Wandemi Developers Limited v Ndegwa (Civil Appeal 217 of 2019) [2025] KECA 431 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 431 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 217 OF 2019

P NYAMWEYA, AO MUCHELULE & GV ODUNGA, JJA

MARCH 7, 2025

BETWEEN

WANDEMI DEVELOPERS LIMITED ..... APPELLANT

AND

MARY WANJIRU NDEGWA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (E.O. Obaga, J.) dated 28th June 2018 in ELC No. 666 of 2012)

JUDGMENT

1. In Housing Company of East Africa Limited -vs- Board of Trustees National Social Security Fund & 2 Others [2018]eKLR, this Court expressed itself as follows:-

> "It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge's ultimate findings cannot by any stretch of imagination be faulted."

2. It was common ground that the appellant, Wandemi Developers Limited, was at all material times the registered proprietor of all those parcels of land known as L.R Nos. 12803/2, 12803/3, 12803/4, 12803/5, 12803/6, 12803/7, 12803/8, 12803/9, 12803/10, 12803/11, 12803/12 and 12803/13 which were amalgamated into L.R No. 27981 and subsequently subdivided in seventy (70) parcels of land including L.R No. 27981/12 (the suit property). By agreement dated 19th June 2007, the appellant agreed to sell to the respondent, Mary Wanjiru Ndegwa, the suit property, identified as Plot No.

46, at a consideration of Kshs.2,000,000/=. The respondent was required to pay the entire purchase price within three (3) months. On the execution of the agreement, the respondent paid a deposit of Kshs.650,000/=.

3. On 4th October 2012, the respondent sued the appellant at the Environment and Land Court at Nairobi claiming that she had paid the entire purchase price, although outside the three months but with the appellant's agreement, but that the appellant had threatened to sell the suit property to a third party on the allegation that the respondent had failed to pay full purchase price. The suit was filed for specific performance and for a permanent injunction to restrain the appellant from selling, transferring, disposing or in any way dealing with the suit property in a manner that was prejudicial.

4. The appellant denied the claim, seeking that it be dismissed with costs. Its case was as follows:

> "
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> 4. In reply to paragraphs 4, 5 and 6 of the plaint, the defendant avers that the plaintiff accepted an offer to buy the suit premises for Kshs.2,000,000/= within a time frame of 90 days after which the purchase price would change and accord to whatever would be the market price. The plaintiff did not pay the initial purchase price for the suit premises and also failed to pay the adjusted purchase price hence the defendant had to recede the sale."

5. In evidence before the trial court, the appellant testified that when the respondent failed to pay the agreed purchase price on time it (the appellant) adjusted the price to the market price of Kshs.5,000,000/= and asked the respondent to pay the same; that when the respondent did not pay after being served with a letter dated 18th September 2012 giving a completion notice of 21 days, the appellant rescinded the contract and sold the suit property to a third party, one Jacinta Kingi.

6. The respondent's evidence was that, yes, she did not pay the entire purchase price within three months. She had paid Kshs.900,000/= to add on the Kshs.650,000/=. That left a balance of Kshs.540,000/=. The appellant wrote her a letter dated 10th June 2008 threatening to terminate the contract if the balance was not received within 21 days. Following negotiation, she stated, she was able to pay Kshs.450,000/= vide cheque dated 7th January 2009 which was accepted. The appellant pushed her to pay penalties for late completion, she testified, which led to her paying Kshs.500,000/=. This followed a letter dated 10th February 2011 which had asked her to clear the "outstanding balance". She further testified that she refused to pay Kshs.5,000,000/= that was claimed by the appellant.

7. After the parties testified before the trial court, the learned Judge allowed the claim. It was found that the purchase price remained Kshs.2,000,000/= and that the figure of Kshs.5,000,000/= had been unilaterally raised in the appellant's letter dated 18th September 2012 but had not been agreed to by the respondent as the new purchase price for the suit property. Secondly, that the respondent had not completed paying the purchase price within three months as had been agreed, but that the appellant had accepted payment outside the three months and therefore was -

> " stopped from raising the issue of payment"
>
> outside the agreed time; that the appellant had waived its right as to time under their agreement.

8. On the question of rescission raised by the appellant, this is what the learned Judge observed:

"16. Rescission of an agreement can only occur if there is a breach of the terms of the contract. The defendant demanded payment of the balance of the purchase price of Kshs.450,000/= on 10th June 2008. That balance was paid on 6th May 2009. It was accepted. There was therefore no basis upon which the defendant could purport to rescind. It is clear from the evidence that the defendant was trying to arm-twist the plaintiff into paying a higher price which was the prevailing market price. What the defendant forgot is that there was a binding agreement entered into on 19th June 2007 and that it could not keep demanding more money from the plaintiff."

9. The appellant was aggrieved and came before this Court on the following grounds.

"1. The learned trial judge erred in law by disregarding the fact that the contract subject matter of the case before him related to land and had been subject to the provisions of section 3 of the *Law of Contract Act* 23 Laws of Kenya.

2. The learned trial judge erred in law by failing to consider the fact that the Sale Agreement subject matter of the suit was not enforceable under the said *law of Contract Act*.

3. The learned trial judge erred in law and fact by enforcing the judgment against a party who was not the one described as a seller in the contract subject matter in the suit.

4. The learned trial judge erred in fact and law by finding that the plaintiff paid a penalty after late payment of the purchase price while the evidence tendered before him clearly showed that she was actually paying a part of the enhanced purchased price.

5. The learned trial judge erred in fact and law by finding that there was one fixed purchase price that could be paid within an open-ended time frame.

6. The learned trial judge erred in fact and law by adopting the plaintiff's assertion that she paid Kshs. ½ million as a late payment penalty and that it was the sum payable while the handwritten evidence on record stated a different thing.

7. The learned trial judge erred in law by ordering to enforcement a contract that had clearly been rescinded.

8. The learned trial judge erred in law and fact by finding that the terms of the contract were unilaterally changed by the appellant while the evidence before him was that there was discussion between the parties.

9. The learned trial judge erred in fact and law by finding that criminal complaint preferred by the respondent against some directors of the appellant had no bearing on the land case before him while the respondent had already admitted a connection.

10. The learned trial judge erred in fact and law by disregarding uncontroverted evidence that the land subject matter of the case had been sold to a third party and that fact had prompted the respondent to file a complaint against a Director of the appellant alleging an offense of obtaining money by false pretenses.

11. The learned trial judge erred in fact and law by granting a judgment on grounds of waiver and estoppel in a situation where the principles were clearly not applicable.

12. The learned trial judge erred in law by granting an equitable relief to a party who had neither done equity nor come to court with clean hands.

13. The learned trial judge erred in law and fact by finding that the property was available for transfer while uncontroverted evidence was before the court illustrating subsequent sale to another party.

14. The learned trial judge erred in law by exercising his discretion wrongly by ordering specific performance of a parcel of land where a third party's rights had already accrued."

10. The respondent, in affirming the decision of the trial court relied on several grounds, essentially contending that, on the evidence, the specific performance and permanent injunction were justifiable remedies; that there was a valid contract between the parties in which the purchase price was clear; and that by accepting payment after the three months the appellant could not urge the case that the purchase price had not been paid on time.

11. We have re-considered the evidence tendered before the trial court. We are entitled to reach our own independent conclusions thereon, while bearing in mind that we did not have the benefit of seeing and hearing the witnesses (Jabane -vs- Olenja [1968] KLR 661). We will only depart from the findings of the trial court if they were not based on the evidence on record or where the trial court is shown to have acted on the wrong principles.

12. During the hearing of this appeal, learned counsel Mr. Njuguna Mbigi was present for the appellant while learned counsel Ms. Mathu represented the respondent. Counsel had each filed written submissions which they elected to rely on.

13. It was submitted on behalf of the appellant that the learned Judge erred by failing to find that the agreement in question was a nullity, incapable of being enforced. We were referred to the case of Morgan -vs- Stabinski [1977] KLR 181 and urged to find that the agreement herein was invalid due to the ambiguity of the parties to the same. Further, that the agreement was not enforceable because the respondent had failed to prove to a satisfactory level that she actually paid the purchase price of Kshs.2,000,000/=, and that the learned Judge had rewritten the agreement by finding that the purchase price was Kshs.2,500,000/= which was not contained in the agreement.

14. Learned counsel for the appellant further submitted that the relief of specific performance was not available to the respondent as the suit property had already been disposed to a third party. Secondly, that the remedy of specific performance, being an equitable relief, was underserved for the respondent whose conduct was wanting, including not paying the purchase price in accordance with the terms of the agreement.

15. On her part, the respondent supported the findings of the learned Judge. According to the submission by her counsel, it was not disputed that the parties had entered into the agreement over the suit property and that the appellant had been paid. Consequently, it was argued, the appellant was estopped from denying the validity of the agreement. Regarding the purchase price, it was submitted that the agreement provided for Kshs.2,000,000/= and that, by the demand letter dated 7th January 2009 by the appellant, what was outstanding was Kshs.450,000/=. In the letter dated 10th February 2011, the appellant sought the outstanding balance whose amount was not disclosed; and that by letter dated

18th September 2012 the appellant asked for Kshs.5,000,000/=, a figure that the parties had not agreed upon.

16. With respect to the alleged termination of the sale agreement learned counsel Ms. Mathu argued that the same lacked basis as the sale agreement did not have a completion date notice, and therefore the Law Society Conditions of Sale were applicable and the respondent ought to have been issued with a completion notice. Finally, that the order of specific performance was merited given that the respondent had paid the purchase price as per the terms of the sale agreement.

17. We have considered the record, the appeal, the grounds affirming the judgment and the rival submissions.

18. In our considered view, the questions for determination are whether there was a valid and enforceable sale agreement between the appellant and the respondent; whether the appellant lawfully determined and/or rescinded the sale agreement; and whether the respondent was entitled to the orders of specific performance and permanent injunction.

19. As to whether there was a valid sale agreement between the parties, it was submitted for the appellant that the said agreement did not meet the requirements of the *Law of Contract Act* as each signature, of buyer and seller, was not attested, and that under section 37 of the *Companies Act*, it was not indicated that the person contracting for the appellant was a director, or was authorized to transact for the company or that there was a second signatory or that the company seal was affixed and witnessed.

20. We take note of the fact that in the defence filed by the appellant, these matters were not raised. Parties are bound by their pleadings and any evidence produced by the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored. (See IEBC & Another -vs- Stephen Mutinda Mule [2014]eKLR). In the statement of defence, it was deponed that –

> " ....the defendant avers that the plaintiff accepted an offer to buy the suit premises for Kshs.2 million within a time frame of 90 days...."

21. In the witness statement of Joseph Ng'ang'a Njuguna, a director of the appellant company, he stated that the appellant was a land buying company which offered the suit premises to the respondent at Kshs.2,000,000/= to be paid within 90 days.

22. The appellant cannot depart from its own pleading and witness statement, which was adopted in evidence, that a contract for the sale of the suit premises was entered into between the appellant for Kshs.2,000,000/= which was to be paid within 90 days. This was, and we agree with the learned Judge on this, a valid contract for the sale of the suit property for Ksh.2,000,000/= to be paid within 90 days. The appellant conceded this and cannot be allowed to resile from it.

23. If we understand the appellant's pleadings and his evidence, his case was that it rescinded the agreement when the respondent failed to pay the purchase price within the 90 days. We have looked at the evidence of Joseph Ng'ang'a Njuguna as recorded. When cross-examined, the witness testified that there was no completion date in the agreement; that he terminated the agreement by letter dated 10th June 2008. He was asked to admit that even after the letter which showed an outstanding balance of Kshs.450,000/=, this money was paid by the respondent and accepted by the appellant on 7th January 2009. When this payment was paid and received beyond the letter that purported to terminate the agreement, the appellant was saying that the agreement was still valid and that the letter of termination had ceased to have any effect.

24. We agree with the learned Judge that, upon the applicant receiving the outstanding balance of Kshs.450,000/= beyond the three months and after the letter purporting to terminate the sale agreement, the respondent was not in breach of any of the terms of the agreement which the parties had signed, and therefore the issue of rescission of the agreement did not arise. It is notable in this respect that for legal purposes, when a contract is rescinded, it is treated as though it was never made and never took place, and the outcome is that whatever was done by the parties by making the contract is reversed; the parties are put back in the position they would have been in as if the contract had never even been made (the status quo ante) and the contract is treated as 'non-existing."

25. In Housing Company of East Africa Limited -vs - Board of Trustees National Social Security Fund (supra), it was observed that where a purchaser has dragged his feet and has been guilty of unnecessary delay, the vendor is perfectly entitled to serve upon the purchaser a notice limiting time, at the expiration of which the vendor will treat the contract as having come to an end. We go on to state that, where the vendor has issued a notice limiting time and proceeds to receive payment from the purchaser beyond that time, he cannot be heard to say that the contract came to an end at the expiry by the time in the notice. He has to issue afresh notice and stick to its terms.

26. Regarding the Kshs.5,000,000/=, we agree with the learned Judge that the appellant wrote to the respondent suggesting that because of the delay in the payment of the purchase price it was varying the contract to meet the obtaining market price for the plot. There was no evidence that the respondent agreed, either verbally or in writing to pay the amount, or that she paid any amount towards the suggested figure. We find that the Kshs.5,000,000/= was a proposal by the appellant which did not receive concurrence from the respondent. The proposal did not amount to a new term in the contract that the parties had signed. It did not vary the contract.

27. Consequently, we find that there was a valid sale agreement signed between the appellant and the respondent, and which the respondent performed. Further, the receipt of the balance of the purchase price after giving notice of termination effectively operated as a bar to the remedy of rescission, as the appellant is thereby deemed to have affirmed the contract, and restitution became impossible.

28. Therefore, the learned Judge was correct in finding that the respondent was entitled to the prayers in the plaint. This means that, the appeal has no merits and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.