Sevany v Kaur wife of Sigh (Civil Appeal E178 of 2023)
[2024] KECA 1138 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1138 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E178 OF 2023

DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA

SEPTEMBER 20, 2024

BETWEEN

NAZIR SEVANY ..... APPELLANT

AND

MOHINDER KAUR WIFE OF AMRIK SIGH ..... RESPONDENT

(Being an appeal against the entire judgment and decree of the Environment and Land Court of Kenya at Nairobi (Oguttu Mboya, J.) dated 2nd February 2013 in ELC Civil Suit No. 166 of 2019)

JUDGMENT

1. The facts leading to this appeal are that the appellant asserted ownership of all that piece or parcel of land known as Land Reference No. 12565/36, ("the suit property"), as a bona fide purchaser for value. He allegedly bought it from the respondent through a nominee, Batuk Vitlhani. The respondent then released the original certificate of title and a signed and notarized transfer form to the appellant through her then advocate, Mr. M. A. Khan Esq., so as to facilitate the registration of the transfer of the suit property in favour of the appellant. However, the transfer was not immediately registered as the partners of M/s Rayani, Rach & Sevany Advocates, who were acting for the appellant, were at the time embroiled in the restructuring and relocation of their law firm. In the process, the transfer form and other title documents were misplaced. Later on, the appellant got wind of the respondent's attempts to obtain from the Lands Office a provisional certificate of title on the grounds that the original certificate of title in his possession was lost. Despite his contestation, a Gazette Notice dated 25th July 2014 was duly issued, followed by a grant of a provisional certificate of title to the respondent.

2. On the basis of the foregoing, the appellant, through Messrs Gichuki King'ara & Co. Advocates, filed a suit in the Environment and Land Court ("ELC") in Nairobi, seeking orders of injunction, specific performance of the agreement, eviction of the respondent from the suit property, general damages, damages for trespass, costs and interest.

3. The respondent defended the suit through a defence dated 26th July 2021 and filed by Harith Seth Advocate. She denied the contents of the plaint in toto. She reiterated that she was the registered owner, in possession of the suit property, and had not sold it to the appellant or any other person. The respondent maintained that there was neither an agreement for sale of the suit property, nor was there any payment of consideration by the appellant. Finally, the respondent averred that the suit was in any event time barred by the provisions of the *Limitation of Actions Act*.

4. After hearing the parties, the trial court delivered its judgment on 2nd February 2013 in which it found that the appellant had not proved to the required standard that there was a valid sale agreement between him and the respondent regarding the suit property; nor was consideration paid. Consequently, the appellant had not made out a case for an order of specific performance, and in any event, the suit was time-barred, having been filed outside the statutory period of six years for actions based on contract. In the end, the trial court dismissed the suit with costs to the respondent. The court further and in line with the provisions of section 13(7) of the *Environment and Land Court Act* directed the appellant to surrender and hand over the original certificate of title in respect of the suit property to the respondent within 60 days of the judgment.

5. Aggrieved by the judgment and decree, the appellant filed the instant appeal on 14 grounds set out in the memorandum of appeal dated 9th March 2023. We have however, condensed them into the following: that the trial court erred in law and in fact in holding that: no lawful sale agreement was entered into between the appellant and the respondent or the appellant's nominee; the suit property belonged to the respondent despite there being no defence which had been tendered by the respondent; granting unjust orders not prayed for and without any invitation by any of the parties to do so; ignored the appellant's evidence and submissions as to why the respondent released the original title documents to the appellant's advocate; and in holding that the subject suit was barred by the *Limitation of Actions Act*.

6. The appeal was canvased by way of written submissions with limited oral highlights. Mr. King'ara, learned counsel, appeared for the appellant, whereas Ms. Koech, learned counsel, appeared for the respondent. Mr. King'ara, in highlighting his submissions, addressed four thematic areas: the effect of admission in evidence of an executed and notarized transfer form in favour of the appellant; whether there was any valid defence to the suit by the respondent; the intention of the respondent in releasing title documents to the suit property; and whether the suit was time-barred.

7. On the first issue, he submitted that the transfer form tendered in evidence showed that it was duly executed and notarized. That the respondent's sole witness, Jaswinder Singh Rihal, DW1, confirmed that the respondent voluntarily released the duly executed and notarized transfer form in addition to the original title documents to the appellant's then advocates aforesaid. That the authenticity of the transfer form had never been questioned, nor was this evidence controverted by the respondent. That it was after the acceptance of the offer and payment of the consideration that the respondent's advocate released the title documents to the appellant's advocates. It was submitted that the transfer form indicated the actual amount received by the respondent as consideration. Accordingly, this was evidence of a written contract which supersedes any alleged oral contract. On the issue of the respondent's want of defence, it was submitted that the trial court having expunged from the record the respondent's sole witness's statement, it erred in reverting to the same in its judgment. That from the evidence on record, it was apparent that the respondent was aware that the title documents were with the appellant but nonetheless went ahead to perjure herself in her application for a provisional certificate of title by claiming that the title documents were lost. That the release of the title documents to the appellant could only have been on the basis of payment of the consideration by the appellant to the respondent. That there was evidence of the issuance of cheque no. 196734 drawn on Bank of Credit

and Commerce International by the appellant's advocate for the amount of Kshs. 850,000.00 in favour of the respondent's advocate. It was counsel's submission that the trial court therefore misdirected itself when it held that the appellant had not discharged the burden of proof as to the existence of a valid sale agreement and payment of consideration.

8. On limitation, counsel submitted that by 12th June 2014, the respondent was still attempting to apply for a provisional certificate of title. That it was only after this application and the gazette notice dated 25th July 2014 came to the knowledge of the appellant that he decided to file the suit. To the appellant, therefore, this was when time started running for purposes of limitation. Accordingly, the suit was not time-barred as claimed by the respondent and upheld by the trial court.

9. On the respondent's part, Ms. Koech submitted that the trial court was right in its conclusions in view of the evidence availed and could not be faulted. She relied in support of this submission on the cases of Reliable Elactrical Engineers Limited vs. Mantrac Kenya Limited (2006) eKLR and Gurdev Singh Birdi & Narinder Singh Ghatora as a Trustees of Ramgharia Institute of Mombasa vs. Abubakar Madhubuti (1997) eKLR. She submitted further that the suit before the ELC was time-barred under the provisions of the *Limitation of Actions Act*. That this statutory defence was duly pleaded and was framed as an issue for determination. The trial court concluded that the agreement, if at all, was entered into on 19th November 1995; that the appellant was obligated to pursue and ensure that the impugned contract was concluded and finalized within six years from the date of execution. That the trial court concluded, and rightfully so, that the appellant's claim was essentially premised on breach of contract and hence the prayer for specific performance was clearly barred by the provisions of section 4 (1) of the *Limitation of Actions Act*. That the appellant never had a lawful interest in the suit property as there was neither an agreement duly executed by both parties nor any evidence of payment of any consideration to the respondent.

10. It was submitted that the title to the suit property was given to the appellant's advocate for preparation of a sale agreement between the respondent's late husband and one Mr. Batuk Vithlani in 1989. The transaction, however, aborted following the death of Mr. Batuk Vithlani. However, instead of the appellant's advocates returning the title documents to the respondent, Mr. Mohamood Sevany Advocate, a partner in the aforesaid law firm and who is the appellant's brother, conspired with the appellant to defraud the respondent of the suit property by laying a baseless claim of purchase of the same by the appellant. Most importantly, the transfer document that the appellant referred to showed that the part where the appellant was to sign was blank. Therefore, it was not true that this transfer became an agreement between the appellant and the respondent.

11. The respondent went on to submit that there was no evidence that there was any consideration paid by the appellant to the respondent. No copy of the cheque or bank statement was tendered in evidence to show that the funds were actually moved to the respondent by the appellant. That, in any event, there was a letter from the respondent's advocate confirming that there was no consideration received by the respondent from the appellant. Further, counsel submitted that the trial court having found that there was no contract for sale between the parties, it was right under section 13 (7) of the ELC Act, to make a consequential order for the appellant to release the title documents in his possession to the respondent. It only made sense that such an order be made, and the court cannot therefore be accused of making unjust orders not asked for by any of the parties.

12. We have considered the record, the rival submissions, the authorities cited and the law. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions on the appeal. See Selle vs. Associated Motor Boat Co. [1968] EA 123 and Jabane vs. Olenja, [1986] KLR 661, 664. In the latter case, this Court stated that it will not lightly differ from the findings of fact of the trial court and will only do so if they are based on no evidence at all. See also Ephantus Mwangi vs.

Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs.Kenya Bus Services (1982-88) 1 KAR 870.

13. Having so stated, we deem the issues for our determination to be whether: there was a valid sale agreement between the appellant and the respondent; the appellant made a case for the grant of the order of specific performance; the claim was time-barred; and whether the trial court gave orders that were not asked for in the pleadings.

14. The appellant was required to prove that indeed there was a valid sale agreement between him and the respondent. Further, he was expected to prove that there was a common intention by the parties to enter into an agreement for the sale of the suit property and that consideration was paid. That burden of proof remained on the appellant throughout. This was because he maintained that there was an agreement and that the respondent had negated it.

15. The standard of proof in civil cases was enunciated in the case of Samuel Ndegwa Waithaka vs. Agnes Wangui Mathenge & 2 Others [2017] eKLR where this Court observed:

> " In civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not."

16. It is also a principle of law that whoever lays a claim before the court against another has the burden to prove it. In that regard, sections 107 and 108 of the *Evidence Act* provide as follows:

> " 107
>
> (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 119 of the *Evidence Act*, however, provides the following on oral agreements:

> " The Court may presume the existence of any fact which it thinks likely to have happened, regard being to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case."

17. In Civil Appeal No. 22 of 2013, Peter Mbiri Michuki vs. Samuel Mugo Michuki [2014] eKLR, this Court held:

> " Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. .... Prior to the amendment of section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows:

3. No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract -
>
> 1. Has in part performance of the contract taken possession of the property or any part thereof; or
>
> (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

18. In our view, whether there was a written agreement for the sale of the suit property, common intention for sale of the suit property, and payment of consideration were not proved to the required standard and the trial court was right in so holding. We are fortified in this holding by the answers given by the appellant and his witness whilst under cross-examination during the hearing. The appellant in pertinent paragraphs testified thus:

> "I didn't meet Mohinder Kaur. I didn't transact with Mohinder Kaur. I didn't sign any sale agreement with Mohinder Kaur to date. I have not signed any document at all with Mohinder Kaur over the suit property. The money was paid out by my advocate. My advocate is my brother namely Mohamood Sevany. It is my brother who paid out the consideration to the advocates for the vendor. The nominee was Batuk Betra Vickhangh (sic). I didn't appoint the nominee. The nominee was appointed by my brother. The nominee was a client to my brother. I don't know where the money that was paid to the nominee came from. It is not true that I am the one who paid out the money to the nominee. The money was paid out vide cheque. There is a cheque. I don't know the details of the cheque. I don't know the details of the cheque number. I don't have the evidence to show the remittance of the money. The transfer shows that the property was not being transferred to me. Even the original transfer shows that the transfer was not being made to me. The property was initially being purchased by the nominee. It is my evidence that it is this nominee that sold the property to me. The defendant did not sell the property to me. The defendant sold the property to the nominee".

The appellant's witness, Mohamood Sevany, PW2, stated thus:

> "The vendor was Mohinder Kaur and the purchaser was Mr Batuk Vitulani (sic). The advocate for the vendor was Mr. Khan Advocate. I didn't have the sale agreement between Batuk Vithlani before the court today. I don't recall whether a sale agreement was ever drawn/prepared. The payment of the purchase price was paid from the firm of Rayani & Sevany Advocates vide cheque to the firm of M. A Khan Advocates in November 1989. I don't have evidence/copy of the said cheque. I also don't have evidence of funds /transfer from the account of Rayani & Sevany Advocates. I received instructions to prepare a blank transfer. I didn't recall whether there was any agreement between the plaintiff and the defendant. As pertains the issue of payment of the purchase price, the firm of Mr. Khan said that the purchase price had not been received by them. The firm of Mr. Khan also confirms

that the sale of the property was being made to Butik Vithlani. He passed away one and a half years later. The firm of Mr. Khan has not expressly admitted receipt of the purchase price."

19. From the foregoing, it is pretty obvious that there was no agreement of any sort between the appellant and the respondent for the sale of the suit property. Had there been any, it could only have been between the late Bunik Vithlani and the respondent. It is Bunik Vithlani who had initially expressed interest to purchase the suit property pursuant to which title documents were released to the firm of Rayani & Sevany Advocates. However, Bunik Vithlani passed on a year later and before the transaction was finalized. The further proof that there was no agreement is that the appellant invited the court to infer the same from the contents of the executed and notarized transfer form. Even if there was an oral agreement, it was null and void as there was no evidence of part performance of agreement by way of occupation and or possession by the appellant.

20. As to whether an agreement could be inferred from the signed and notarized transfer form, that was not tenable, given that the transfer form was not complete as it had been signed by only one party, the respondent. The document did not even have the details of the suit property. How then can that be evidence of a sale agreement, even by inference, as we were invited to do by counsel for the appellant?

21. On consideration again, there was no credible evidence that it was paid. Indeed, the same witnesses testified that the payment was made to M. A. Khan Advocate, not the respondent. The appellant himself even went further and asserted that he never parted with the purchase price. He was not even sure if it was paid. Much as there was evidence of a cheque drawn out in favour of the respondent's advocate, there was no evidence that it was cashed. Then there was evidence in the form of correspondence exchanged between the advocates of the parties, culminating in a letter in which M. A. Khan advocate vehemently denied ever receiving the purchase price or part thereof from the appellant's advocates. Without evidence to prove payment or show that the transfer forms were intended for the suit property, it is difficult to discern that indeed there was any agreement for sale or that the sale of the suit property to the appellant was actually contemplated.

22. On the last issue, our determination is in the negative. Our determination is fortified by reason that an order for specific performance is an equitable remedy, which, like all equitable remedies, is available at the court's discretion. It is an order that is, however, rarely granted, and only in the clearest of cases and where damages would not be an adequate remedy. In the present case, the appellant did not establish through evidence that he had performed his part of the bargain to entitle him to an order of specific performance.

23. In Gharib Suleman Gharib vs. Abdulrahman Mohamed Agil, Civil Appeal No. 112 of 1998 (UR), this Court observed:

> "The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages."

Further, in the case of *Gurder Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti, Civil Appeal No. 165 of 1996*, (UR) it was held that the underlying principle in granting the equitable relief of specific performance is that:

> " The plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."

The principle was further elaborated in Thrift Homes Ltd vs. Kenya Investment Ltd [2015] eKLR, where the court stated that:

> " Specific performance like any other equitable remedy is discretionary and will be granted on well-settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistakes or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction".

24. From the foregoing, it is clear that the prayer was not available to the appellant given our holding on the first issue that there was no valid contract for the sale of the suit property. There having been no valid contract or any part performance thereof by way of occupation or possession by the appellant which would have informed the court to consider the appellant's rights as to the suit property, it follows therefore, that indeed the prayer for specific performance could not obtain. Having said that much, we do not find it necessary to enter into an analysis of the other issues framed for determination.

25. In the end, we find no merit in the appeal and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROB THIS 20TH DAY OF SEPTEMBER 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR