Licinus Investment Limited v Dalpiaz (Civil Appeal 40 of 2020)
[2023] KECA 465 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KECA 465 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 40 OF 2020

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

APRIL 28, 2023

BETWEEN

LICINUS INVESTMENT LIMITED ..... APPELLANT

AND

MAURIZIO DALPIAZ ..... RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court at Malindi (Olola J.) delivered on 30th January 2020 in Malindi ELC Case No. 206 of 2016)

JUDGMENT

1. This appeal was lodged by the Licinus Investment Limited, the Appellant herein, after the Environment and Land Court at Malindi (Olola J.) dismissed the suit it had filed in *Malindi ELC Case No 206 of 2016*, and allowed a counterclaim by Maurizio Dalpiaz, the Respondent herein. The trial Judge granted an order of specific performance compelling the Appellant to comply with agreements dated 24th November 2004 and 28th September 2006, and to execute all necessary documentation and take all necessary steps to complete the said transactions within 90 days from the date of the judgment, which was delivered on 30th January 2020. In default of compliance, the Deputy Registrar of the trial Court was to execute all necessary documents to ensure the transfer of the suit property to the Respondent's name.

2. The Appellant claimed to be the registered proprietor as a lessee from the Government of Kenya of LR No 5054/275, Kilifi (the suit property), and that one Pietro Cannobio, a Director of the Appellant, entered into agreements dated 24th November 2004 and 28th September 2006 with the Respondent, and purported to sell to the Respondent a portion of the suit property referred to as "No A". The Appellant contended that the said agreements were not executed as required by the *Companies Act* and the *Law of Contract Act*, and that it was therefore not bound by the said agreements. Further, the Appellant neither registered any power of attorney in favour of the said Pietro Cannobio enabling him

to sign any agreements on its behalf, nor received any part of the purchase price. The Appellant also stated that the suit property was governed by special conditions contained in the grant and provisions of the Government Lands Act, which provided that the said property could not be subdivided, sold, transferred, sublet or possession thereof given without prior written consent of the Commissioner of Lands, which consent was nether sought or obtained. Therefore, that the purported agreements were also null and void under the provisions of the *Government Lands Act*.

3. The Appellant further stated that the Respondent had actual knowledge that the suit property had not been subdivided and portion "A" did not exist at the time of entering the agreement, and listed the particulars of this knowledge in the pleadings filed in the trial Court. Therefore, that the Respondent unlawfully obtained possession of a house and other developments on the suit property without consent of the Appellant or the Commissioner of Lands. The Appellant accordingly sought the following relief in the trial Court.:

    a) A declaration that the Agreements dated 24th November 2004 and 28th September 2006 are null and void;

    b) A declaration that the Defendant acquired possession of part of the suit premises unlawfully and is therefore trespassing into the suit premises;

    c) A declaration that the continued possession of the suit premises by the Defendant without the prior written consent of the Plaintiff and the Commissioner of Lands is illegal and unlawful;

    d) Vacant possession of the suit premises in good order and condition and in the condition in which the suit premises were when the Defendant acquired possession thereof;

    e) An order of injunction restraining the Defendant by himself, his employees, servants and/or agents from digging any well or continuing to dig any well and from altering the structure of the house, or any of the developments standing on the suit property or altering any fence and from building any additional structures thereon or leasing or pledging or trespassing or remaining upon any part of the suit property;

    f) Mesne profits;

    g) General damages; and

    h) Costs.

4. The Respondent on his part refuted the position taken by the Appellant in an Amended Statement of Defence and Counterclaim dated 23rd March 2009, and asserted that the said Portion 'A' existed on the suit property and was clearly marked on a plan annexed to the agreement dated 24th November 2004, as well as to an earlier agreement dated 30th May 2003. It was his position that the agreements dated 24th November 2004 and 28th September 2006 were lawfully executed by the Appellant through its director, Pietro Cannobio, and thus were valid and binding. The Respondent averred in his Counterclaim that by the sale agreement dated 24th November 2004, the Appellant and its said director agreed to sell to him the said Portion 'A' of the suit property for a consideration of Kshs 10,000,000/-, out of which sum he paid a deposit of Kshs 4,000,000/-. Further, by the sale agreement dated 28th September 2006, the Appellant and its director agreed to sell to him the said Portion 'A' of the suit property upon payment of the balance of the purchase price of Kshs 6,000,000/-. However, that despite paying the full purchase price and fully complying with the agreements, the Appellant and its said director failed to transfer the property as agreed or to refund the purchase price.

5. The Respondent asserted that he as a result suffered loss and damage, and prayed for judgment against the Appellant and its director, Pietro Cannobio, for: -

   a) Special damages of Kshs 10,000,000/-;

   b) In the alternative specific performance of the agreements dated 24th November 2004 and 28th September 2006;

   c) In default of compliance with an order of specific performance, the Deputy Registrar of this Court to execute all necessary documents to ensure the transfer of the property; and

   d) Costs and interest.

6. During the hearing in the trial Court, the Appellant called one witness, being its director, Pietro Cannobio (PW1), who while admitting into entering into the two agreements dated 24th November 2004 and 28th September 2006 with the Respondent, testified that the Appellant was not paid the full purchase price. The gist of his evidence was that he received 14,000 Euros and 6800 Euros, which was less than the Kshs 4,000,000/= deposit required to have been paid, and that he did not receive the money that was deposited with their common Advocate-Sachdeva & Company Advocates. The Respondent in turn testified as DW1, and he stated that he paid 14,000/- Euros on 24th November 2004 and made later payments of 5000 Euros and a final payment of 6,800/- Euros in Italy to one Cannobio Renata who is a sister to PW1, bringing the total to Euros 25,800/-. That the balance of the deposit was paid in cash to PW1 as they were friends. With regard to the second agreement, DW1 told the Court that he paid the sum of 60,142/- Euros to Sachdeva & Company Advocates through a bank transfer.

7. After hearing the parties, the trial Judge found that contrary to the pleadings that the sale agreements were null and void as the same were not executed by the Appellant, PW1 confirmed that he entered into and executed the two agreements with the Respondent to sell a section of LR No 5054/275 known and marked out as Portion 'A' to the Respondent at a consideration of Kshs 10,000,000/=, and while the Appellant's seal was not affixed thereto, the two agreements were valid and binding on the parties. Further, that though both parties to the agreements were very casual in the manner in which they went about the transaction, the parties themselves confirmed and affirmed by the second agreement executed on 28th September 2006 that a sum of Kshs 4,000,000/- had indeed been paid by the Respondent to the Appellant f, and that the balance being Kshs 6,000,000/- was to be paid to the Appellant through their mutual Advocate Sachdeva & Company Advocates. The Appellant was thereby estopped from claiming that the Respondent had not paid the full amount of Kshs 4,000,000/- due under the first agreement. In addition, that on 2nd October 2006, the Respondent through a bank transfer deposited a sum of 60,142/= Euros to the account of the said Sachdeva & Company Advocates, and obtained judgment in its favour on 25th September 2017 in Mombasa HC Misc. Application No 51 of 2017 wherein the High Court (Njoki Mwangi J.) determined that the said law firm received a sum of Euros 60,000/- from the Respondent. The trial Court was therefore satisfied that the Respondent had provided proof that he fulfilled all his obligations under the said two agreements.

8. Being dissatisfied with the decision of the trial Court, the Appellant proffered this appeal, and has raised four grounds of appeal in its Memorandum of Appeal dated 27th May 2020, in two main broad areas, namely that the trial Court did not consider and analyse the evidence and an earlier judgment made in favour of the Respondent when dismissing the Appellant's case and allowing the prayer for specific performance, and that the trial Court erroneously thereby granted the Respondent both the main prayer for refund of the purchase price, and the alternative prayer for transfer of land sought in

the Counterclaim. The Appellant prayed that the judgment and decree of the superior Court be set aside and the Respondent to pay the costs of the appeal and the cost.

9. The appeal was virtually heard on 7th November 2022, and learned counsel Mr. Nyongesa appeared for the Appellant, while learned counsel Ms. Omondi, appeared for the Respondent. The two counsel also filed and adopted a consent to rely on their written submissions dated 3rd August 2021 and 16th August 2021 respectively. Our duty as the first appellate Court in this respect is as stipulated in rule 29(1) of the *Court of Appeal Rules*, namely, to reappraise the evidence and to draw inferences of fact thereon, and was explained in *Selle v Associated Motor Boat Co.* [1968] EA 123, 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 (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270)."

10. It is not in dispute that the parties herein entered into and executed two agreements with respect to the sale of the suit property dated 24th November 2004 and 28th September 2006, which they both produced as evidence in the trial Court. The two issues arising in this appeal are whether there was evidence of full payment of the purchase price; and whether the remedy of specific performance was merited in the circumstances of the case.

11. On the issue of payment of the purchase price, the Appellant's counsel placed reliance on the section 107 to 109 of the *Evidence Act* and the case of *Steel Makers Limited v Jackson Makau Kaswii* [2018] eKLR to submit that the burden shifted to the Respondent to adduce evidence to prove payment, which burden the Respondent did not discharge. That the 25,800 Euros alleged to have been paid as deposit under the agreement dated 24th November 2004 was less than Kshs 4,000,000/= deposit agreed upon, and that the Respondent did not explain how much, when and to whom the undocumented sum was paid. Reliance was placed on the decision in *Esther Kabugi Njuguna v Martha Chebet & 3 others* [2020] eKLR that without such an explanation, then there was no proof of payment. The Appellant submitted that the amount the Respondent proved as having paid was 25,800 Euros which was Kshs 2,580,000/= and Kshs 6,000,000/= which was held by the Advocate who acted for both parties, and that the Respondent failed to prove the payment of the initial Kshs 4,000,000/=.

12. The Respondent's counsel submitted that in fulfilment of the terms of the agreement of 24th November 2004, the Respondent paid a deposit of Kshs 4,000,000/= in several instalments which were accepted by the Appellant as follows: 14,000/= Euros paid on 24th November 2004 and receipt issued, 5,000/- Euros paid on 28th February 2005 and a handwritten acknowledgment in Italian was issued by the same director and 6,800/- Euros paid on 4th March 2005 by way of bank transfer. That the parties entered into a further sale agreement dated 28th September 2006, whose terms were to the effect that the suit property would be transferred upon receipt of the balance of the purchase price from the Respondent, which was Kshs 6,000,000/=, and which was to be deposited with Sachdeva & Company Advocates. That on 2nd October 2006, the Respondent through his bank transferred 60,142/- Euros to the firm of Sachdeva & Company Advocates, which was inclusive of bank charges. Further by acknowledging in the previous agreement dated 24th November 2004, and agreeing that the balance of the purchase price was Kshs 6,000,000/=, the parties in essence confirmed that the deposit of

Kshs 4,000,000/= was paid in full at the time of entering the sale agreement dated 28th September 2006. Therefore, that the Respondent proved that payment of the full purchase prices of Kshs 10,000,000/=, and payment of the deposit of Kshs 4,000,000/= was not in doubt as the parties acknowledged the same in the agreement dated 28th November 2006.

13. In this regard, the trial Court's findings on the payment of the purchase price were as follows:

> " 41. But while the absence of any documentation on the alleged payments may have brought doubt to the Defendant's assertions, a perusal of the second agreement executed on 28th September 2006 leaves no doubt that indeed the payments were made to the Plaintiff. Paragraph 2 to 5 of the short agreement executed before Sachdeva & Company Advocates are of great interest as they state as follows:-
>
> > " Whereas by an Agreement dated the 24th November 2004 made between the parties hereto the Vendor agreed to sell to the Purchaser Portion No 'A' of LR No 5054/275 ("the property") as per plan attached to the said Agreement provided the Vendor settles the matter with one Mr. Gilberto Agosta who had originally agreed to purchase the property.
> >
> > The Vendor confirms that the matter between the Vendor and the said Gilberto Agosta has been settled and that he is now in a position to transfer the property to the Purchaser.
> >
> > It is now agreed between the parties that the Vendor would transfer the property to the Purchaser on receipt of the balance of purchase price which is confirmed and agreed between the parties as Kshs 6 Million and the Purchaser agrees to pay the said sum of Kshs 6 Million to Messrs Sachdeva & Company Advocates on receipt of the title deed for the property to effect transfer in favour of the Purchaser.
> >
> > Messrs Sachdeva & Company would hold the funds in trust and pay the same to the Vendor on successful registration of the transfer in favour of the Purchaser at Land Registry Kilifi". (Underlining mine).
>
> 42. Accordingly, the parties themselves confirmed and affirmed by this second agreement that a sum of Kshs 4,000,000/- had indeed been paid by the Defendant to the Plaintiff and that the balance being Kshs 6, 000,000/- was to be paid to the Plaintiff through their mutual Advocate Sachdeva & Company Advocates. The Plaintiff was thereby estopped from claiming that the Defendant had not paid the full amount of Kshs 4,000,000/- due under the first agreement.
>
> 43. In regard to the balance of Kshs 6,000,000/- it was again evident from the material placed before me that on 2nd October 2006, some four (four) days after the second agreement was executed, the Defendant through a bank transfer deposited a sum of Euros 60,142 to the account of the said Sachdeva & Company Advocates."

14. It is instructive that the Appellant does not dispute that proof was provided by the Respondent of payment of 25,800 Euros (approximately Kshs 2,580,000/-) in partial fulfilment of the payment of the deposit of Kshs 4,000,000/= as per the terms of the agreement dated 24th November 2004. The Respondent is on the other hand contending that an inference be made from the terms of the agreement of 28th September 2006 as regards the fact of payment of the full amount of the deposit. We are in this respect alive to the requirement in law that an inference leading to a conclusion of fact can only be drawn when there is one irresistible deduction to be made from a proven set of facts. The direct evidence tendered by the Respondent in this respect was that the balance of the deposit payable under the agreement dated 24th November 2004 was paid in cash, as he and PW1 were friends. In our view, the terms of the sale agreement dated 28th September 2006 were of probative value and further evidence on the fact of payment of the balance of this deposit, and the trial court could properly draw an inference and make a reasonable conclusion from its terms that the deposit of Kshs 4,000,000/= was indeed paid in full, since it was clearly stated therein that the balance outstanding was Kshs 6,000,000/=.

15. The Respondent also provided evidence of the transfer of the sum of 60,142 Euros to the firm of Sachdeva & Company Advocates, which fact of transfer is also not disputed by the Appellant, with the point of departure being the equivalent value of the said sum in Kenya Shillings, and its actual receipt by the Appellant. We shall address the legal effects of this transfer in our consideration of the second issue as to whether specific performance was merited in the circumstances, and at this point our conclusion is that there was sufficient evidence of substantial payment of the purchase price by the Respondent, and the trial Court did not err in its finding in this respect.

16. The second issue is whether the trial Court erred in granting the order of specific performance. The Appellant's counsel submitted that the available evidence proved that the only amount the Respondent had paid directly to the Appellant was 25,800 Euros, approximately Kshs 2,580,000/-, which was a fraction of the purchase price, as the rest was deposited in Court as a result of the orders given in Mombasa HC Misc. Application No 51 of 2017, and could only be accessed by the Respondent since the Appellant was never made a party to the suit. The Appellants contended that should the judgment of the trial Court be left to stand, they would greatly suffer as the suit property will be transferred to the Respondent without payment of the full purchase price. The counsel also made reference to the cases of *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR and *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR where it was held that where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so, and that both cannot be granted in blanket form.

17. It was therefore the Appellant's case that it was not proper for the trial Court to grant a prayer for specific performance, when there was evidence that the Respondent had already obtained judgment in Mombasa HC Misc. Application No 51 of 2017 in his favour for the release of Kshs 6,000,000/- which was part of the purchase price. Therefore, that by granting the prayer for specific performance, the trial Judge ended up giving the Respondent both the money and the suit property, thereby unjustly enriching the Respondent. The Appellant's counsel opined that that the appropriate remedy was for the Respondent to enforce the decree in Mombasa HC Misc. Application No 51 of 2017 for the sum of Kshs 6,000,000/-, get the proved balance of Kshs 2,580,000/- from the Appellant, and give vacant possession of the suit property. Further, that the reasons given by the trial Judge for granting specific performance were contrary to the evidence, since the Respondent did not provide any evidence or indicate the kind and extent of improvements, he had made to the suit property.

18. The Respondent's counsel in response submitted that the obligation to pay the balance of the purchase price arose only upon receipt of the title deed in respect of the suit property and the Appellant did not avail the title documents, and that the Respondent transferred 60,142/- Euros, the equivalent of

Kshs 6,000,000/- to the firm of Sachdeva & Company Advocates as per the terms of the agreements. Therefore, that the trial Judge did not err in granting the order of specific performance, and reliance was placed on the holding in *Edward Gitahi Kibia v Thomas Caroll* [2020] eKLR that the jurisdiction to order specific performance is based on the existence of a valid and enforceable contract, and is granted where the party seeking it cannot obtain sufficient remedy by an award of damages. The counsel submitted that the Respondent demonstrated that he had fulfilled his obligations under the terms of the agreements by paying the purchase price; the Appellant put him in possession of the suit property from 2006 where he has resided to date after paying the purchase price; and that the Appellant therefore held the full purchase price and failed to transfer the suit property in favour of the Respondent as per the terms of the agreement dated 28th September 2006.

19. Accordingly, that special damages of Kshs 10,000,000/- would not serve justice, taking into account the full purchase price was paid fifteen (15) years ago and the Respondent was residing on the suit property and had developed it and maintained it. In addition, that the refund of the purchase price would not enable the Respondent purchase a similar property in the same location. On the ruling in Mombasa HC Misc. Application No 51 of 2017, the counsel submitted that the said suit was an advocate/ client proceeding which the Respondent filed with the intent of obtaining statement of accounts from the firm of Sachdeva & Company Advocates in respect to the deposit of the sum of 60,142/= Euros, to prove that the said transfer amounted to Kshs 6,000,000/- and to safeguard the said money pending the hearing and determination of Malindi ELC Case No 206 of 2016. Further, that the ruling in Mombasa HC Misc. Application No 51 of 2017 did not order the refund of the monies held by the firm of Sachdeva & Company Advocates to the Respondent as alleged by the Appellant, and that the said firm did not comply with the orders issued in Mombasa HC Misc. Application No 51 of 2017 that the money be deposited in Court, which was therefore still held by the firm in trust for the Appellant.

20. The requirements for the grant of the remedy of specific performance were set out by the Supreme Court of Uganda in *Manzoor v Baram* (2003) 2 E.A. 580 as follows:

> " Specific performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course."

21. This Court (Masime, Cockar & Muli JJA) also held in *Mangi v Munyiri & another* [1991] eKLR that a claim for specific performance is not granted as a matter of course, and being an equitable remedy, the Court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief. The remedy of specific performance is therefore discretionary, with the relevant factors to be taken account being the existence of a valid enforceable contract, and where damages are not an alternative effective remedy, as noted by this Court (Okwengu, Kiage & Sichale, JJA) in *Edward Gitahi Kibia v Thomas Caroll* (*supra*).

22. Applying the above prerequisites for granting the relief of specific performance, we have already noted that the existence of the agreements dated 24th November 2004 and 28th September 2006 and the terms of the sale of the suit property were admitted by the parties, and we have found that there was evidence of substantial payment of the purchase price by the Respondent. The only outstanding question that we need to address in this respect was the effect of the payment of the balance of the purchase price to the firm of Sachdeva and Company Advocates. The contention by the Appellant was that the value of

the 60,142 Euros transferred by the Respondent was less than the balance of Kshs 6,000,000/= that was required to be paid by the Respondent in the agreement dated 28th September 2006, and that in any event, it was never received, and the Respondent was therefore in breach thereby making the two agreements unenforceable.

23. The Respondent provided evidence of the transfer of the 60,142/= Euro to the firm of Sachdeva & Company Advocates, and correspondence with the said firm on the said transfer and the equivalent value of the sum of 60,142/= Euro in Kenya shillings. The difference of opinion between the Respondent and said firm of advocates on the value of the sum culminated in the filing of an Originating Summons in Mombasa HC Misc Application No 51 of 2017 by the Respondent, and the High Court in its ruling thereon on 25th September 2017 ordered the firm of Sachdeva & Company Advocates to deliver the statement of accounts in respect of the deposit of 60,142/= Euro, and deposit an equivalent sum of 60,142/= Euro in Kenya Shillings in Court within 21 days. The Respondent has submitted that the firm of Sachdeva and Company Advocates did not comply. The issue of the value of the deposit of 60,142/= Euro is therefore res judicata, and it is notable that the firm of Sachdeva & Company Advocates was in this respect at the time the mutual advocate for both the Appellant and Respondent.

24. In addition, the agreement between the parties dated 28th September 2016 specifically provided that the firm of Sachdeva & Company Advocates was to hold the balance of the purchase price in trust and pay the same to the Appellant upon successful registration of the transfer in favour of the Respondent at Land Registry Kilifi. The Appellant did not bring any evidence of such registration, and in the circumstances the Appellant could not allege that the failure to release the funds was in breach. He who comes to equity must be prepared to do equity, and in the circumstances, we find that the trial Court did not err in granting the remedy of specific performance. We also find that there was no unjust enrichment thereby, nor grant by the trial Court of both the main and alternative relief sought by the Respondent in its Counterclaim as alleged, since the evidence on record points to the balance of the purchase price still being in the custody of the firm of Sachdeva & Company Advocates, who are under an obligation arising from a court order to provide accounts thereof. We therefore do not see any reason to interfere with the exercise of discretion in this respect by the trial Judge for these reasons.

25. This appeal is therefore found to have no merit, and is dismissed in its entirety with costs to the Respondent.

26. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR