



REPUBLIC OF KENYA



Rajpal v Giacosa (Civil Appeal E006 of 2021) [2023] KECA 766 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 766 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E006 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JUNE 23, 2023

BETWEEN

RAKESH RAJPAL APPELLANT

AND

PAOLO GIACOSA RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Malindi (J. O. Olola J.) delivered on 25th September 2020 in Malindi ELC Case No. 285 of 2016)

JUDGMENT

1. Rakesh Rajpal, the Appellant herein, is dissatisfied with the judgment delivered on September 25, 2020 in Malindi ELC Case No 285 of 2016, and dismissed the suit the Appellant had instituted in the Environment and Land Court (ELC) at Malindi. The Appellant's claim in the ELC was that at all material times, Paola Giacosa, the Respondent herein, was a joint owner with Christina Giacosa, his sister, and beneficially entitled to sell the parcel of land referred to as 624/711 (CR 24711) delineated in survey plan number 177786 within Mambrui Malindi (the suit premises). The Appellant stated that he entered into an agreement in writing for the purchase of the suit premises dated August 28, 2015 with the Respondent who as the vendor upon seeing an advertisement for its sale, and agreed inter alia; the purchaser would buy the property for Kshs 300,000 Euros, that a deposit of the sum of Kshs 30,000 Euros or 10% would be paid by the purchaser to the vendor; and that the balance would be paid in instalments of 10% that is 30,000 Euros on October 31, 2015; 30% that is 90,000 Euros to be paid on December 31, 2015 and the final 50% that is 150,000 Euros to be paid on or before June 30, 2016. Payment was to be in Kenya Shillings at an average exchange rate of Kenya shillings, one hundred and six (Kshs 106/-) to the euro.
2. Further, that the agreement provided that Cristina Giacosa, would, after the execution of the agreement and when she visited Kenya, donate a power of attorney to the vendor to enable him transact everything pertaining to the suit premises, and that the vendor would execute and supply all the documents, contents and any other relevant documents required to be executed. The vendor



undertook to ensure to that the purchaser would have, without interference, whatsoever, peaceful enjoyment and possession of the said property, a four bedroom villa with all furnishings and an inventory was to be taken and signed between the purchaser and the vendor. The requisite stamp duty, title fees and all expenses incurred in transferring the property from the vendor would be paid by the purchaser. It was a term that, should the vendor breach the said agreement and the purchaser decide that he does not wish to pursue the acquisition of the property, the vendor shall refund the purchaser all the money within 30 days of demand together with 10% interest, and in the event of non payment, within 30 days, the principal sum would attract an additional 20% interest per annum till payment in full. However, were the purchaser to breach the said agreement by failing to undertake his obligations, the vendor was to give 30 days' demand notice as of forfeiture of the 10% deposit and was at liberty to render the agreement null and void, retain 10% purchase price and refund any money in excess thereof already paid to the vendor.

3. The Appellant averred that he entered into the sale agreement and paid 30,000 euro, being 10% of the purchase price on the understanding that the size of the land as shown in the title documents to LR 624/711 was 1.898 hectares, and when his advocate applied for a search to confirm the position, it was discovered that the mother title being 624/42 measured 1.719 ha and that the suit property, which was a subdivision of the mother title was shown to be bigger, which was not possible. The Appellant instructed a surveyor to verify and confirm the measurements and it was confirmed that the measurements of the suit premises were not 1.898 ha. Upon informing the Respondent of the irregularities, the Appellant was stripped of possession and promised verbally that he would be refunded his monies. The Appellant therefore claimed breach of the agreement, listed the particulars of misrepresentation and breach and stated the Respondent had neglected and refused to take any steps towards the completion of the agreement or refund all the monies advanced. The Appellant gave to the Respondent a notice of repudiation/rescission of the agreement and prayed for judgment against the Respondent for refund of Euros 30,000/- plus interest thereon at 20% per the agreement from the date of recession of agreement, being monies had and received under the agreement till payment in full; salaries for workers of Kshs 85,000.00/-; damages for breach of contract and misrepresentation, and costs of the suit together with interest.
4. The Respondent in her statement of defence and counterclaim dated March 6, 2017 denied placing an advertisement for the sale of the suit premises, and stated that the alleged advert would not amount to misrepresentation for the reason that she gave the Appellant a copy of the certificate of title which indicated that the plot number as subdivision number 624/711 registered at the Coast Registry as CR, No 24711 which plot originally was known as plot number 624/42/1 and whose measurements were approximately 1.898 ha based on a deed plan no 177786, and which property was acquired together with her sister from Angels Bay Limited by way of transfer registered on November 11, 1993. That upon receipt of the information and before entering any sale agreement, the Appellant was obliged by law and in conformity with the principle of due diligence to conduct a search either by himself or through his advocate to verify the facts. In the alternative, the Respondents averred that she may have neglected, failed or refused to conduct a search and thereby adopted the principle of purchasing the property on as it is basis, on the basis of satisfaction from the inspection of the property irrespective of the actual facts contained in the register of titles.
5. The Respondent denied the averments in the Plaint and faulted the Director of Surveys or the Registrar of Lands the person responsible for distortion of the facts and misleading her by issuing her with documents they knew contained the wrong information, and the Appellant ought to have sued them and not her. In her particulars of breach, she claimed against the Appellant for failure to pay the balance of the purchase price as required under the agreement. Consequently, the Appellant having breached and repudiated the agreement was not entitled to a refund or specific performance as he misrepresented



to the Respondent that he was able and willing to pay the purchase price. The Respondent also counterclaimed for a declaration that the Appellant was in breach of the sale agreement and therefore not entitled to a refund of the monies paid or an order of specific performance and the cost of the suit and the Counterclaim.

6. During the hearing of the suit in the trial Court, the Appellant testified as PW1 and reiterated the averments made in his Plaint, and stated that the original title was different in terms of reference number and number in the deed plan and acreage, and was smaller than the sub-divisions, and that he served the Respondent with the notice terminating the agreement on October 21, 2015 as per clause 18 of the agreement, before due date for payment of the second instalment of the purchase price on October 31, 2015. The Appellant called two witnesses, Luke Omondi Achando (PW2), a surveyor at the Kilifi Lands Office who testified that he was instructed by the Appellant to undertake a survey of and given a copy of the title deed and deep plan, but could not locate the survey plan for the deed plan, and used the survey plan for the mother title, which indicated that the land was extended to include land reclaimed from the sea to create the subdivision, but that the extension did not have a deed plan. He confirmed that measurements on the ground did not correspond with those on the deed plan. Samuel Kariuki Mwangi, a Registrar of Titles at Mombasa Lands Office testified as PW2 that while the Deed Plan attached to the title for the suit premises read 177786, the one in their records was shown to be 177787, and the discrepancy could have arisen from typing error and was yet to be rectified as the Respondent had not availed the original title.
7. The Respondent testified as DW1, and reiterated that she gave the Appellant the title documents she had received from the Lands office and which indicated the size of the suit premises, and the Appellant was represented by an advocate and did not raise any objection. She confirmed that the Appellant paid 30,000 euros upon execution of the sale agreement but did not pay any other instalments, and was not entitled to any refund since there was no breach on her part.
8. After hearing the Parties, the trial Judge (JO Olola J) entered judgment in favour of the Respondent and found that there was no basis for the accusation levelled against the Respondent that she had falsified the documents, as the facts concerning the suit property were clearly discernible from the documents of title presented to the Appellant, which documents were in consonance with the official documents held by the relevant land registry and confirmed by the Appellant's own witness namely the Registrar of Titles Mombasa (PW3). Further, that as the person buying the property, there was a clear duty on his part to conduct appropriate due diligence and inform himself on all the relevant aspects concerning the property he was purchasing, and it was clear from a perusal of Clause One of the agreement that the Appellant executed the same in the full knowledge that the Respondent had the sister's authority and consent to transact and deal with the property, and there was no evidence that the Respondent's sister had repudiated and or disowned the transaction in any manner whatsoever.
9. Lastly, that under Clause 4 of the agreement, the Appellant was required to pay a further 30,000/- Euros on October 30, 2015, 90,000 Euros on December 31, 2015 and a final 150,000/- Euros on June 30, 2016 and there was no evidence that the Appellant paid these additional instalments, which failure amounted to a breach of Clause 19 of the agreement. That having so breached the agreement, the Appellant could not by the letter dated October 21, 2015 repudiate the agreement for no apparent breach on the part of the Respondent, and had thereby forfeited the deposit paid. In addition, that there was no Clause in the agreement allowing a refund of the expenses incurred in securing the premises as demanded by the Appellant. Therefore, that the Respondent had proved her case on a balance of probabilities, and the trial Judge accordingly dismissed the Appellant's suit in its entirety and entered judgment for the Respondent as prayed in the Counterclaim together with costs.



10. Being dissatisfied with the decision of the trial Court, the Appellant proffered this appeal and has raised twenty three (23) grounds of appeal in their memorandum of Appeal dated January 22, 2021 and lodged on February 23, 2021. The grounds of appeal are on the findings by the trial Court in three broad areas namely, the legality of the sale agreement, breach of the agreement, and the remedies due. The Appellant seeks orders that the judgment delivered at Malindi by AO Olola J on September 25, 2020 be set aside and substituted with a judgment in favour of the Appellant against the Respondent for refund of Euros 30,000/- plus interest thereon at 20% per annum from August 28, 2015; Kshs 85,000.00/- and damages for breach of contract and misrepresentation, and that the Respondent's counterclaim be dismissed with costs.
11. We heard the appeal on February 20, 2023 on this Court's virtual platform, and learned counsel Mr Kinyua, appeared for the Appellant, while Mr Aboubakar appeared for the Respondent. Mr Kinyua relied on written submissions dated September 16, 2021, while Mr Aboubakar relied on a Notice of Grounds for affirmation of the decision dated March 25, 2021 and lodged on March 29, 2021 filed pursuant to Rule 94 of the Court of Appeal Rules, and informed us that he had not filed written submissions, and would rely on the submissions filed in the trial Court.
12. On the first ground on the legality of the sale agreement, Mr Kinyua placed reliance of section 3 (3) of the Law of Contract Act for the proposition that disposition of an interest in law must be in writing and signed by all parties and section 3 (6) of the said Act for the definition of a party, and submitted that though it was stated that Christina Giacosa had given authority and consent, no such evidence was presented before the Court. Additionally, the advocate who prepared the agreement and the Appellants imposed obligations upon Christina Giacosa without involving her. The agreement was therefore nullity from the start and could not be completed.
13. Further, that section 2 of the Land Registration Act, 2012 defines the word instrument and that the sale agreement dated August 28, 2015 being a covenant fell within that definition, while section 44 and 45 of the Land Registration Act makes provisions on the execution and verification of signatures in instruments and it is a mandatory requirement that every consenting party to the disposition must execute the instrument. In this regard, that Christina Giacosa was out of the country and did not execute the agreement, neither did she give her authority to the Respondent to execute on her behalf. In addition, that no power of attorney was presented in the trial Court despite the Respondent undertaking to do so in the agreement. Therefore, that agreement having not been executed by Christina Giacosa rendered the transaction a nullity and it constituted fraud against her and the Appellant.
14. The counsel pointed the Court to a material discrepancy in the land survey plan number that was given as 177786 while the deed was no 177787, which documents were given to the Appellant by the Respondent. He further stated that when the Registrar of Titles testified in the trial Court, he admitted the discrepancy and regretted that the original title was not produced to him for purposes of rectification. Further, that the Appellant would not in the circumstances have a cause of action against the registrar and nor be able to recover the purchase price or obtain an order of specific performance in the absence of execution of the contract by Christina Giacosa. The counsel submitted that payments totalling up to Kshs 3,180,000.00/- were made to the Respondent and not to Christina Giacosa, and the learned Judge unfairly enriched the Respondent and treated the Respondent as the sole owner of the suit premise despite evidence to the contrary. Additionally, the Appellant was not able to pay the balance of the purchase price before the Respondent obtained a duly registered power of attorney and rectified the discrepancies in the title.



15. Mr Aboubakar on his part submitted that the Appellant raised grounds in the Appeal which were not pleaded and which were not issues presented before the trial Court for consideration and or determination, namely that the agreement of sale dated August 28, 2015, was not executed in accordance with the Law of Contract Act and section 44 of the Land Registration Act, 2012 which implies that the said agreement was illegal, null and void. The counsel urged that the Appellant having executed the sale agreement, and having knowledge that the Respondent had the full authority of her sister and co-owner of the suit property was estopped from claiming otherwise, and placed reliance on section 120 of the Evidence Act. Further, that the Appellant was regarded to have accepted that the Respondent had authority to sell from her sister by the principles of equity which was 'regard as done that which ought to be done'.
16. Our duty as the first appellate Court as set out in *Selle and another v Associated Motor Boat Co Ltd & others (1968) EA 123* is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the finding by the trial Court if they were not based on the evidence of record where the said Court is shown to have acted on wrong principles of law as held in *Jabane v Olenja (1986) KLR 661* or if its discretion was exercised injudiciously as held in *Mbogo & another v Shab (1968) EA 93*. The main issues arising in this appeal are whether there was a valid and enforceable sale agreement between the parties, and if so if there was breach thereof and by which party, and lastly if the parties were entitled to the relief sought in their respective claims.
17. We have perused the sale agreement dated August 28, 2015 and note that clauses 1, 2 and 3 thereof provided as follows:
 - ' 1. 'The vendor' is a foreigner of Italian nationality and is a joint registered owner of a subject parcel of land together with her sister currently in Italy, Cristina Giacosa, holding Italian passport number xxxx who has given 'the vendor' authority and consent to transact and deal for and on her behalf save for the fact that she has not been able to at the time of execution of this agreement to be present in Kenya to execute it.
 2. It is generally agreed therefore, that Cristina Giacosa shall, after execution of this agreement and when she visits Kenya, immediately donate a power of attorney to 'the vendor' to enable 'the vendor' to transact everything pertaining to the said parcel of land on her own behalf and on behalf of Cristina Giacosa, which transaction shall include the transfer of the said parcel of land to the purchaser.
 3. It is agreed that in the meantime Cristina Giacosa shall directly communicate with the firm of NO Sumba & Company Advocates, who are the advocates of 'the vendor' and 'the purchaser' herein, to confirm and endorse the agreement entered herein'
18. It is not in dispute that the sale agreement was duly signed by the Appellant and Respondent, and that the Appellant paid the deposit of Euro 30,000/= in accordance with the terms of the agreement. The contract having been in writing and executed by the parties thereto, it is our finding that it was valid and binding on the parties thereto in line with the provisions of section 3(3) of the Law of Contract Act, and the main issue was whether it was vitiated by misrepresentations claimed by the Appellant. In this regard, it is notable that the sale agreement did not contain any representations by the Respondent or term as regard the title to the suit property, nor description of the premises, which could form a basis for the allegations of misrepresentation by the Appellant. The Appellant had in this respect listed



the particulars of misrepresentation as being with regard to size of the premises, title deed and deed plans, and securing of the power of attorney. As demonstrated by clause 2 and 3 of the contract, the power of attorney was to be donated by Cristina Giacosa and the obligation was on the advocates to ensure confirmation from the said Cristina Giacosa in this respect. We therefore find that there was no misrepresentation and breach by the Respondent on this account, and the Appellant is not entitled to any damages in this regard.

19. The Appellant consequently repudiated the contract by a letter dated October 21, 2015. It is notable that clause 18 of the sale agreement provided that if the Appellant did not want to pursue the agreement, the Respondent would refund the monies paid within 30 days of demand. Under clause 19 similar provisions were provided in the event the Appellant breached the agreement, the Respondent would give notice and retain the deposit and refund any other purchase price paid by the Appellant. It is also instructive that the demand notice was made on October 21, 2015, and under clause 4 of the sale agreement, and the next instalment was due on October 31, 2015.
20. The demand notice was clearly an anticipatory breach of the contract by the Appellant, the effect of which entitled the Respondent to either sue at once for the anticipatory breach or wait until the time of performance and sue for specific performance. It is also held in *Aldina vs Globe Mercantile Corporation Ltd (1968) EA 114* that if an innocent party elects to wait until performance is due, he or she must show that they are able and willing to perform their part of the agreement. In the present appeal, the Respondent chose not to act on the anticipatory breach, and sought payment of the balance of the purchase price in her counterclaim. However, it is evident that it was a term of the agreement that after execution of the agreement Cristina Giacosa was to donate a power of Attorney to the Respondent, when she visited Kenya and in the meantime was to confirm and endorse the agreement. No evidence of any of these events was provided, and in the intervening period, the Appellant was also made aware of discrepancies in the title to the suit premises regarding the acreage and different numbers of the survey plans and deed plan.
21. It is our finding that the Respondent would not have been able to complete the sale transaction in the absence of the power of attorney from Cristina Giacosa and rectification of the title to the suit premises, and was therefore not entitled to any orders of specific performance sought in her counterclaim. In addition, we find that since the Appellant gave a demand notice in accordance with the provisions of clause 18 of the sale agreement, and the Respondent did not bring any evidence that she made a demand pursuant to clause 19, it was the Appellant who was entitled to the refund of the deposit paid.
22. Lastly, clauses 9 to 10 of the sale agreement clearly stipulated that the Appellant would take over payment of salaries of employees on the suit premises and costs of its repairs after execution of the agreement, and we note that although the Appellant pleaded that he be paid 85,000/- as ATHE salaries he paid for workers, the receipts on record that he produced in evidence show that he made payments of Kshs 36,000/= in this regard, which is the amount he therefore proved and is entitled to be refunded.
23. It is thus our view that the findings made by the trial Judge were not supported by the provisions of the sale agreement, the applicable law and evidence, and we therefore find merit in this appeal. We accordingly set aside the judgment and orders made by the trial Judge on September 25, 2020 in Malindi ELC Case No 285 of 2016, and make the following orders in their place:
 1. The Respondent shall refund to the Appellant the sum of Euros 30,000/= with interest at 20% per annum with effect from November 21, 2015 until payment in full, in accordance with clause 18 of the sale agreement between the parties dated August 28, 2015.



2. The Respondent shall refund the Appellant the sum of Kshs 36,000/= incurred with respect to the suit premises pursuant to clause 9 and 10 of the sale agreement dated August 28, 2015, with interest at court rates from the date of this judgment until payment in full.
3. The Respondent's Counterclaim dated March 6, 2017 in Malindi ELC Case No 285 of 2016 is hereby dismissed.
4. The Appellant is awarded the costs of the suit in in Malindi ELC Case No 285 of 2016 and of this appeal.

24. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 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

