Okoth v Nyaberi & another (Civil Appeal 248 of 2018)
[2024] KECA 427 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 427 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 248 OF 2018

MA WARSAME, S OLE KANTAI & PM GACHOKA, JJA

APRIL 26, 2024

BETWEEN

BEATRICE OKOTH ..... APPELLANT

AND

FRANCIS PIUS OMWERI NYABERI ..... 1ST RESPONDENT

REBECCA NYABOKE OMWERI ..... 2ND RESPONDENT

(Appeal against the judgment of the Environment and Land Court at Machakos (Angote, J.) dated 23rd November 2017 in ELC Case No. 19 of 2017)

JUDGMENT

1. By an agreement made in writing dated 30th July, 2012 Francis Omweri Nyaberi and Rebecca Nyaboke Omweri (the respondents), stated in the agreement as "..trading as Topland Motors and General Agencies" on the one part and Beatrice Okoth (the appellant) of the other part entered into contract for the sale by the respondents to the appellant of a parcel of land known as Mavoko Municipality LR No. 27770/761 ("the suit property") in consideration of Kshs.4,000,000 to be paid on terms set out in the agreement. The agreement was signed by Pius Omweri Nyaberi (for the vendor) and Beatrice Okoth (the purchaser) but was not signed by Rebecca Nyaboke Omweri. The title to the suit property is in the name of the respondents "...carrying on business under name of Topland Motors and General Agencies, a body duly registered under pursuant to and in accordance with the provisions of the *Registration of Business Names Act* (Cap 499) of the Laws of Kenya ...".

2. In a plaint filed at the High Court of Kenya at Nairobi (Environment and Land Division), the appellant averred that the respondents were husband and wife who traded under the *Registration of Business Names Act*; that she had entered into an agreement with the respondents to purchase the suit property and had paid various sums as part of the purchase price; that terms of the agreement included clauses to the effect that the respondents were to deposit completion documents with a lawyer

and the appellant had the option to sue for specific performance; the respondents had not deposited completion documents as required and were thus in breach of the agreement. Particulars of breach were set out including that the respondents had not sought or obtained consent of the land control board for transfer of the suit property; failing to avail clearance certificates; issuing a premature notice of intended revocation of the agreement and demanding payment of a sum of KShs.1,200,000.00

3. when the balance due was Kshs.1,000,000.00. The appellant claimed to have suffered damage as a result of the said breach particulars given being that the respondents had registered a caveat over the suit property and:

> "...emotional disputes over the fate of KShs.3,000,000.00 paid with no chances of completion...".

4. It was therefore prayed that judgment be entered against the respondents for an order of injunction to restrain the respondents from entering into or interfering with the suit property; a declaration be issued to the effect that the respondents were in material breach of the sale agreement; an order of specific performance compelling the respondents to hand over transfer of the suit property and other completion documents; and general damages be awarded for breach of contract with interest and costs of the suit.

5. The respondents delivered a joint defence where the appellant's claim was denied. The existence of a contract between the parties was denied as was execution of such contract; it was stated that:

> "...The defendants have received a sum of Kshs.3,000,000.00 but KShs. 2,600,000.00 has been paid to the 1st defendant..."

6. It was alleged that KShs.1,000,000 acknowledged in agreement for sale was paid to a lawyer as was a sum of KShs.1,700,000.00; that there was a balance of KShs.1,000,000. It was stated in the defence that the sale agreement was not executed by the 2nd respondent (Rebecca Nyaboke Omweri); that she was not present when the appellant and the 1st respondent executed it and that she was not privy to it and had not received any consideration; that the agreement was invalid and legally unenforceable - that the sale agreement would not form the basis of a suit for disposition of an interest in and; that payments made were in contravention of an invalid agreement. The respondents prayed that the suit be dismissed with costs.

7. A hearing was conducted by Angote, J. where the appellant adopted his witness statement filed with the plaint where she had stated how she had entered into an agreement with the respondents to purchase the suit property, how she had paid for it, how the respondents had failed to handover completion documents; that she had received notice for revocation of the agreement; that she had registered a caveat against the title to the suit property and that she had been notified that the contract had been revoked. In cross-examination, she admitted that the 2nd respondent had never executed the agreement stating:

> "...Rebecca was not present when we discussed the issue of the sale of the land. I know her position is that the land should not be sold ..."

8. The 1st respondent testified that he had signed the sale agreement but that his wife the 2nd respondent had refused to sign; that the purchase price was to be paid to him through his bank account but not to his lawyers, that:

> "...I have not managed to convince Rebecca to sell land. She has refused. I have been unable to get this consent of the board. I have been telling the plaintiff's advocate to have their money back. My family has refused to sell the land. I cannot sell the land..."

9. The case was then closed and in a considered judgment delivered on 23rd November 2017, the Judge found no merit in the appellant's case and dismissed it. Those findings provoked this appeal where the appellant lists 5 grounds of appeal in a Memorandum of Appeal drawn by her lawyers M/s Ayieko Kangethe & Co. Advocates. The Judge is faulted for failing to find that the sale agreement conformed with the mandatory provisions of section 3(3)(a) and (b) of the *Law of Contract Act* and section 38 (1) (a) and (b) of the *Land Act*; that the Judge erred in law and fact when he found that the presence of an endorsement by one of the respondents invalidated the entire contract of sale between parties; that the Judge erred in law and fact in failing to find that the respondents were husband and wife who traded as a partnership and that an act by one partner binds the other under section 17 of the *Partnerships Act*; that the Judge erred in law and fact in failing to find that the amounts paid by the appellant to the respondents was for purchase of the suit property and, finally, that the Judge erred in law and fact in failing to apply the principles of equity "especially the doctrine of estoppel to stop the respondents from denying existence of a clear agreement for sale in which they had even received substantial amount of money from the appellant..." We are therefore asked to allow the appeal and set aside the orders of the High Court.

10. When the appeal came up for hearing before us on 6th February, 2024 the appellant was represented by learned counsel Mr. Wanyama while the respondents were represented by learned counsel Mr. Momanyi. Both sides had filed written submissions and in a highlight counsel for the appellant identified as an issue whether the agreement for sale complied with section 3 (3) of the *Law of Contract Act* and provisions of the *Land Registration Act*. According to counsel, the suit property was owned by a partnership and therefore the agreement signed by one partner was binding on the other partner. He submitted that it was wrong for the respondents to hold the purchase price and refuse to surrender the suit property to the appellant.

11. Counsel for the respondents did not agree. According to him there was no partnership and the sale agreement was not governed by the *Partnerships Act*. He submitted that the agreement for sale indicated that it required to be signed by both respondents; the 1st respondent had proceeded on the basis that he would persuade the 2nd respondent to sign which did not happen.

12. Mr. Wanyama, in a brief rejoinder, submitted that it has not been shown that the 1st respondent had acted outside the scope of his authority under the *Partnerships Act*.

13. We have considered the whole record, submissions made and the law.

14. Rule 31 Court of Appeal Rules, 2022 requires us in a first appeal like this one to re-appraise the evidence and to draw inferences of fact, in effect to re-try the case. This is what this Court had to say of that mandate in the recent case of Njenga vs. Kenya Women Finance Trust [2023] KECA 1144 (KLR) where the Court stated:

> "Rule 31 of the rules of this Court requires that, on a first appeal, we re-appraise and re-evaluate the evidence and come to our own conclusions of fact. It was held of that mandate in the case of Peters vs. Sunday Post [1958] EA 424: "It is a strong thing for an appellate

court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witness."

15. We are of the considered opinion that this appeal will be determined by a determination of whether the agreement for sale was properly executed in terms of the *Law of Contract Act* and whether there was a partnership between the 1st and 2nd respondents. These issues are actually related and intertwined.

16. As we have seen the agreement dated 30th July 2012 was made between the appellant on the one hand as purchaser and the respondents on the other hand as vendors. On the execution page it is signed by the 1st respondent and witnessed by an advocate and by the appellant (witnessed by the advocate). The 2nd respondent did not sign it but there is a curious witnessing by the same advocate of a non-existent signature. The agreement stated that the respondents traded as Topland Motors and General Agencies.

17. The title to the suit property identified the owners of the same as "Francis Pius Omweri Nyaberi and Rebecca Nyaboke Omweri w/o Francis Pius Omweri carrying on business under the name of Topland Motors and General Agencies, a body duly registered under pursuant to and in accordance with the provisions of the *registration of Business Names Act* (Cap 499) of the Laws of Kenya ..."

18. It was stated in the plaint that the respondents traded in that name under the said Cap 499 Laws of Kenya. Nowhere in the plaint was it alleged that the respondents were in a partnership; this allegation is made by the appellant in submissions. As has been held before, parties are bound by pleadings and it is wrong for a party to introduce an issue which is not pleaded; such an issue cannot be brought through submissions. On parties being bound by pleadings see the case of Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR where this Court agreed with the holding of the Supreme Court, Malawi, in Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3, where that Court quoted with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in 1960, Current Legal Problems, at p.174 where the author had stated:

> " "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a partyis equivalent to not hearing him at all and thus be a denial of justice.
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> ....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.""

19. In Galaxy Paints Company Limited vs. Falcon Guards Limited CA Case No. 219 of 1998 (2000) eKLR, this Court stated that:

> "Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination."

20. As we have seen the title to the suit property was registered in the name of both respondents. The agreement for sale dated 30th July, 2012 was not signed by the 2nd respondent.

21. Section 3 of the *Law of Contract Act* requires that all contracts for disposition of an interest in land shall be in writing, shall be signed by all the parties thereto and each signature must be attested. The agreement in contestation before the Judge was not signed by the 2nd respondent. In the absence of the signature, the agreement offended the provisions of the *Law of Contract Act* and was not enforceable by the appellant at all.

22. The Judge was therefore right to make the finding that the agreement was not enforceable without the signature of the 2nd respondent.

23. There was no partnership between the respondents at all. It was stated in the plaint that they traded in a certain name and the title stated that the two had a business registered under the *Registration of Business Names Act*. As we have seen the appellant could not introduce a non- pleaded issue through submissions.

24. We agree with the trial Judge that the suit had no merit. Equally, this appeal has no merit and is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA CIArb., FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR