Kioko v Tercy Investments Limited (Civil Appeal 376 of 2018)
[2024] KECA 1739 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1739 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 376 OF 2018

SG KAIRU, DK MUSINGA & M NGUGI, JJA

DECEMBER 6, 2024

BETWEEN

NANCY KIOKO ..... APPELLANT

AND

TERCY INVESTMENTS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (K. Bor, J.) dated 30th August 2018 in ELC Case No. 505 of 2017 (Formerly Nairobi HCCC No. 168 of 2006)

JUDGMENT

1. This is an appeal from the judgment and decree of the Environment and Land Court at Nairobi (K. Bor, J.), delivered on 30th August 2018 in ELC Suit No. 505 of 2017 (formerly HCCC No.168 of 2006).

2. The background to this appeal relates to a sale transaction in respect of a property known as L.R. No. 17864/9 situate in Karen, Nairobi, (hereinafter referred to as "the suit property"), which is owned by the appellant. The respondent contended in its suit before the trial court that the appellant agreed to sell the suit property to it through its director, one Mercy Kanyara,

   (hereafter "Mercy") at an agreed consideration of Kshs.1,600,000. As at the time of execution of the agreement for sale dated 20th June 2005, the respondent had already paid to the appellant part of the purchase price amounting to Kshs.1,479,000, leaving a balance of Kshs.121,000 which was to be paid within 6 months from 1st June 2005, or upon the successful registration of the transfer in favour of the respondent.

3. As part of the said payment, the respondent stated that it deposited the sum of Kshs.250,000 in a joint account in the names of the appellant and Mercy, which the appellant withdrew for her own

use. Having taken possession of the suit property, the respondent stated that it expended a sum of Kshs.400,000 on fencing and improving it.

4. The other amounts paid by the respondent included Kshs.100,000 as part of the purchase price, legal fees of Kshs.50,000, and provisional valuation fees of Kshs.3,000.

5. The transaction did not materialize. On 15th August 2005 the appellant wrote to Mercy stating as follows:

> "RE: Sale of LR No.17864 - Nancy J. Kioko to Yourself
>
> I refer to the above matter and regret to inform you that I am unable to proceed with the sale of the above property to you due to the fact that the Commissioner of Lands has declined to give his consent to the proposed transfer citing the reason enumerated in the attached copy letter. In the circumstances therefore I have got no alternative
>
> other than to refund you your deposit being Kshs one Million only (Kshs.1,000,000).
>
> I am in the process of making arrangements to refund the said money and I would appreciate if you could indulge me for the next six (6) months from today's date within which I hope to give you a cheque for the entire amount."

6. The respondent's claim against the appellant was for a sum of Kshs.3,810,100, which comprised the deposit paid towards the purchase price being Kshs.1,579,000, and the monies expended towards improving the suit property, Kshs.400,000, together with interest at the rate of 10% per month from 1st May 2006 until payment in full in terms of the sale agreement.

7. In her defence, the appellant contended that together with Mercy they entered into a business venture known as Isongu Home Makers and Designs Limited (Isongu company); that she agreed to sell the suit property to Mercy and not the respondent; that she signed the sale agreement which she believed was between her and the Mercy; that her signature on the sale agreement was obtained fraudulently; and that the Kshs.1,000,000 that she had offered to refund was in relation to their Isongu company, "but not as the purchase price of the suit property." She urged the trial court to dismiss the suit.

8. After a full trial where only the appellant and Mercy testified, the trial court held:

> "The Defendant admits entering into a sale agreement over the suit property but denies that the plaintiff was the purchaser. She
>
> offered to refund the sum of Kshs. 1 Million when the Commissioner of Lands declined to give consent for the transfer of the suit property. The letter from the Commissioner of Lands referred to transfer to Tersy Investments. The appellant did not demonstrate how the invoices she produced related to the plaintiff's claim. She did not demonstrate that the monies Mercy Kanyara paid were for the joint venture and not for the purchase of the suit plot.
>
> The Defendant did not produce the agreement she claimed that she entered into with the Mercy Kanyara to show that the terms of that agreement were different from those of the agreement produced by the Plaintiff. The court is inclined to believe that the sale agreement presented by the Plaintiff in evidence was the one the parties executed."

9. In the end, the court held that the respondent had proved its claim on a balance of probabilities and accordingly entered judgment in its favour as prayed in the plaint, together with costs.

10. Dissatisfied with the findings of the trial court, the appellant instituted this appeal. She contends that the learned judge erred in law and in fact by, inter alia: misdirecting herself on the issues for determination; misapprehending the nature of the dispute; relying on unproven and unpleaded issues and facts; failing to consider the submissions of the parties and the issues raised therein, and in particular the doctrine of non est factum, fraud, mistake and misrepresentation that she had advanced, thereby arriving at an erroneous conclusion.

11. At the hearing of the appeal, learned counsel Mr. Okatch appeared together with Mr. Wamwai and Mr. Wachira for the appellant, while learned counsel Ms. Moga held brief for Mr. Lutta for the respondent. Mr. Okatch and Ms. Moga made oral highlights of their client's respective written submissions.

12. Highlighting the appellant's written submissions, Mr. Okatch submitted that the learned judge erred in law in finding that there was a valid contract for sale capable of enforcement, citing the provisions of Section 3 (3) of the *Law of Contract Act* relating to contracts for disposition of an interest in land.

13. On the issue of attestation of the appellant's signature on the agreement for sale by Mr. J. M. Mburu Advocate, Mr. Okatch submitted that the appellant had never met and/or given instructions to the said advocate to attest her signature, and therefore the agreement was invalid as it contravened the provisions of Section 3 (3) of the *Law of Contract Act*.

14. As regards the sale of the suit property, it was submitted that the appellant had offered to sell it to Mercy, not the respondent; and that the transaction was frustrated by the Commissioner of Lands' refusal to grant consent for its sale.

15. As regards the sale agreement that she executed, it was submitted that it did not show the appellant's identification number; that she was only given the last page of the agreement; that there was fraud and misrepresentation in that the appellant did not know that the alleged purchaser was the respondent;

    that the common seal of the respondent was not affixed on the agreement; and that the purported execution by the purchaser was not attested by an advocate.

16. Regarding the sum of Kshs.3,810,100 awarded to the respondent by the trial court, it was submitted that no sufficient proof was availed in support; that this was a claim in the nature of special damages which required to be specifically pleaded and strictly proved, as held by this Court in Herbert Hahn vs. Amrik Singh [1985] eKLR.

17. Lastly, the appellant's counsel submitted that the appellant was not accorded a fair hearing because the trial court granted the respondent leave to bring in new documents in the middle of cross-examination which gave it an advantage over the appellant; and because the learned judge did not call Mr. J. M. Mburu Advocate to testify.

18. On her part, Ms. Moga submitted that there was a valid sale agreement between the parties, and the trial court cannot be faulted for so finding; that the judgment sum was well pleaded and proved; that the agreement clearly showed that the appellant had received a total sum of Kshs.1,479,000 towards the purchase price at the time of its execution; that a further sum of Kshs.100,000 was paid to the appellant vide Authority No. 399187 drawn by Equity Bank; and that it was not disputed that the respondent had expended a further sum of Kshs.400,000 towards improvement of the suit property as per the delivery notes and payment receipts tendered in evidence.

19. Counsel submitted that the manner in which these sums were to be repaid in the event of breach was provided for in the sale agreement, including the interest component, and therefore the learned judge correctly awarded the sum of Kshs.3,810,100/= on account of the purchase price paid, interest thereon, improvements made to the suit property and legal fees.

20. Regarding the appellant's argument that she was not accorded a fair hearing, counsel submitted that the trial court heard both parties, and its decision was based on the law and evidence tendered during the trial.

21. We have considered the record of appeal, submissions made on behalf of the parties, as well as the law. This being a first appeal, we are bound to revisit the evidence on record, evaluate it and reach our own conclusion in the matter. In doing so, we appreciate that as the first appellate court we ordinarily ought not to interfere with findings of fact by the trial court, unless they are based on no evidence, or on a misapprehension of it, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. We also take into account that we did not have the privilege of seeing the witnesses testify at the trial court. See this Court's decision in J. S. M. vs. E. N. B. [2015] eKLR.

22. There are only two major issues for our determination in this appeal. These are:

    i. Whether the learned judge erred by making a finding that the parties had entered into a valid agreement for sale in respect of the suit property; and,

    ii. Whether the learned judge erred by awarding the respondent the Kshs.3,810,100/= pleaded in the Plaint.

23. The sale agreement entered into by the parties was produced by Mercy, a director of the respondent. Mercy detailed the negotiations that took place between herself and the appellant. There was no dispute that at the time of the negotiations, the two were close friends, and had even started a company together. Mercy said that she negotiated the purchase of the suit property for and on behalf of the respondent, and a valid sale agreement was ultimately drawn and executed.

24. The appellant challenged the finding of the trial court on the validity of the agreement, on two fronts: that it reflected the wrong purchaser, and that it was not properly attested in compliance with the provisions of section 3 (3) of the *Law of Contract Act*, and that it was not duly sealed by the respondent.

25. Section 3 (3) of the *Law of Contract Act* stipulates as follows:

    (3) No suit shall be brought upon a contract for

    the disposition of an interest in land unless—

    a. The contract upon which the suit is founded—

        i. is in writing;

        ii. is signed by all the parties thereto; and

    b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

    Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust."

26. There is no dispute that the appellant and Mercy discussed and agreed on the sale of the suit property to her. However, the appellant said that she intended to sell the suit property to Mercy and not to her company, though she never advanced any reason for that preference. On the other hand, Mercy stated: "I had informed the Defendant that the property was being purchased for the benefit and in the name of the plaintiff even though the payments for the purchase price were being made by me."

There was a company resolution that was passed by the respondent to purchase the suit property, and the resolution was produced before the trial court.

27. The sale agreement that was drawn by Mr. J. M. Mburu Advocate was signed by the appellant, though she alleged that she was given only the last page thereof. We find it difficult to agree with the appellant. The appellant did not allege that she is an illiterate person, or one who could be taken advantage of by the respondent and its advocate into signing a document she had not read and comprehended. In any event, that last page on which she signed showed that the purchaser was the respondent. The record does not show that the appellant raised any objection at the material time, it only became an issue when the Commissioner of Lands did not give consent to the

transaction, the reason being that it was part of a Children's

home which the appellant was running.

28. The agreement shows that the appellant signed it in the presence of Mr. Mburu. That is an issue of fact that the trial court did not expressly pronounce itself on, save to indicate that it was satisfied that the respondent had proved its case on a balance of probabilities. Mr. Mburu was not called as a witness by any of the parties. It was not for the trial court to summon Mr. Mburu to testify, as the appellant now laments. Nothing stopped the appellant from asking the trial court to summon him for cross examination on the documents that he had prepared if she so desired. We do not, therefore, agree with the appellant that there was any fraud, mistake of misrepresentation in the execution of the sale agreement by herself. Failure to have the appellant's national identification card number indicated on the sale agreement cannot invalidate an agreement which the appellant agrees to have signed.

29. Turning to the argument that the respondent's common seal was not affixed to the sale agreement, we do not think that omission per se, if at all, could invalidate the agreement, the same having been duly executed by Mercy as a director, who also held a power of attorney donated to her by her co-director, Charity Wairimu Kanyara, authorizing her to execute documents on her behalf. Mercy told the trial court that the original copy that was in Mr. Mburu's office was duly sealed.

30. Section 42 (7) of the *Companies Act*, 2015, which has since been deleted by *Act No. 1 of 2020*, stipulated that failure to affix the official seal renders a deed or document "void so far as the company is concerned." As against other parties to the deed, the contract could not be deemed as void. We may add that following the changes brought about by the Business Laws (Amendment) Act, 2020, it is no longer necessary for a local company to have a common seal. This ground must therefore fail. We are satisfied that the parties herein had entered into a valid sale agreement.

31. We now turn to consider whether the learned judge erred in law in awarding the sum of Kshs.3,810,000 as pleaded in the plaint.

32. The prayers sought in the Plaint were as hereunder:

> " WHEREOF, the Plaintiff prays for judgment
>
> against the Defendant for:
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> a. Kshs.3,810,100/= being the principal sum plus interest thereon at 10% per month with effect from 1st August 2005 until 30th April 2006.
>
> b. Further interest on the principal sum at the rate of 10% per month from 1st May 2006 until payment in full.

c. Any other or further relief that this Honourable court may deem fit to grant to meet the ends of justice.

d. Costs of this suit with interest."

33. The respondent had provided a breakdown of the Kshs.3,810,100 at paragraph 20 of the Plaint. The said amount comprised the purchase price paid to the appellant which was

Kshs.1,579,000 together with an interest component of 10% per month from 1st August 2005 to 31st April 2006 amounting to Kshs.1,421,100; improvements on the suit property at Kshs.400,000 together with interest at 10% per month from 1st August 2005 to 31st March 2006 being Kshs.360,000; and legal fees at Kshs.50,000. The rate of interest as prescribed in the sale agreement is rather punitive, but the trial court could not rewrite the terms of the contract. See National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503.

34. The respondent alleged in its suit that the purchase price for the suit property was Kshs.1,600,000 and that on diverse dates, Mercy paid to the appellant a sum of Kshs.1,579,000 towards the said purchase price. The respondent provided a breakdown of the said sum of Kshs.1,579,000 as follows:

a. Kshs.250,000 which was withdrawn from the respondent's bank account held at Equity Bank, Kimathi Street on 8th June 2005 and deposited in the joint account opened at the same branch which was jointly operated by the appellant and the Mercy. This amount of money was said to have been withdrawn by the appellant from the joint account for her own use.

b. Kshs.80,002 withdrawn by the appellant on 9th June 2005 from the joint account held by the appellant and Mercy for her own use and being part payment of the purchase price.

c. Kshs.165,002 withdrawn by the appellant from the joint account on 10th June 2005 for her own use.

d. South African Rand 28,320 (equivalent of Kshs.337,824) which Mercy processed on behalf of the appellant towards payment of the school fees for the
appellant's daughter at the Nelson Mandela

Metropolitan University, Port Elizabeth, South Africa.

e. Kshs.100,000 paid to the appellant on 21st July 2005 vide authority Note No. 399187.

35. At the hearing before the trial court, the respondent produced several documents in support of the payments made by Mercy to the appellant. The documents produced included cash withdrawal slip dated 9th June 2005 for Kshs.80,002; cash withdrawal slip dated 10th June 2005 for Kshs.165,002; cash withdrawal slip dated 10th June 2005 for Kshs.15,002; cash withdrawal slip dated 14th June 20005 for Kshs.170,002; instructions to Barclays Bank of Kenya from Mercy to transfer 28,320 Rands to Nelson Mandela Metropolitan University; Barclays Bank of Kenya advice by Mercy on the swift transfer to the said university; and Authority Note dated 21st July 2005 to Equity Building Society to pay the appellant Kshs.100,000.

36. The appellant on her part contended that the respondent did not make any payments to her towards purchase of the suit property; that the respondent's director, Mercy, and the appellant were in a joint business venture known as Isongu Home Makers and Designs Limited; that they had agreed to invest in the said joint venture; and therefore, any money received from Mercy was in respect of the joint venture and not towards the purchase price over the suit property.

37. The appellant produced before the trial court several invoices bearing different dates and amounts in an attempt to

demonstrate the expenses incurred towards the realization and the running of the said joint venture. However, during cross- examination, she acknowledged that the invoices were issued in her name and not in the joint venture's name. She also did not have the receipts in respect of the said invoices in court.

38. We associate ourselves with the views expressed by the learned judge that the appellant did not demonstrate how the invoices she produced related to the claim before court. In addition, the appellant did not adduce any evidence to show how Mercy and herself were to invest in the joint venture and in what proportion. In the absence of any supporting evidence, the only logical conclusion that we can arrive at, as did the trial court, is that the monies paid to her by the respondent through Mercy were in respect of the purchase price for the suit property, which transaction did not materialize as anticipated.

39. In addition, the appellant, in her letter to Mercy dated 15th August 2005, had expressly agreed to refund the deposit of Kshs.1,000,000 paid to her as part of the purchase price. Therefore, the allegation that the monies paid to her by Mercy were in respect of the joint venture is a red herring intended to deny the respondent a refund of its monies.

40. Turning to the claim for refund in respect of the improvements on the suit property which the respondent quantified at Kshs.400,000 together with interest at 10% per month from 1st August 2005 to 31st March 2006, we are satisfied that various

documents were produced in proof of that claim, which is repayable in terms of the sale agreement.

41. All in all, we find this appeal unmeritorious and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

D. K. MUSINGA, (P)

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

MUMBI NGUGI

JUDGE OF APPEAL

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

Signed

Deputy Registrar