Abdi v Fondo (Civil Appeal E21 of 2021) [2023] KECA 821 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 821 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E21 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JULY 7, 2023

BETWEEN

SANGARA YUSUF ABDI ..... APPELLANT

AND

KADHENGI KALAMA FONDO ..... RESPONDENT

(Being an appeal from the Judgement of the Honourable Justice J. O. Olola dated 29th January, 2021 in the Environment and Land Court in Malindi Land Case No. 45 of 2014)

JUDGMENT

1. The Respondent in this appeal was the Plaintiff before the Environment and Land Court in Land Case No 45 of 2014 in which the Respondent sued the Appellant herein, the Defendant before the trial court for a declaration for rescission of the agreement dated December 1, 1999, costs and interests. It is agreed by the parties that on December 1, 1999, the Appellant and the Respondent entered into an agreement in which the Respondent agreed to sale to the Appellant three acres of the Respondent's land Plot 218 Mtondia Settlement Scheme in the sum of Kshs 165,000.00.

2. According to the said agreement, the Appellant was to pay to the Respondent Kshs 50,000.00 at the time of the execution of the agreement and the balance was to be paid upon the obtaining of the consent of the Land Control Board.

3. At the hearing, the Respondent testified that he had only been paid Kshs 123,000.00 by the Appellant and that despite reporting the matter to the chief, the Appellant did not fulfil her side of the bargain. As a result, the Respondent instructed an advocate who informed the Appellant to collect her money. According to the Respondent, since 2002 he had not received any money from the Appellant. It was the Respondent's evidence that due to the failure by the Appellant to complete her payment, they were unable to complete the transaction. He therefore lost interest in selling the land to the Appellant but was ready to refund the Appellant her money. The Respondent, however, denied that he had received a

better offer from someone else. Though he admitted that there was attempt to pay him Kshs 42,000.00 at the chief's office, he stated that by then he had already instructed his lawyers to rescind the contract.

4. On the part of the Appellant, DW1, the Appellant's son and holder of power of attorney confirmed the existence of the said agreement but testified that apart from the initial payment of Kshs 50,000.00 there were other subsequent payments made to the Respondent which he particularised. According to him, in 2012, the Appellant gave to DW2, his cousin, Kshs 42,000.00 to take to the Respondent at the chief's office. According to him this sum comprised of Kshs 25,000,00 being the balance of the purchase price and Kshs 17,000.00 to facilitate the Respondent to obtain the consent to transfer land. However, the Respondent declined to receive the money following differences between the Respondent and his wife and the money was returned to the Appellant.

5. According to DW1, whereas the Appellant was always ready and willing to complete the transaction, the Respondent failed to invite the Appellant to the Land Control Board for consent to transfer. He however conceded that whereas the agreement was entered into in 1999, the last payment was made in 2002 and explained it on the Appellant's inability to get the whole sum at once.

6. DW2, the Appellant's cousin confirmed that he was the one who was sent to the chief's office to go and make payment to the Respondent in the sum of Kshs 42,000.00. According to him, he never met the Respondent at the Chief's office but only met the Respondent's wife who declined to receive the money on the ground that the past payments were being made to the Respondent. While admitting that the sum of Kshs 59,000.00 was made in his presence, the witness was not aware when Kshs 4,000.00 was paid.

7. The trial court, after considering the evidence placed before it, found that that contrary to the Appellant's assertion that she had paid Kshs 140,000.00 only Kshs 123,000.00 had been paid. The court however found it curious that the Appellant would attempt to pay Kshs 42,000.00 purportedly being the balance of Kshs 25000.00 and Kshs 17,000.00 for facilitation of the consent from the Land Control Board. In the Learned Trial Judge's finding, this reinforced the Respondent's claim that he was still owed Kshs 42,000.00.

8. The Learned Trial Judge found, based on the Appellant's own bundle of documents, that on December 30, 1999, Respondent applied for the consent of the Land Control Board in order to subdivide the land comprising of 12 acres into two portions of 3 and 9 acres respectively and that the said consent was given on January 27, 2000. Since it was admitted that the last payment made by the Appellant was on January 6, 2002, the Court found that the decision by the Respondent to rescind the contract was not made until 10 years later vide a letter dated October 1, 2012 by which the Respondent gave the Appellant 21 days to complete the sale in default of which the contract would stand cancelled and the deposit would be refunded. However, that notice was not complied with and that it was not until 2017 that attempts were made to pay the balance by which time the matter was already in court. Based on *Njamunyu v Nyaga [1983] KLR 282*, the trial court found that the Respondent having subdivided the three acres of land within three months of the execution of the agreement and the Appellant having made the last instalment of Kshs 4,000/- to the Respondent on January 6, 2002 and took no step after that to conclude the contract, the Respondent had made out a case for rescission of the contract and an order for rescission was deserved. The Respondent was also awarded the costs of the suit.

9. Aggrieved by the said decision the Appellant is before this Court seeking that the said decision be upset.

10. We heard the appeal on March 1, 2023 vide the Court's virtual platform. At the hearing Learned Counsel Ms Sidinyu appeared for the Appellant while Ms Otieno appeared for the Respondent. Both learned counsel relied on their written submissions which they briefly highlighted.

11. It was submitted by Ms Sidinyu that though the Appellant, in response to the Respondent's pleadings, filed a Defence and Counter Claim on the August 25, 2016, the Counterclaim was totally disregarded by the trial Court which did not make any pronouncement on it; that the learned Judge completely disregarded the Appellant's submissions to the effect that the Respondent is the one who delayed obtaining the Land Control Board Consent thus delaying the performance of the contract while declining to receive payment; that the learned Judge erred in both law and fact in making final judgement allowing the Respondent's suit to rescind the valid executed contract between the parties; that based on the foregoing, it was not proper for the trial court to allow the Respondent's suit to rescind the contract considering that the Appellant had paid more than two thirds of the purchase price; and that the termination of the contract was not in accordance with the terms spelt out in the contract. We were urged to allow the appeal.

12. Ms Otieno, in her submissions on behalf of the Respondent reiterated the evidence adduced by the Respondent and prayed that the appeal be dismissed.

Analysis And Determination

13. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate as re-affirmed in *Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates [2013] eKLR* is:

> ' To re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

14. However, this Court (Apaloo, JA, as he then was) in *Kiruga vs Kiruga & Another [1988] KLR 348*, while dealing with what amounts to proof, cited *Watt vs Thomas [1947] AC 484*; *Peters vs Sunday Post Ltd [1958] EA 424* and expressed itself as hereunder:

> ' An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.'

15. This Court (per Hancox, JA, as he then was), in *Mohammed Mahmoud Jabane vs Highstone Butty Tongoi Olenja [1986] KLR 661; [1986-1989] EA 183*, held that:

> ' The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.'

16. The trial court made certain factual findings such as the fact that the Respondent sought and obtained the consent of the Land Control Board within 2 months of the agreement and that the Appellant did not complete payments but only attempted to do so after the Respondent had given notice of his

intention to rescind the contract. We have considered the evidence on record. There was documentary evidence that the Respondent sought for and got approval of the Land Control Board to subdivide the land into 3 and 9 acres respectively. It was conceded by the Appellant that due to financial constraints it was not possible for her to complete the payment hence the resort to payment by instalment.

17. The learned Judge found that based on the evidence before him, the Appellant took 10 years between his last payment on January 6, 2002, and October 1, 2023 when the Respondent notified the Appellant of his intention to rescind the contract. Apart from setting out payments, there was no evidence that the payments made aggregated to more than Kshs 123,000.00 which was admitted by the Respondent. Though the Appellant contended that his attempt to pay Kshs 42,000.00, which, going by the Appellant's own evidence was an overpayment of Kshs 17,000.00 was declined, there was no satisfactory explanation as to why the balance was in excess of what she was obliged to pay. She did not point out any clause in the agreement which obliged her to facilitate the obtaining of the consent of the Land Control Board. In the absence of such an explanation, we agree with the Learned Judge, that the said Kshs 42,000.00 was the balance due and owing as at the time it was tendered. However, by then the Respondent was no longer interested in carrying on with the contract after having given notice of its rescission which notice was not acted upon by the Appellant.

18. The Judgement was clearly based on the evidence as presented before the Court. It was not pointed to us and we are unable to find any factors which were either not taken into account or were inappropriately taken into account by the Learned Trial Judge. To the contrary, the Learned Trial Judge in a well-reasoned decision considered all the issues that were placed before him and based thereon arrived at an informed decision. Accordingly, we find no reason to interfere.

19. While it may well be clear that there was no time prescribed by the parties for the completion of the agreement, in *Halsbury's Laws of England (4th Edition) Vol 9*, para 481, p 338 cited in *Mwangi v Kiiru [1987] eKLR* it is stated that:

> ' The modern law, in the case of contracts of all types, may be summarized as follows. Time will not be deemed to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.'

20. This Court in *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR* held that:

> ' Where in a contract for the sale of land, the time for completion is not made the essence of the contract but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting time at the expiration of which he will treat the contract as at an end. And in determining the reasonableness of the time so limited, the Court will consider not merely what remains to be done at the date of the notice but all the circumstances of the case including the previous delay of the vendor and the attitude of the purchaser in relation thereof.'

21. In this case the Respondent having waited from for 10 years without receiving any payment from the Appellant gave a 21 days' notice to the Appellant thereby making time of the essence of the contract. The Appellant did not make good his delay in payment. In our view, the Respondent was justified in taking the position that he was no longer bound by the terms of the agreement between him and the

Appellant after the lapse of the said 21 days. Similar circumstances arose in *Gatere Njamunyu v Joseck Njue Nyaga [1983] eKLR*, where this Court expressed itself as follows:

> ' Consent having been obtained the defendant was not to be left standing indefinitely saying like Henry V: 'How long, O Lord, how long.' The principle to be acted upon in such a case is stated in 9 Halsbury 's Laws (4th edn) p 338, para 482, ie: 'Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfil the intention of the parties.' Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. 9 Habbury's Laws, para 481 (ibid). The return of the money by the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. The plaintiff must have known that the only reason for rescission by the defendant was non-payment by him of the balance of the purchase price upon consent or within ten days thereafter. The plaintiff therefore had notice of the default which he was required to rectify within a reasonable time. He did not rectify it. If the plaintiff had paid the balance of the purchase price within a reasonable period thereafter, say within 30 days, equity would in all probability have come to his aid if the defendant refused to complete. As it was the plaintiff waited for 14 months after the agreement and about nine months after the defendant purported to rescind the agreement. He waited too long. It was too late. To give him relief would destroy the defendant's right in law effectively to make time of the essence there must be a point when the length of time must stop and reasonable time should be inferred from the conduct of the parties and reconstruction of clause 2. There was no waiver on the part of the defendant after he returned the money and rescinded the agreement. He did not accept any further payment or otherwise conduct himself in a manner indicating waiver.'

22. We therefore find no reason to differ from the Learned Trial Judges finding as regards the Respondent's liability arising from the said contract.

23. It was however submitted that the Learned Trial Judge erred in not making a finding on the Appellant's counterclaim. The Appellant's counterclaim was based on the contention that the Respondent without any just cause or excuse breached the sale agreement by refusing to obtain the consent to transfer and refused to accept the last instalment of the purchase price. In light of the finding by the Learned Trial Judge, a finding we agree with, that the Respondent did seek and obtain the consent of the Land Control Board and that the Respondent was justified in refusing to accept further payment after the notice time lapsed, we find that the counterclaim was bound to fail. While we agree that the Learned Judge ought to have made an express finding as to the fate of the counterclaim, having revaluated and analysed the evidence on record and pursuant to the powers conferred upon this Court by section 3(2) of the *Appellate Jurisdiction Act* as read with Rule 33 of the *Court of Appeal Rules, 2022*, we find that there was no merit in the counterclaim and nothing turns upon that issue. We are guided by this Court's position in *Development Finance Co of Kenya Ltd v Wino Industries Ltd [1995-98] 2 EA 65* where the Court was dealing with a case in which the claim was intertwined with the counterclaim, just like in the present case. It was held that where no finding is made on a counterclaim but the prayers in the claim are granted, the counterclaim is deemed to have been dismissed with costs.

24. Having considered the issues raised before us in this appeal, we find the appeal wholly unmerited. We, accordingly, dismiss it with costs to the Respondent.

25. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 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