Blueridge Capital Limited v Njoroge & another (Civil Appeal 144 of 2019) [2022] KECA 557 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 557 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 144 OF 2019

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

JUNE 24, 2022

BETWEEN

BLUERIDGE CAPITAL LIMITED ..... APPELLANT

AND

JAMES MWAURA NJOROGE ..... 1ST RESPONDENT

ESTHER W. NJOROGE ..... 2ND RESPONDENT

(An Appeal arising from the ruling by the Environment and Land Court at Mombasa (C. Yano J.) delivered on 4th February 2019 in Mombasa ELC no. 12 of 2014)

JUDGMENT

1. This appeal arises from the judgment dated 4th March 2020 by the Environment and Land Court (ELC) at Mombasa (Yano J.) delivered in Mombasa ELC Case No 322 of 2015, in which the learned Judge dismissed the Appellant's suit with costs to the 1st and 2nd Respondents, after finding that the Appellant (who was the plaintiff therein), had not proved its case on a balance of probability. The Appellant had filed the suit in the ELC by a plaint dated 22nd January 2014 as amended on 19th February 2015, seeking damages of Kshs. 55,740,500/= for breach of contract, an assessment of unaccounted interest earned on the deposit it had paid, and costs of the suit.

2. The Appellant's claim in the said suit was that it entered into the sale agreement dated 12th July 2013 with the 1st and 2nd Respondents for the purchase of the land known as Plot Sub-division 8124 (Original Number 864/1) Sec I Mainland North located within Mombasa County (hereinafter "the suit property") for the price of Kshs.127,000,000= ,and paid a deposit of Kshs. 12,700,000= to the Respondents' advocates, with the balance to be paid upon completion, which was envisaged to be by 13th October 2013. However, that the Appellant was not able to trace the land registry file and undertake a search of the suit property until 15th October 2013, when it was mutually agreed time would start to run. Upon undertaking the search, the Appellant noted that there was an encumbrance

on the title to the suit property in the form of a lease registered in favour of High Time Trading Limited. The Appellant accordingly joined High Time Trading Limited as the 3rd Defendant in the suit, after indications that the said defendant was unwilling to terminate the lease and would exercise its option to seek an extension of the same after expiry.

3. That after further negotiations, the 1st and 2nd Respondents agreed to reduce the purchase price of the suit property to Kshs. 98,000,000/=, the deposit was increased to Kshs. 45,000,000/= with the balance payable by 1st August 2014, and the issue of vacant possession was abandoned. However, that on 18th January 2014, the 1st and 2nd Respondents wrote to the Appellant revising the sale price to Kshs.125,000,000/=, and that in default of agreement of the new price the sale agreement would stand rescinded, which terms the Appellant was not agreeable to. In the meantime, the Appellant had identified a potential buyer of the suit property with whom it had entered into an agreement, and who was willing to pay a purchase price of Kshs.180,000,000/= and had already paid a deposit of 13,500,000/= to a stakeholder. Further, that the Appellant expected to make a profit of Kshs.53,000,000/= from the transaction.

4. In addition, that the Appellant established that the 1st and 2nd Respondents had also since commenced negotiations to sell the suit property with third parties, even though the Appellant was willing and able to complete the agreement between the parties on the terms of the reduced purchase price, or as per the agreement dated 12th July 2013, if the 1st and 2nd Respondents were able to provide it with a title free of encumbrances. Furthermore, that the 1st and 2nd Respondent had not rescinded the contract at that point.

5. The Appellant therefore averred that the 1st and 2nd Respondents were in fundamental breach of contract, as it became apparent that the 1st and 2nd Respondents were incapable of giving vacant possession of the suit property, resulting in the Appellant's prospective purchaser pulling out of the envisioned sale. The Appellant detailed the particulars of breach of contract and of loss and damage in its Amended Plaint. In addition, that the 1st and 2nd Respondents advocates in a letter dated 1st August 2014 purported to raise the purchase price to Kshs. 140,000,000/=. Consequently, that the Appellant instructed its advocates to abandon the contract, and a consent was recorded in the ELC terminating the same, and the 1st and 2nd Respondents' advocate transferred the sum of Kshs. 13,186,952/= held as deposit claiming that Kshs. 486,952/= was the interest allegedly earned on the deposit, which the Appellant also disputes.

6. The 1st and 2nd Respondents on their part admitted the sale agreement dated 12th July, 2013 in their Amended Defence dated 31st December 2015, which they emphasized was the only valid agreement between the parties. They denied that there was any agreement reached to reduce the purchase price of the suit property to Kshs 98,000,000/=, and added that the Appellants were under obligation to carry out due diligence to verify the state of the property before entering into any transaction with the vendors. The 1st and 2nd Respondents denied any breach of contract and averred that the appellants were fully aware that the suit land was not vacant as of the time they entered the sale agreement, and that if there was any proposal to raise the purchase price as alleged, the same was part of negotiations for the sale of the suit property after the previous agreement was breached by the Appellant and rescinded by the parties. Further that the Appellant's advocate was provided with a copy of the bank statement showing all the interest earned on the deposit.

7. Therefore, that the Appellant was not entitled to any of the damages sought, and its claim was an attempt to obtain illegal and unjust enrichment by acting as a broker and attempting to sell the suit property by passing of as owner, when it did not have the purchase of the property.

8. High Time Trading Limited on its part denied the Appellant's claim in a defence dated 12th February 2014, and averred that it was a legal lessee of the suit property, and would, upon expiry of the lease between it and the 1st and 2nd Respondents which was for a term of 5 years and 3 months from 1st August 2009, seek to exercise its option to renew the same for a similar term. In addition, that its advocate did inform the Appellant's advocate of this intention, and that it was not agreeable to have the lease terminated earlier due to the investments it had made on the suit property. Lastly, that the suit did not raise any reasonable cause of action against it. A consent was consequently entered between the Appellant and High Time Trading Limited during the trial on 21st November 2017, wherein the suit against the said defendant was withdrawn with costs.

9. The Appellant called one witness during the hearing in the trial suit, namely Yehuda Sulami, the Chairman and a director of the Appellant, who reiterated that the Appellant entered into the sale agreement dated 12th July 2013 to purchase the suit property for Kshs. 127,000,000/=, and the sold the property to Neno Evangilism Centre for Kshs. 180,000, 000/=. Further, that the Appellant received a refund of the deposit of Kshs. 13,186,952/= from the 1st and 2nd Respondent's advocates, and was claiming additional interest of Kshs 3 million from the time of payment of the deposit, which was held for a period of 2 years and 4 months. Upon cross examination the witness testified that his understanding was that the deposit and purchase price was to be paid upon vacant possession, and that he did inspect the property and saw that there were people in occupation. The witness produced the sale agreement dated 12th July 2013, and various correspondence and documents as evidence.

10. The Respondents also called one witness to testify, namely Esther Wangui Njoroge, the 2nd Respondent herein, who testified that the 1st Respondent was her brother, and confirmed terminating the sale agreement for the suit property for reason that the Appellant did not honour the agreement, and that all the money paid to the Respondents was refunded with interest.

11. The ELC, after hearing the parties, noted in its judgement that AS the balance of the purchase price was not paid, the completion documents were therefore not handed over to the Appellant's advocates; and that the transaction was frustrated and later rescinded vide and agreement of the parties through the consent recorded in court on 15th December, 2014. It was noted that there was no supplementary sale agreement after the original sale agreement and that the only sale agreement between the parties was the one dated 12th July 2013. It was further found that there was no material disclosure on the part of the Respondents since the Appellants agreed to inspect the property and purchased the property with notice of its actual state and condition. It was observed that it was the Appellant who frustrated the sale agreement by non-payment of the balance of the purchase price, and had therefore not proved its case.

12. The Appellant was dissatisfied with the decision of the trial Court, and filed a Memorandum of Appeal in this Court dated 16th October 2019 and lodged on 29th October 2019. The Appellant raised seven grounds of appeal challenging the trial Court's findings on the uncontested and contested facts, on the frustration of the contract by the Respondents, and on due diligence by the Appellant. When the matter came for hearing on 7th March 2022, Mr. Munyithya, learned counsel for the Appellant and Mr. Mutubia, learned counsel for the 1st and 2nd Respondents, were present, and informed us that they would rely wholly on their written submissions dated 1st December 2021 and 15th December 2021 respectively.

13. As this is a first appeal from the decision of the ELC, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, where it was stated that an appeal to this Court is by way of retrial, and the principles upon which this court acts in such an appeal are that it 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 to follow the trial judge's findings of fact if it appears either that they are not based on the evidence on record, or where the trial court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.

14. The counsel for the Appellant in this respect has faulted the finding by the trial judge that clause D(a) of the sale agreement dated 12th July 2013 covered an official search and that the Appellant had prior notice of the lease. The counsel's position is that Clause D (a) only dealt with the physical appearance of the suit property but did not include an official search, and that since the land registry file for the suit property was not available for inspection, the 90-day completion period was frustrated and the parties thereby agreed to extend the completion period.

15. Therefore, that Clause B (I) of the agreement dated 12/7/2013 was amended by various letters dated 5th July, 2013, 14th October, 2013 and 26th October, 2013 exchanged by counsel for the parties, to provide that time to completion was to begin running from the time the land registry file was available. The counsel, while placing reliance on the cases of *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* [2017] eKLR, *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR and *Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others* [2019] eKLR, submitted that variation in a contract to amend a clause for provision of due performance by consent is a constitutional right of parties.

16. Furthermore, counsel argued that both parties to the agreement conceded that they did enter into the contract dated 12th July 2013, and while placing reliance on the case of *National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Ltd & Another* (2001) eKLR , submitted that the said agreement was therefore binding upon them, and the trial court could not rewrite the contract. Therefore, that the confirmation by the Respondents that they had a good and marketable property free and clear of all encumbrances turned to be false after the discovery of the registered lease on the title of the suit property, and they were estopped from denying the same by section 120 of the *Evidence Act*.

17. As a result, the trial judge erred by finding that the Respondents were not in breach of the said agreement, and the Appellant's counsel referred to various letters written to the Respondents' advocate to submit that as at 14th October 2013, the Respondents were not able provide vacant possession of the suit property. Further, that once the Appellant raised the issue of the encumbrance of the registered lease to the property's title, the burden was on the Respondents to show how they were to deal with that encumbrance for purposes of giving vacant possession. In addition, that paragraph 4 of the sale agreement dated 12th July 2013 provided that any amendments and changes thereto were to be in writing and duly executed by or on behalf of the parties, and did not give room for any unilateral amendment by one party. The letters by the Respondents' advocate dated 18th January, 2014 and 1st August 2014 1/8/2014 on the revision of the purchase price were therefore illegal and unilateral, nor did they respond to the Appellant's advocate's queries with regards to completion or the availability of completion documents.

18. According to the counsel, while sub-condition 13.1.2 of the Law Society Conditions of Sale (1989 edition) (hereinafter the "LSK Conditions") was applicable, and provided for the option of rescission or compensation where any mis-description, error, omission or misstatement in the agreement was pointed out before completion, the parties were guided by clause 3 of the LSK Conditions, which provided that in the event of any term or condition being found unenforceable, the parties shall negotiate in good faith to amend such term or condition to engage in the negotiations to review the agreement among other provisions. Accordingly, that negotiations between the parties started immediately the existence of the registered lease was realized, and it is for this reason the sale agreement

was not terminated by any of the parties. However, that the agreement became unenforceable as a result of the failure by the respondents to provide a solution on the registered lease which led to the termination of the contract through frustration.

19. Lastly, the Appellant's counsel submitted that the Appellant laid a basis for award of damages, since under clause 3.4 of the sale agreement dated 12th July 2013 the suit property could either be transferred to the purchaser or to a purchaser's nominee, and it was therefore perfectly in order for the Appellant to enter into agreement of sale with Neno Evangelism Centre. The Appellant's case was that had the transaction proceeded to completion and the Appellant receive the vacant possession, he would have concluded a second sale with Neno Evangelism Centre and made a profit of Kshs. 53,000,000/-, which was the difference between the purchase price set out in the agreement dated 12th July 2013 and that between the Appellant and Neno Evangelism Centre. Furthermore, that the sale agreement had not been rescinded by the parties as there was no express provision on rescission of the sale agreement, and under Clause 4 of the LSK Conditions, the remedy of rescission was only available to the purchaser under Condition 11, where the vendor failed to comply with an objection or requisition.

20. The counsel for the 1st and 2nd Respondents on the other hand agreed with the findings of the trial Court and maintained that the Appellant breached the contract by failing to pay the balance of the purchase price and could not demand vacant possession without such completion. In addition, that there was no requirement to plead the particulars of this breach in the defence. Further, that the Appellant set out to delay and frustrate the transaction after payment of the deposit despite the Respondents' indulgence and accommodation, and sought to vary the terms of the agreement by writing to the Respondents' tenants and demanding completion documents when it had not complied with Clause 3.4 of the agreement on provision of a professional undertaking. Reliance was placed on the decision of this Court in *Waruhiu K'Ówade & Ngáng'a Advocates vs Mutune Investments Ltd* (2016) eKLR on the purpose of professional undertakings. Upon being satisfied that the Appellant had no intention of complying with the agreement, the Respondents accordingly instructed their advocates to issue a notice to rescind and or repudiate the contract.

21. According to counsel the letters sought to be relied upon by the Appellant's advocate are of no legal effect and can only be considered as part of the failed negotiations to amend the agreement and are not enforceable. Further that the Respondents can only be accused of breach after they received the balance and failed to give vacant possession and there was no provision for them to give vacant possession before completion. On the issue of damages, counsel posited that the Appellant had no valid claim as it did not disclose at the time of entering into the sale agreement, nor were the Respondents aware at the time of its agreement with Neno Evangilism Centre, and the damages sought are therefore not only remote but also not contemplated in the agreement. Lastly, that the letters by the Respondents' advocate proposing to vary the price can only be deemed as a fresh offer which was rejected by the Appellant, therefore no legal or contractual obligations can attach to them.

22. We note that it is not in contest that the parties entered into a contract for sale of the suit property dated 12th July 2013, whose completion date was subsequently extended to by the consent of both parties, and which agreement was eventually terminated by consent dated 21st November 2014 signed by both parties and adopted by the trial Court on 9th December 2014 before trial commenced. It is also notable that the Appellant did not produce evidence of any other executed agreement entered into by the parties other than the one dated 12th July 2013, and the alleged amended and supplementary agreements produced in evidence were not executed. The issues for determination before us therefore, are whether the termination of the sale agreement dated 12th July 2013 was a result of the Respondents' breach, and if so whether the Appellant is entitled to damages for the breach and interest on the deposit.

23. It is notable in this regard that the Appellant's main argument is that the Respondents breached the representation and warranty in condition C (7)(iv) of the sale agreement dated 12th July 2013 that they had a good title to the suit property clear of encumbrances, and that they were not able to thereby provide vacant possession of the suit property. The trial Court, held as follows as regards the alleged breach by the Respondents:

> " 45. The plaintiff further alleged that the 1st and 2nd defendants are guilty of material non-disclosure for failing to disclose the existence of a lease to the 3rd defendant. However, as the court had stated earlier, the agreement is clear that the plaintiff agreed and admitted that it had inspected the property prior to purchasing it. The court finds and holds that the plaintiff had prior notice of the said lease. The 1st and 2nd defendants cannot be accused of material non- disclosure when the plaintiff has clearly indicated in the agreement that it inspected and purchased the property with full notice of the identity thereof and of its actual state and condition. The 1st and 2nd defendants therefore were not in breach. This court cannot imply any term in the said contract unless it was intended."

24. While we agree that the Appellant as purchaser had an obligation to inspect the property and conduct any due diligence as regards any possession of the suit property before signing the sale agreement, an additional question that needed to be answered by the trial Court was when good title and vacant possession alleged was required to be provided by the Respondents, in order to make a finding as to any breach in this regard. The sale agreement in this respect did not make any specific provision that vacant possession was to be given after signing of the sale agreement and before completion, and therefore, in the circumstances, possession was deemed to be upon completion, when the necessary documents of title are handed over to a buyer in exchange of the price.

25. Special Condition B of the sale agreement on completion in this regard provided as follows:

> " Completion period shall be 90 days after the date of signing of this agreement time being of the essence.
>
> Upon issuing the vendor advocates with the professional undertaking contemplated in clause 3.4 above the Vendor shall handover to the Purchaser's advocate the following completion documents:
>
> i. Original Certificate of Title in respect of the property
>
> ii. Three copies of the Transfer duly executed and completed by each of the Vendors;
>
> iii. Certified copies of the Vendors' I.D. cards and Pin Cards;
>
> iv. Three coloured passport size photographs of each of the Vendors;
>
> v. Rates Clearance Certificate valid for at least 30 days from the date of execution thereof;
>
> vi. Affidavits/declarations by the spouses of each of the vendor confirming consent to the sale as part of the Land ActNo. 6 of 2012;
>
> vii. Stamp Duty valuation form duly signed by the Vendor

viii. A beacon Certificate confirming the dimensions of the property."

26. Clause 4 of the sale agreement dated 12th July 2013 provided that the LSK Conditions of Sale of 1989 were applicable in so far as they were not inconsistent with the conditions in the said agreement, and Condition 4(2) (a) of the LSK Conditions in this regard provided that upon completion, the purchaser shall pay the purchase money to the vendor's advocate who shall hold the same as stakeholder until registration of the conveyance. The requirement that the discharge of encumbrances would be provided by the Respondents at the date of completion was specifically stated in condition 4(2)(d) of the LSK Conditions as follows:

> " Against payment or delivery (as the case may be) in accordance with paragraph (a) or (b) above, the vendor shall deliver, or, where paragraph (c) applies, produce for inspection to the purchaser's advocate and, if so required by the purchaser, the advocate for the purchaser's mortgagee, the duly executed conveyance and all necessary discharge of encumbrances, consents and clearance certificates together with, if required by the purchaser, a duly completed, Stamp Duty Valuation Form.."

27. The ELC did not therefore err by finding that the Respondents were not in breach, for the additional reasons that the Respondents' obligations to provide good title without encumbrance and vacant possession only arose at completion, and the Appellant's insistence of, and actions requiring vacant possession prior to completion were not only premature but also in breach of the subject sale agreement. In addition, it is also notable that it is not in dispute that the Appellant had also not fulfilled its obligation to provide the professional undertaking to facilitate completion by the Respondents' advocates, or pay the balance purchase price by the completion date as required by the said sale agreement.

28. In the premises, the Appellant's claim for damages for breach of contract also fails, save to note that on the claim for additional interest, Clause 1.1 of the subject sale agreement provided that interest could be calculated on a daily basis from the date it was due until the date paid and provided for the rate of interest, and clause 3.2 which provided for the payment of the deposit of 10% of the purchase price, did not make any provision for interest payable thereon, and specifically provided that the said deposit would be paid to the vendor's advocate's bank account to hold as stakeholders pending completion. Condition 8 (1) and (2) of the LSK Conditions in this regard provided for interest payable on the purchase money, and where completion was delayed as a result of default on the part of the vendor, no interest was payable provided the purchaser deposited the balance in any bank and gave the purchaser notice thereof, in which case the purchaser would accept the interest payable by the bank on the deposit.

29. It is notable in this regard that the Appellant's advocate did by a letter of 14th October 2013 seek and receive confirmation from the Respondents' advocates that the said deposit was paid into an interest earning account with NIC Bank Nkurumah Branch. The deposit in the bank was confirmed by the Appellant's advocates further letter dated 26th October 2013. It is also notable that the amount refunded of Kshs. 13,186,952/= was as a result of the consent entered into by the parties dated 21st November 2014 to terminate the sale agreement and for refund of the deposit, which consent was adopted as an order by the trial Court on 9th December 2014. The Appellant cannot therefore seek to set aside and vary the said consent by seeking additional interest in this appeal.

30. We therefore find no merit in this appeal, and accordingly dismiss it with costs to the 1st and 2nd Respondents.

31. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR