Kivungi v Mangenge (Civil Appeal 22 of 2019)
[2024] KECA 1755 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1755 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 22 OF 2019

SG KAIRU, S OLE KANTAI & JM MATIVO, JJA

DECEMBER 6, 2024

BETWEEN

GABRIELLE MUTIE KIVUNGI ..... APPELLANT

AND

MARGARET KAMENE MANGENGE ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Makueni (Mbogo, J.) dated 24th April, 2019 in ELC Case No. 48 of 2017)

JUDGMENT

1. The appellant in this appeal, Gabriel Mutie Kivungi, is challenging the judgment of the Environment and Land Court (ELC) delivered by C. G. Mbogo, J. on 24th April 2019 in Makueni ELC Case No. 48 of 2017 dismissing his suit against the respondent, Margaret Kamene Mangenge. In that suit, the appellant had sought an order of specific performance to compel the respondent to complete the sale and transfer to him of Plot No's 169 and 170 (the property) situated at Ngulu-Kikumbulyu Location, Kibwezi Division in Makueni County. The appellant had also sought damages for lost opportunity and use of the property for the two (2) years; a mandatory order to compel the respondent to hand over vacant possession of the property to him and an eviction order.

2. Based on the pleadings and the evidence presented before the ELC, the facts are that the parties entered into a 'home-made' agreement for sale dated 21st March 2014 in which the respondent agreed to sell the property to the appellant for Kshs.800,000.00. Under Clause 2 of the agreement, the appellant covenanted "to immediately pay" Kshs.800,000.00 "before taking possession of the land and transfer of the necessary papers." The appellant paid Kshs.540,000.00 to the respondent on the same date.

3. In a separate handwritten note signed by both parties, the respondent acknowledged receipt of Kshs.540,000.00 "in cash". It was stipulated in that note that the "remaining balance of 260,000 shillings to be paid in a duration of 42 days from today." The 42 days would have lapsed on 2nd May

2014. In an endorsement on that hand written note appearing after the parties signatures, there is a note that "further Kes100,000 was given to Margaret in the presence of her sister at Mlolongo (sic) in December 2014". (The word "December" is superimposed on the word "September" which is crossed out). What appears to be the signature of the appellant appears immediately below that endorsement. The respondent however contests that a further Kshs.100,000.00 was paid.

4. According to the appellant, he was to pay "the balance of Kshs.160,000.00 to complete the transaction" but the respondent "avoided" the appellant and "refused to accept the money nor to pick [his] phone calls and disappeared to unknown locations whenever" he tried to contact her.

5. The respondent, on the other hand, while denying that she avoided the appellant or refused to complete the transaction, asserted that the appellant breached the agreement by failing to pay the balance of the purchase price within the stipulated 42 days; that the agreement expressly stipulated that the appellant would be granted possession of the property upon payment of the full purchase price.

6. It was the respondent's testimony that the 42 days within which the appellant was to pay the balance of the purchase price ended without any communication from the appellant; that on contacting him, he said that he was in the process of getting the money, which he did not do; that she got frustrated and was eventually constrained to seek assistance of her lawyers who wrote letters to the appellant dated 7th June 2016, 10th August 2016 and 21st August 2016 rescinding the agreement. For good measure, the respondent pleaded that the transaction was in any event void as Land Control Board consent was never obtained.

7. Having heard the testimony of the appellant and that of the respondent and her witness Robert Kiio Mutiso, who attested the agreement for sale, and having considered the submissions by the parties, the learned Judge of the ELC was not satisfied that the appellant had established his case to the required standard, and as already indicated, dismissed the suit, and hence the present appeal.

8. The appellant has challenged the judgment on sixteen grounds of appeal contained in the Memorandum of Appeal, including, that the trial court erred in: failing to grant an order of specific performance; finding, without evidence, that the balance of the purchase price was payable within 42 days; failing to grant an alternative remedy of refund of the deposit paid; failing to consider that the property was un-surveyed and did not have a title deed without which land control board consent could not be sought; failing to appreciate that it was the duty of the respondent to apply for land control board consent; concluding, without evidence, that the property had been sold to a third party; wrongly imposing an obligation on the appellant to have carried out a search on the property; failing to find that the respondent held the property in trust for the appellant; and failing to dispense substantive justice.

9. Expounding on the grounds in the Memorandum of Appeal, learned counsel, Ms. Njeri Kariuki holding brief for Mr. Koceyo for the appellant relied on the appellant's written submissions. It was submitted that the Judge erred in declining to grant the relief of specific performance; that contrary to the finding by the Judge, there was no provision in the agreement for a fixed period of 42 days for the payment of the balance of the purchase price as the "balance of Kshs.160,000.00 was to be paid at a later date as agreed between the parties."; that there was no evidence to support the contention that the balance of the purchase price was payable in 42 days and the Judge erred in effectively re-writing the contract in violation of the principle in *National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Limited & Another*, Civil Appeal No. 95 of 1995; that the conditions for the grant of the relief of specific performance were satisfied and the Judge erred in failing to grant that relief.

10. It was submitted further that the ownership of the property was admitted by the respondent; that the Judge erred in holding that the appellant should have conducted a search over the same prior to the hearing; that the purported sale of the property to a third party was not pleaded and no evidence was

led to support that contention; that the respondent had the burden under Section 107 and 108 of the *Evidence Act* to prove that the property had been sold to a third party but did not discharge that burden. Furthermore, it was urged that despite Kshs.640,000.00 having been paid by the appellant to the respondent towards the purchase price, the Judge erred in failing to order a refund as an alternative remedy.

11. As for the absence of land control board consent, it was submitted that the duty to obtain the same lay with the respondent as the vendor; that in any event, on the strength of the decision of this Court in Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR, the respondent held the property in trust for the appellant and lacked the authority to sell or transfer it to a third party.

12. It was submitted that in finding that the appellant was in breach of the agreement, the Judge considered irrelevant and extraneous matters and misinterpreted and misconstrued the law on equitable remedies and made a wrong decision.

13. There was no appearance for the respondent during the hearing of the appeal but written submissions had been filed urging the Court to uphold the decision of the ELC. It was submitted for the respondent that based on the pleadings before the ELC, the appellant's claim was for specific performance and did not seek a refund of the money paid to the respondent; that parties are bound by their pleadings and the Court could not pronounce itself on matters that were not pleaded. In that regard, reference was made to the decision of the Court in *Independent Electoral and Boundaries Commission and Another vs. Stephen Mutinda Mule & 3 Others*, C.A. No. 219 of 2013 [2014] eKLR for the proposition that all issues in a suit arise from the pleadings and parties and the court are bound by the same. It is submitted that based on the pleadings, it was not open to the trial court to order a refund.

14. On the prayer for specific performance, it was submitted, on the strength of the persuasive decision in *Joseph Ngunjiri Gachimu vs. Josephine Wairimu Kagunda & 2 Others* [2015] eKLR, that specific performance is an equitable relief which is discretionary and is based on the existence of a valid and enforceable contract; that the conditions for the grant of the relief of specific performance were not met in this case; that the appellant was required to demonstrate that damages would not be an adequate remedy; that specific performance was not available in this case as there was evidence that the property had been sold to a third party. It was submitted further that based on correspondence, the appellant had been offered his money back, but refused the same insisting on the transfer of the property.

15. It was submitted that the Judge correctly assessed the evidence and correctly applied the law and there is no basis for this Court to interfere with his decision.

16. We have considered the appeal and submissions, and the authorities cited. This being a first appeal from the decision of the ELC, our task, as stated by this Court in *Selle vs. Associated Motor Boat Company Limited [1968] E A 123*, is to review the evidence before the High Court and to draw our own conclusions bearing in mind that we have not heard or seen the witnesses. In the case of *Mwangi vs. Wambugu* (1984) K L R 453 this Court held that:

> " A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles in reaching the finding, and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. In Mwanasokoni vs. Kenya Bus Services Limited [1985] KLR 931, this Court held that the Court of Appeal will interfere with findings of fact by the High Court where the finding is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding. See also the pronouncement by this Court in *Makube vs. Nyamuro* [1983] KLR 403.

18. With those principles in mind, we discern two principal issues in this appeal. First is whether the Judge erred in declining to grant the order of specific performance of the agreement for sale. Second, is whether the Judge erred in failing to order a refund of the deposit paid.

19. Specific performance is a discretionary remedy. A trial court has a choice in the matter. However, it is not a choice to be exercised arbitrarily or capriciously. The conduct of the parties in a claim for specific performance is a relevant consideration. See Anson's Law of Contract, 28th Edition, by J. Beatson at page 634. As held by the Court in Openda vs. Ahn [1984] KLR 208, a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such person as he directs at the time and place of completing the sale.

20. As already indicated, there is no dispute that the parties entered into an agreement for sale of the property dated 12th March 2014 for a price of Kshs.800,000. Under clause 1 of that agreement, provision was made that the respondent "shall make available the whole piece of land for the value amounting to...Kes800,000.00 and the buyer shall take possession of the land commencing...12-03-2014." Under clause 2, the appellant, as buyer, covenanted with the respondent, as seller, "to immediately pay the sum of...Kes.800,000.00 before taking possession of the land and transfer of the necessary papers."

21. In effect, the full purchase price was to be paid on the same day possession was to be handed over to the appellant. However, that did not happen, for on the same day, 12th March 2014, in a handwritten note signed by both parties, the respondent acknowledged receipt of Kshs.540,000.00. Provision was made for the balance of Kshs.260,000.00 to be paid "in a duration of 42 days from today". That too did not happen. Even if the appellant was to get the benefit of doubt that he paid the disputed further amount of Kshs.100,000.00 in December 2014, and that the balance that remained after that was Kshs.60,000.000, the alleged payment of Kshs.100,000.00 was clearly outside the agreed time frame of 42 days.

22. Moreover, the appellant did not present any evidence of having tendered or having been able to tender Kshs.160,000.00 to the respondent. There was therefore clear breach of the agreement by the appellant. We are therefore fully in agreement with the learned Judge when he stated in his judgment:

> " ...it is clear that the Plaintiff did not fulfill the terms of the agreement dated 12th March 2014. Whereas he said that he paid Kshs.100,000 to the Defendant in December 2014, that was clearly outside the terms of the agreement. I do not believe the Plaintiff when he says that after entering into the agreement, the Defendant evaded him as there is no evidence of him having ever gone to look for her in her homestead or even sought the assistance of witnesses to the said agreement. I fully associate myself with the sentiments of Mary G. Gitumbi J in Joseph Ngunjiri Gachimu vs. Josephine Wairimu Kagunda and 2 others [2015] eKLR that the equitable remedy of specific performance is not available to the Plaintiff herein owing to the fact that the Plaintiff is in breach of the sale agreement dated 12th March 2014."

23. The factors that the learned Judge considered that militated against the exercise of discretion in the appellant's favour are therefore clearly discernible and are relevant considerations in the exercise of

judicial discretion on whether to grant the discretionary remedy of specific performance. We have no basis for interfering with that decision.

24. What remains is the question whether the Judge erred in failing to order the refund of the deposit paid as an alternative remedy. It is trite that parties are bound by their pleadings. See Independent Electoral and Boundaries Commission and Another vs. Stephen Mutinda Mule & 3 Others (above).

25. In this case, the appellant pleaded in paragraph 4 of the plaint that in adherence to the terms of the sale agreement he paid Kshs.540,000.00 on 12th March 2014 and later paid Kshs.100,000.00 in December 2014. His prayers were specific performance, mandatory order to compel the respondent to hand over vacant possession of the property and damages for lost opportunity and use of the property for two years. There was no prayer or alternative prayer for a refund of the deposit paid.

26. In paragraph 4 of her Statement of Defence in response to paragraph 4 of the plaint, the respondent in addition to a general denial of paragraph 4 of the plaint "in particular" denied "ever receiving any money" from the Plaintiff in December 2014. However, in her witness statement, the respondent after setting out the terms of the agreement for sale dated 12th March 2014 then stated:

> " The Plaintiff then paid me the deposit of Kshs.540,000.00 in cash on 12/3/2014 and we signed the agreement on the same date..."

27. In his reply to defence, the appellant reiterated the contents of the plaint and also denied that the contract was rescinded, as pleaded by the respondent, went on to aver that the contract was not rescinded as claimed by the respondent "since the [respondent] never refunded the Kshs.640,000.00 paid to her." This plea was reiterated in the appellant's submissions before the learned Judge.

28. The respondent's counsel in submissions before the trial court in submitting that the remedy of specific performance was not available to the appellant then submitted that "the only remedy that the plaintiff could get is an order a(sic) refund of the Kshs.540,000.00 paid to the Defendant. Unfortunately, the same has not been prayed for and the court is guided by the prayers sought."

29. In that regard, the learned trial Judge in his judgment expressed as follows:

> " I am in agreement with the Defendant's Counsel that the only remedy available to the Plaintiff is for refund of Kshs.540,000.00 which he paid to the Defendant. However, the same is not one of the prayers in the plaint and parties are bound by their own pleadings."

30. Given the foregoing background in relation to the question of refund, it seems to us that the issue was a live matter before the trial court despite the absence of an express prayer for refund. We adopt the approach taken in *Kinyanjui Kamau vs. George Kamau Njoroge* [2015] eKLR, where this Court expressed as follows:

> " Parties are indeed bound by their own pleadings. See *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014] eKLR (Civil Appeal No. 219 of 2013). Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in Odd Jobs v Mubia [1970] EA 476, "a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."

31. In the circumstances of this case, and because the matter of payment of the deposit of Kshs.540,000.00 was referred to in the pleadings and in the witness statements; and considering the respondent admitted

receiving that deposit; and since the parties alluded to the matter in their submissions; and bearing in mind that the respondent stated that following default by the appellant in tendering the balance of the purchase price, she sold the property to a third party, we take the view that the matter of refund of the deposit was a matter before the trial court under the Odd Jobs principle and the learned Judge should have granted that relief.

32. In conclusion, we allow the appeal to the extent only that we vary the decision of the ELC by ordering that the respondent shall within 60 days from the date of delivery of this judgment refund the amount of Kshs.540,000.00 to the appellant. In default of payment within 60 days, the said amount shall attract interest at 12% p.a from the date of delivery of this Judgment.

33. Each party shall bear its own costs of this appeal.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR