Lamba v National Social Security Fund & another (Civil Appeal E168 of 2021) [2023] KECA 124 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 124 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E168 OF 2021

KI LAIBUTA, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 3, 2023

BETWEEN

EUNICE LAMBA ..... APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND ..... 1ST RESPONDENT

FLORENCE MAINA ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environmental and Land Court of Kenya at Nairobi (K. Bor, J.) delivered on 1st day of February 2021inCivil Suit No. 78 of 2007)

JUDGMENT

1. The dispute between the parties relates to a parcel of land known as Kitisuru 101/E49 ("the suit property") situated in Nairobi, and which was owned by the 1st respondent.

2. By way of background, it was the appellant's position that the 1st respondent agreed to sell the suit property to her on March 1, 2004 under a tenant purchase agreement on certain terms to wit; at the agreed purchase price of Kshs 2,750,000/=; that she was to pay a deposit of Kshs 275,000/= and the balance, together with interest through monthly installments; that the appellant was to be put in possession of the suit property upon execution of the tenant purchase agreement and payment of the initial deposit.

3. According to the appellant, the 1st respondent had on numerous occasions, acknowledged the existence and validity of that agreement in writing and yet, in mid 2006, it purported to enter into another agreement with the 2nd respondent for the sale of the suit property. It was the appellants' case that the 2nd respondent took possession of the land and began constructing on it. The appellant states that, as a result, she suffered loss and damage of Kshs 15,195,930 on account of the market value of the

property, the perimeter fence, and the gate that she had erected on the suit property together with the installments that she had paid.

4. The appellant filed Civil Suit No ELC Case No 78 of 2007 on January 25, 2007, against the 1st and 2nd respondents, which was amended twice. In the further amended plaint dated October 24, 2011, the appellant sought a number of prayers as follows: a permanent injunction to restrain the 2nd Respondent from trespassing, remaining on, or building any structures or interfering with her possession and interest in the suit property; a declaration that she had a right to the immediate and actual possession of the suit property, and that she was entitled to the transfer and ownership of the land; a mandatory injunction compelling the respondents to demolish and remove the buildings or materials lying on the suit property and, in default, the appellant be at liberty to demolish the structures at a cost to be borne by the 2nd respondent; and that the 1st respondent be ordered to reinstate to her the property in the same state that it was before the encroachment. In the alternative, the appellant sought a sum of Kshs 15,195,930 as special damages.

5. The 1st respondent's position in the suit was that the appellant's remedy lay in damages only for a refund of any sum of money that she may have paid to the 1st respondent. According to the 1st respondent, it had issued all the requisite notices to the appellant for breach of the agreement and urged the court to dismiss the appellant's suit with costs.

6. According to the 1st respondent, the appellant had defaulted in remitting the monthly installments she had agreed upon with the 1st respondent. The appellant in response submitted that the completion of the tenant purchase agreement was to occur over a period of 180 months, which would have run from the year 2004 to 2019, and that she would still have been required to pay the monthly installments when they fell due, and not later if she were to perform her contractual obligations.

7. On its part, the 2nd respondent filed a defence to the suit including a counterclaim with a raft of prayers as follows: a permanent injunction to restrain the appellant from interfering with her quiet possession of the suit premises; a permanent injunction to restrain the 1st respondent from interfering with her

quiet possession and enjoyment of the suit premises; and a declaration that the 1st respondent had breached the tenancy agreement that it had signed with her.

8. The 2nd respondent further averred that the 1st respondent had breached the tenant purchase agreement by colluding with the appellant to stop her construction, and had occasioned loss to her in the sum of Kshs 10,000/= per day with effect from January 19, 2007. She broke down her loss as being the cost of the construction she had already undertaken at Kshs 4,600,000, and loss of bargain for the suit premises of Kshs 6,600,000/=. The 2nd respondent sought an order for dismissal of the appellant's suit and judgment as prayed in the counterclaim.

9. Upon hearing the parties, the trial court (K Bor, J) found that the appellant did not prove that, at the time she filed the suit, she was able, ready, and willing to perform her obligations under the tenant purchase agreement. The learned Judge further held that the tenant purchase agreement was never executed by both parties and that, therefore, did not meet the legal requirements of section 3(3) of the *Law of Contract Act*. The court declined to grant the order of specific performance sought by the appellant and held that her recourse lay in the 1st respondent refunding the monies paid together with interest at court rates from the date of filing suit until that sum was fully paid.

10. In the end, the learned judge held as follows:

> "35. The 1st defendant is to blame for the situation the plaintiff and the 2nd defendant found themselves in regarding the sale of the suit property for

it terminated its agreement with the plaintiff on account of her failure to remit her monthly payments but appeared to change its position to urge that it could not have lawfully entered into another agreement with the 2nd defendant because it had not rescinded its agreement with the plaintiff by sending her notices through registered post. There was no validly executed contract between the plaintiff and the 1st defendant. It was improper for the 1st defendant to accept the lump sum payment from the plaintiff after it had entered into an agreement with the 2nd Defendant over the same land.

36. The 2nd defendant has proved on a balance of probabilities that she entered into an agreement with the 1st defendant vide which it agreed to sell the suit property to her and duly paid the purchase price as agreed under the tenant purchase agreement. She took possession of the land and commenced development on it while paying the monthly installments until january 2007 when the 1st defendant and the court stopped her from continuing with the construction on the suit land.

37. The 1st defendant entered into an agreement with the 2nd defendant for the sale of the suit property and it would not only be unjust to allow it to benefit from leading the 2nd defendant to believe that it could lawfully sell her the suit property which it had repossessed from the plaintiff, but also unconscionable to allow it to retain the suit property whose value has significantly appreciated over the years while this suit was pending in court. The 1st defendant did not demonstrate that the 2nd defendant defaulted in paying the monthly installments when they fell due. From the evidence adduced, the 2nd defendant was up to date with her payments until the plaintiff filed this suit in 2007 and the 2nd defendant was stopped from further constructing on the suit property.

38. The court allows the 2nd defendant's counterclaim dated November 15, 2011 in terms of prayers 12 and 13. The court declines to grant the other prayers sought in the counterclaim. The 2nd defendant did not adduce any evidence of payment of Kshs 10,000/= per day which she claimed as damages against the 1st defendant for stoppage of her construction.

39. The plaintiff's claim to the suit property fails and she is to be refunded the sum of Kshs 1,350,130.93 which she paid to the 1st defendant together with interest at court rates from the date of filing suit until payment in full. The 1st defendant will bear the costs of the suit and of the counterclaim."

11. Aggrieved by the High Court's decision, the appellant moved this court on seven grounds set out in the memorandum of appeal dated February 3, 2021 and which we take the liberty to summarize and reframe as follows: that the learned judge ignored her submissions; that the learned judge ignored the totality of the evidence adduced by the 1st respondent and, more so, that there was a sale agreement between them; and that the learned judge apportioned undue weight to the 2nd respondent's evidence relative to the evidence adduced, and ignored relevant factors.

12. The prayers sought in the memorandum of appeal are that the appeal be allowed, and that the impugned judgment be set aside and substituted for orders allowing in terms of prayers 1, b, c, d and e in the further amended plaint dated October 25, 2011.

13. The appellant filed written submissions dated October 14, 2022. Counsel for the appellant, Mr Awele highlighted the same and submitted that the proceedings were almost in the form of interpleader where the court would be seeking to establish who, as between the appellant and the 2nd respondent, was entitled to the property. His focus was on whether or not there existed a sale agreement between the appellant and 1st respondent. Counsel submitted that there could not have been a lawful or valid agreement between the 1st respondent and the 2nd respondent if the agreement between the appellant and the 1st respondent was still validly in place.

14. Counsel for the appellant further submitted that there was a sale agreement in place, and that there was overwhelming evidence in that regard. Counsel argued that the appellant was merely required to sign that tenant purchase agreement and forward it to the 1st respondent after which the sale would become effective and binding. He asserted that there was evidence of numerous references by the 1st respondent to that tenant purchase agreement against which payments were being made to the 1st respondent.

15. M/s. Olendo, the 1st respondent's counsel, filed submissions dated October 19, 2022. Counsel highlighted the same, and emphasis was placed on the prayer for specific performance by the appellant. She submitted that the appellant had defaulted in making a monthly payment, and that this had been admitted; that payment being an essential part of an agreement, and the appellant having not complied with the same, then the orders for specific performance could not be granted.

16. According to the 1st respondent, the judgment as delivered by the trial court ought to remain because an order for specific performance could not be granted to a party that had not complied with the agreement. On her part, the 2nd respondent did not file written submissions, and did not participate in the hearing even though her advocates were duly served with a hearing notice and directions on the filing of submissions.

17. This being a first appeal, it is our duty, in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. This approach was adopted in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR where the court cited the case of *Selle v Associated Motor Boat Co* [1968] EA 123 and held as follows;

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

18. From a careful perusal of the record of appeal, parties' submissions, and the authorities, the issues arising for determination can be discerned to be: Whether there was a valid sale agreement between the appellant and the 1st respondent; and whether the 1st respondent had entered into a valid and binding agreement with the 2nd respondent.

19. In her judgment, the learned Judge correctly identified the main issue for determination to be whether the court would grant the reliefs sought by the appellant, or those sought by the 2nd respondent. In other words, who, as between the appellant and the 2nd respondent was entitled to the suit property.

The trial court, upon considering the evidence, made a finding that the sale agreement between the appellant and the 1st respondent was never executed by both parties and, therefore, did not meet the legal requirements of section 3(3) of the *Law of Contract Act*. The trial court also made a finding that there was no dispute that the appellant had defaulted in making monthly installments that had been agreed upon with the 1st respondent. The trial court further held that the 1st respondent was to blame for terminating the agreement with the appellant for non-payment, but change its position and argue that it could not lawfully enter into another agreement with the 2nd respondent. The court made a finding that, since there was no validly executed agreement with the appellant, it was improper for it to accept a lump sum payment from the appellant after entering into another agreement with the 2nd respondent over the same land.

20. We note that the trial court, after considering the evidence, found that the 2nd respondent had proved on a balance of probabilities that she had entered into an agreement with the 1st respondent and duly paid the purchase price. We also note that the 2nd respondent took possession of the land and commenced developments while paying the monthly installments until January 2007 when the 1st respondent and the court stopped her from continuing with the construction on the suit land. The learned judge observed that it would be unjust to allow the 1st respondent to repossess the suit land from the 2nd respondent whom it had made believe that it had lawfully sold to her. It would also be unconscionable for the 1st respondent to repossess the land whose value had appreciated over the years, in the face of clear evidence that the 2nd respondent had not defaulted in the monthly installments until 2007 when she was stopped from continuing with further construction.

21. We note that, in both its written and oral submissions, the appellant made heavy weather of the fact that she received the agreement in triplicate, executed her part, and forwarded the same to the 1st respondent for execution, but never got her copy of the agreement executed by the 1st respondent. The appellant further submitted that the 1st respondent's bare assertion denying the existence of the agreement was an afterthought that amounted to parole evidence contradicting its own documentary evidence and conduct.

22. Section 107 of the *Evidence Act*, Cap 80 states as follows: -

> " (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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

23. A cursory look at sections 109 and 112 of the *Act* provides that:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ...
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

24. We note from the evidence on record that it was not proved to the court that an agreement existed, but was being withheld by the 1st respondent. The question that begs for an answer is: did a valid agreement exist between the appellant and the 1st respondent? The answer to that question is in section 3(3) of the *law of contract Act*, cap 23 which provides:

> " No suit shall be brought upon a contract for the disposition of an interest in land unless-
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> (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 ."

25. It follows, therefore, that for an agreement for the disposition of land to be enforceable, the agreement must not only be in writing, but must also be signed by the parties thereto and attested by a witness, who must be present when the contract is signed. In the instant case, in as much as the appellant alleges that the 1st respondent indeed signed the agreement, but hid it from the court, this was not proved and remained mere allegations. The agreement not being before the court, we shall never know whether it was signed or not. As such, the agreement did not measure up to the standards of Section 3(3) of the Law of Contract Act and cannot, therefore, be regarded to be a valid and enforceable agreement for the disposition of an interest in land.

26. In the case of Isaiah *Mathenge & another v Alfred Rugendo Kimotho* [1994] eKLR, the court held inter alia:

> " In Kukal Properties Development Ltd v Tafazzal Hatimali Maloo & three others (Civil Appeal No 155 of 92) (unreported), the issue as far as I can see from the judgments was not one a memorandum or note in writing signed by a party to be charged. One of the parties who sought specific performance simply relied on an agreement which was signed by him but not signed by the other party. The judge in that case purported to justify failure to sign by the other party on the grounds that there had been an over-sight on the part of the advocate who was responsible for ensuring that the agreement was properly executed. This court rightly rejected that argument with Kwach, JA saying:
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> "The agreement in question was not signed by the appellant or anyone authorised by the appellant to sign it. The porbunderwallas could not rely on the proviso because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree of specific performance. As to the judge's holding that the appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of Patterson v Kanji [1956] 23 EACA 106 where the "Court of Appeal for Eastern Africa held that there can be no estoppel against an Act of Parliament "
>
> If my appreciation of this case is correct, the Porbunderwallas did not rely on "a memorandum or note" signed by the appellant evidencing an agreement between them, they simply relied on an unsigned document and the judge gave them specific performance on the grounds that the appellant was estopped from denying the existence of the agreement. It is no wonder this court held the judge was wrong."

To this stretch, the appellant and the 1st respondent did not have a valid contract binding on both parties and, accordingly, we find that the learned judge did not err in this regard. In our view, the learned judge correctly held that there was a valid agreement between the 1st and 2nd respondents, and that the 1st respondent could not run away from this agreement.

27. Indeed, the learned judge was right in holding that the 1st respondent was to blame for the situation the appellant and the 2nd respondent found themselves in, regarding the sale of the suit property. The 2nd respondent was an innocent purchaser for value without notice. She was brought on board not knowing of the earlier engagements between the appellant and the 1st respondent. However, the existence of the previous arrangement was immaterial since the appellant had defaulted, and the plot taken away from her. The 1st respondent could not mischievously run away from the agreement it had entered with the 2nd respondent, and the learned judge could not be faulted for allowing the counterclaim.

28. The appellant's recourse, therefore, as correctly observed by the learned judge, lay in damages. During the trial, as can be discerned from the record, the appellant chose to abandon the claim for damages and decided to pursue the other prayers as sought in the amended plaint. In the judgment, the learned judge states as follows: "during the hearing, she indicated that she was abandoning the prayer for damages so that she could pursue the suit property."

    The judge, therefore, had no avenue of awarding damages as the prayer for special damages was abandoned. It is trite law that courts can only grant orders that have been prayed for in the pleadings, or make appropriate orders as it deems fit if need arises in the cause of a trial. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs. The appellant chose to abandon her prayer for special damages and must therefore lie on her own bed. In any event, the claim for Kshs 15,195,930.00, being a claim for special damages, had to be strictly proved, but there is no evidence that this was done.

29. The prayer for damages having been abandoned, then the prayers sought in the amended plaint were rightly rejected by the learned Judge. It is a cardinal principle of law that a court will only grant reliefs sought by a party. The learned Judge did not misdirect herself in finding that the appellant's claim to the suit property failed, and that she was to be refunded the sum of Kshs 1,350,130.93, which she had paid to the 1st respondent, together with interest at court rates from the date of filing suit until payment in full.

30. In view of the foregoing, and after careful re-analysis and re-evaluation of the evidence, it is our finding that the appellant has failed to demonstrate that the learned Judge erred in law and in fact in coming up with the determination in the impugned judgment. Accordingly, we hold that this appeal has no merit and is dismissed. Regarding costs, it is a settled principle of law that costs follow the event unless there are reasons to depart from this rule. We note that this ugly scenario between the appellant and the 2nd respondent was caused by the 1st respondent. In the circumstances, it would be unconscionable to award costs to the 1st respondent. On her part, the 2nd respondent did not file written submissions nor participate in the hearing. In the circumstances, we find that this is a proper case in which each party should bear their own cost, and we so order.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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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