 of the agreement for sale. The respondent filed suit on 22ndDecember 2006 but in my view that could not invalidate the notice provided breach of the agreement on the part of the respondent was proved in the suit by way of counterclaim by the appellant.

18. I have held that breach of the agreement by the respondent was proved and the appellant ought to have been granted judgment on the counterclaim. In the result, it is my finding and holding that the appellant's appeal has merit and I allow the same on the following terms:-

> **(i) The judgment of the subordinate court delivered on 5th May 2008 is set aside and substituted with an order dismissing the plaintiff's suit with costs to the defendant.**

(ii) The defendant's counterclaim in the subordinate court is allowed and judgment is entered on the counterclaim on the following terms:-

(a) The defendant is awarded the sum of kshs. 430,000/= being agreed liquidated damages under Clause 12 of the agreement for sale dated 4th December 2006.

(b) The said sum of kshs. 430,000/= to be offset from the payments made by the plaintiff to the defendant (appellant herein) in the sum of kshs. 937,080/= so that a refund of kshs. 507,080/= is made to the plaintiff (respondent herein) where upon all parties would stand discharged from the agreement dated 4th December 2006.

(c) The sum of kshs.507,080/= to accrue interest at court rates with effect from 1st January 2017 if the same shall not have been paid to the plaintiff/respondent by 31st December 2016.

(d) Each party to bear their own costs on the counter claim.

(iii) The appellant is awarded 60% costs of the appeal as he succeeded to a large extent.

Judgment dated, signed and **delivered** at **Kisii** this **16th day** of **December, 2016**.

J. M. MUTUNGI

JUDGE

In the presence of:

Abobo for Bosire for the appellant

Ochoki for Kimanga for the respondent

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE