Omweri v Kiptugen (Civil Appeal 5 of 2018) [2022] KECA 413 (KLR) (4 March 2022) (Judgment)

Neutral citation: [2022] KECA 413 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 5 OF 2018

MSA MAKHANDIA, SG KAIRU & J MOHAMMED, JJA

MARCH 4, 2022

BETWEEN

PIUS FRANCIS OMWERI ..... APPELLANT

AND

SHADRACK K. KIPTUGEN ..... RESPONDENT

(An appeal from the decree & judgment of the Environment & Land Court at Eldoret (A. Ombwayo, J.) delivered on 28th June 2017 in ELC No. 6 of 2016)

JUDGMENT

Background

1. This is a second appeal. Pius Francis Omweri Nyaberi (the appellant) initially filed suit against the respondent in the Chief Magistrate's Court in Eldoret being CMCC No. 85 of 2009. The appellant's case in that suit was that by a sale agreement dated 29th May, 2006, the respondent sold to the appellant two (2) properties known as L. R. Nos. 9930/8 and 9930/10 (the suit properties) comprising a total of 44 acres at Kshs. 95,000.00 per acre, the total purchase price being Kshs. 4,180,000.00. The appellant pleaded that Shadrack K. Kiptugen (the respondent) breached the terms and conditions of the sale agreement by transferring the suit properties to Lavington Security Guards Ltd and to one Charles Chemase Cherono respectively, who were strangers to the sale agreement, before the expiry of the 6-month period stipulated for payment of the balance of the purchase price. The appellant sought a refund of the initial down payment of Kshs. 665,000.00, interest thereon at 30%, and costs of the suit. The respondent, in his defence and counter-claim, contended that it was the appellant who had breached the terms of the sale agreement by failing to pay the balance of the purchase price.

2. The issues for determination were identified as which party had breached the terms of the sale agreement; whether the appellant defaulted in making the payment; and whether the respondent sold the suit properties to third parties before the expiry of the 6-month period stipulated in the sale agreement for payment of the balance of the purchase price.

3. The trial court dismissed the appellant's case, finding that the terms of the sale agreement did not include a refund of the purchase price but instead provided for a penalty of 30% against the party who breached the sale agreement; that the appellant failed to make further payments to liquidate the balance as at 29th November, 2006; that the appellant had failed to prove that the respondent frustrated his efforts to fulfil his part of the sale agreement; that the appellant was in breach of the terms of the sale agreement; and that the respondent had opted not to claim the penalty of 30%.

4. Aggrieved by that decision, the appellant lodged an appeal to the Environment & Land Court (ELC). The grounds of that appeal were inter-alia that the trial court erred by failing to find that the sale agreement became null and void six (6) months after its execution by operation of the law due to the absence of consent of the Land Control Board; in holding that the appellant's case would only have succeeded had he paid the full purchase price by 29th November, 2006; in holding that in the absence of a clause providing for a refund, no refund was payable to the appellant; and by allowing the respondent to retain the down payment despite the same being unconscionable and the *Land Control Act* specifying the appellant's remedy.

5. The ELC (Ombwayo, J.) dismissed the 1st appeal, agreeing with the trial court that the appellant was in breach of the sale agreement, having failed to pay the balance of the purchase price as at 29th November, 2006; and failing to prove that the respondent frustrated his efforts to fulfil his part of the sale agreement. The ELC held that although the consent of the Land Control Board was a condition precedent, it was not agreed by the parties that the balance of the purchase price was to be paid before or after obtaining the consent.

6. Aggrieved by the decision of the ELC, the appellant lodged the instant appeal. The appeal is premised on the grounds that the learned Judge erred in holding that the balance of the purchase price had to be paid by 29th November, 2006 when the sale agreement provided for an approximate date where time was not of the essence; in failing to note that the suit properties had already been sold to third parties and transfer documents executed by 28th September, 2006 and 29th September, 2006; in failing to note that the transaction had become null and void by operation of the law six (6) months after the sale agreement was executed by dint of the *Land Control Act*; and in failing to note that the remedy of a refund is enshrined in the *Land Control Act* hence there was no need for the parties to provide for it.

Submissions by counsel

7. The appellant filed written submissions and submitted that failure to provide for a refund in the agreement could not defeat the appellant's claim as the sale was nullified by operation of the law under the *Land Control Act* (the Act), and that the Act provides for a refund once the sale is nullified owing to failure to secure consent of the Land Control Board. It was further submitted that as per the sale agreement, time was not of the essence and that there was proof that transfers had already been executed in favour of third parties by the respondent on 28th September, 2006 and 29th September 2006.

Determination

8. We have considered the record, the submissions, the authorities cited and the law. This being a second appeal, this Court is confined to considering matters of law, unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See *Kenya Breweries Ltd V Godfrey Odoyo [2010] eKLR.*

9. The main thrust of the appeal is the appellant's assertion that time was not of the essence with regard to the sale agreement with the respondent and therefore the two courts below erred in finding that the appellant was in breach of the sale agreement for failing to complete payment of the purchase price

by 29th November, 2006; and secondly that the sale agreement had become void due to the failure to obtain the consent of the Land Control Board, automatically converting the deposit paid into a debt recoverable from the respondent.

10. The issue of the sale agreement being void in the absence of the consent of the Land Control Board was raised for the first time in the memorandum of appeal filed in the ELC. The issue was not specifically pleaded, canvassed or raised during the trial at the trial court, and the trial court did not make any finding in relation to that issue. In *Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR*,this Court summarised the principles guiding appellate courts in determining whether it can entertain a new point on appeal:

> " In Openda v. Ahn, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have be properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea...
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> And in Attorney General v. Faroe Atlantic Co Ltd [2005-2006] SCGLR 271, a decision of the Supreme Court of Ghana which was quoted with approval by this Court in DEN v. PNN [2015] eKLR, it was accepted that in addition to a matter going to jurisdiction, a new point may be taken on appeal where an act or contract is made illegal by a statute. However, even then there is a qualification that the legal question sought to be raised for the first time must be substantial and one that can be disposed of without the need for further evidence."

11. In the instant appeal, the issue of whether the sale agreement was void and unenforceable in the absence of the Land Control Board consent could only have been considered by the trial court had evidence been led in relation to whether an application for consent had been made. Since these factual matters were not pleaded, canvassed or raised at trial, neither the trial court nor the 1st appellate court can be faulted for not pronouncing themselves on the issue. The pleadings and evidence on record made it clear that the appellant's suit was based on the contention that the respondent had frustrated the appellant's efforts to complete payment of the balance of the purchase price, and the counter-claim that the appellant was the party in breach for failing to complete payment of the purchase price within six (6) months from the date of execution of the sale agreement.

12. The appellant disputed the finding of the learned Judge that the sale agreement stipulated that time was of the essence. The specific disputed clause is clause 6 of the sale agreement which provided as follows:

> " The balance of the purchase price Kenya shillings three million five hundred and fifteen thousand (Kshs. 3,515,000/=) only will be paid in six months or thereabouts."

13. To guide the interrogation of whether the learned Judge erred in his interpretation of clause 6, this Court's finding in *Sun Sand Dunes Limited v Raiya Construction Limited [2018] eKLR* is instructive:

> " The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective,

that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean."

14. Regarding making time of the essence in contracts, *Halsbury's Laws of England (4th Edition) Vol. 9 at paragraph 481* elucidates as follows:

> " The modern law, in the case of contracts of all types may be summarised as follows. Time will not be considered 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."

15. In the instant appeal, clause 6 of the sale agreement, or any other clause for that matter, did not expressly stipulate making time of the essence with respect to payment of the balance of the purchase price. No date was specified for completion in the sale agreement. The learned Judge therefore erred in interpreting the wording of clause 6 providing for payment "in six months or thereabouts" as imposing an obligation upon the appellant to make full payment by 29th November, 2006. The sale agreement merely indicated an approximate period for making the payment.

16. An argument that was advanced by the respondent was that his advocates' letter of 15th December 2006 gave notice to the appellant to complete the payment, thereby making time of the essence. The success of this letter in making time of the essence would depend on whether the notice fixed a reasonable time for completion. *Halsbury's Laws of England (3rd Edition) Vol. 8, page 165 at paragraph* 282 elaborates as follows:

> " In cases where time is not originally of the essence of the contract; or where a stipulation making time of the essence has been waived, time may be made of the essence where there is unreasonable delay, by notice from the party who is not in default fixing a reasonable time for completion and stating that in the event of non-completion within the time so fixed he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice was given, and to all circumstances of the case."

17. In *Aida Nunes v John Mbiyo Njonjo and Charles Kigwe [1962] 1 EA 88* this Court pronounced itself as follows:

> " When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that, at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence."

18. In *Simpson v. Connolly (4), [1953] 2 All E.R. 474*, Finnemore, J., stated at p. 476 in relation to contracts for the sale of land:

> " The purchaser or vendor cannot just say: 'The time has gone and the contract is at an end'. Some kind of notice must be given or what has been called in this case an ultimatum to say that: 'After a certain time if you do not complete this matter we shall treat the contract as

at an end'. No such ultimatum was given in this case, and, therefore (it is argued), when the plaintiff said to the defendant in July that he was no longer bound by this agreement, whatever it was, he was acting wrongly, because he had not the power to do so."

19. The letter by the respondent's advocates dated 15th December, 2006 gave notice to the appellant to complete the remaining balance "very soon" failure to which the respondent would treat the transaction as revoked. This letter gave no indication as to the exact period of time fixed for payment of the balance of the purchase price. The conduct of the respondent of transferring the suit properties to third parties on 22nd December, 2006 can be construed to suggest that the respondent expected payment of the balance to be completed within six (6) days which cannot be considered a reasonable period for completion in the circumstances. Therefore, the respondent's subsequent conduct of transferring the suit properties to third parties soon after his imprecise ultimatum to the appellant should be considered unconscionable.

20. At this point it should be noted that it was not disputed that upon payment of the down payment, the appellant immediately took possession of 7 acres of the suit properties, which was equivalent to the Kshs. 665,000/= paid, with the intention that the suit properties would be transferred to him on completion. It can be concluded that as a result, a constructive trust had been created in favour of the appellant. In Willy Kimutai Kitilit v Michael Kibet [2018] eKLR this Court held that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the *Land Control Act*, though this is subject to the circumstances of the particular case.

21. This Court in *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR* elaborated on the doctrine of constructive trust as follows:

> " Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman – vs- Steadman (1976) AC 536, 540,
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> "If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable".

22. Having established that the agreement executed by the parties herein did not make time of the essence; that the subsequent notice given by the respondent vide the letter of 15th December, 2006 did not fix a reasonable time for completion; and that the transfer of the properties to third parties by the respondent seven (7) days later constituted unconscionable conduct, the appellant is deserving of a remedy of damages equivalent to the down payment paid.

23. The upshot is that this appeal has merit. Judgment is hereby entered for the appellant in the sum of Kshs. 665,000/- plus interest thereon at court rates from 5th November, 2009 when the suit was filed until payment in full. We award costs of the suit in the Environment & Land Court and the appeal in this Court to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR