



REPUBLIC OF KENYA



KENYA LAW
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**Afyare Enterprises Company Ltd v Mugambi & 3 others (Civil Appeal
345 of 2018) [2022] KECA 1101 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1101 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 345 OF 2018
HA OMONDI, PM GACHOKA & KI LAIBUTA, JJA
OCTOBER 7, 2022**

BETWEEN

AFYARE ENTERPRISES COMPANY LTD APPELLANT

AND

GIDEON KIREMAH MUGAMBI 1ST RESPONDENT

MAX GAS AND LOGISTICS LIMITED 2ND RESPONDENT

CHIEF LANDS REGISTRAR, NAIROBI 3RD RESPONDENT

GLADYS KALUYU MUGAMBI 4TH RESPONDENT

(Being an Appeal from the Ruling and Order of the Environment and Land Court at Nairobi (B.M. Eboso, J.) delivered on 25th May, 2018 in E.L.C Case No. 1626 of 2016)

JUDGMENT

1. The 1st respondent (Gideon Kirema Mugambi) and the 4th respondent (Gladys Kaluyu Mugambi) were formerly husband and wife. The 1st respondent was registered proprietor of all that the parcel of land known as LR No. 36/VII/403 situate in the Eastleigh area of Nairobi (“the suit property”), and which comprised part of their matrimonial property.
2. On or about the 1st day of September 2014, the 1st respondent entered into an agreement with the appellant (Afyare Enterprises Company Ltd) wherein he agreed to sell to the appellant the suit property for the sum or price of KShs. 112,000,000 payable in the following terms as stipulated in clause 3, namely: 5% deposit on execution of the Agreement; and the balance within 90 days next following.
3. The proposed sale and transfer to the appellant by the 1st respondent of the suit property was subject to a condition precedent, to wit, the 4th respondent’s spousal consent without which the sale Agreement would be stripped of its legal force and cease to bind the parties. According to clause H sub-clause



- (r) c of the said Agreement, the 1st respondent undertook to obtain the requisite spousal consent to facilitate the proposed sale.
4. In part performance of his part in the Agreement, the appellant paid to the 1st respondent a sum of KShs. 9,400,000. However, the 1st respondent failed to secure the requisite spousal consent in consequence of which the sale agreement between the appellant and the 1st respondent was at an end.
 5. Subsequently, the 1st and 4th respondents entered into a sale agreement with the 2nd respondent (Max Gas and Logistics Ltd) on 24th September 2015, pursuant to which they transferred the suit property to the 2nd respondent, which is now the registered proprietor.
 6. Dissatisfied by the turn of events, the appellant sued the respondents jointly and severally in the Environment and Land Court at Nairobi ELC No. 1626 of 2016 seeking, inter alia, an order nullifying and cancelling the sale and transfer of the suit property made in favour of the 2nd respondent in 2014. In addition to the main suit, the appellant filed a Notice of Motion dated 23rd December 2016 in which he prayed for an order of injunction restraining the respondents from, inter alia: undertaking any developments, construction, demolition or improvements to the building erected and being thereon; transferring or otherwise dealing in any manner with the suit property in favour of any party; dealing in any manner whatsoever with the suit property, pending hearing and determination of the suit; and costs of the application.
 7. The applicant's Motion was supported by the annexed affidavit of Hassan Abdi Warsame sworn on 22nd December 2016, and was made on the grounds that the appellant had a registrable interest in the suit property, having purchased it from the 1st respondent and paid a deposit of KShs. 9,400,000; that the 2nd sale agreement entered into with the 2nd respondent was contracted during the subsistence of the sale agreement entered into with the appellant; that the 1st respondent had since transferred the suit property to the 2nd respondent; that the appellant stood to suffer irreparable damage should the order of injunction not be granted; and that the status quo then prevailing be maintained.
 8. In reply, the 1st respondent filed his affidavit sworn on 8th May 2017. In summary, the 1st respondent's case was that the 4th respondent declined to give her consent to which the proposed sale to the appellant of the suit property was conditional; that the proposed sale was thereby frustrated; that the 1st respondent duly notified the appellant of their intention to terminate the sale agreement vide his letter dated 2nd October 2014; that it was a term of the said Agreement that, in the event of breach by the vendor (the 1st respondent), the 1st respondent would refund the deposit to the appellant together with interest at the rate of 10%; that on 9th March 2017, the High Court in HCCC No. 9 of 2005 (OS) – Gladys Kaluyu Mugambi vs. Gideon Kirema Mugambi – ordered that the deposit paid to the 1st respondent by the appellant be refunded to him; that the 1st respondent refunded to the appellant the deposit in question on 22nd March 2017 in the total sum of KShs. 10,400,000 (inclusive of accrued interest and costs); that the sale agreement dated 1st September 2014 having been discharged by frustration, and the appellant's deposit, interest and costs having been fully paid to the appellant, there existed no contractual relationship between the appellant and the 1st respondent; and that, accordingly, the appellant's suit against the respondents was fatally defective.
 9. In her replying affidavit sworn on 31st July 2017, the 4th respondent contended that the suit property was matrimonial property registered in the name of the 1st respondent, who was her former husband; that she had filed HCCC No. 9 of 2005 (OS) seeking division of matrimonial property; that she and the 1st respondent agreed to sell the said property to the 2nd respondent in terms of a consent order recorded on 9th October 2014 in the said suit; that the 1st respondent's attempt to sell the same property



- to the appellant was without her knowledge and consent; and that, in any event, the deposit paid to the 1st respondent by the appellant was refunded.
10. The 2nd respondent's Managing Director (Ahmed Mohamed Elmi) also filed a replying affidavit sworn on 8th May 2017. He deposed that the 2nd respondent was the registered proprietor of the suit property, having purchased it from the 1st and 2nd respondents; that he was not aware of the alleged sale agreement between the appellant and the 1st respondent; and that the 2nd respondent was the bona fide owner of the property in issue.
 11. By a ruling delivered on 25th May 2018, the ELC (Eboso, J.) dismissed the appellant's Motion. Aggrieved by the Ruling, the appellant has come to this Court on appeal on 10 grounds, which we need not replicate here. Suffice it to observe that the appellant faults the learned Judge for, among others: holding that the appellant had not established a prima facie case to merit the injunctive relief sought; finding that the appellant's remedies lay in damages; holding that the property in issue was matrimonial property; and for failing to appreciate the legal principles set for the consideration of an application for injunction.
 12. We need to point out at the onset that this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.
 13. In *Selle's* case (ibid), the Court held that:

“ 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”
 14. Having considered the record of appeal, the written and oral submissions of learned counsel for the appellant and learned counsel for the 1st, 2nd and 4th respondents, we are of the considered view that the appeal herein stands or falls on three main grounds, namely: whether the sale agreement in issue was subject to a condition precedent and, if the answer is in the affirmative, whether that condition was satisfied to merit specific performance in the appellant's favour; whether the appellant had established a prima facie case with a probability of success to merit the injunctive relief sought; what relief (if any) was available to the appellant; and, finally, what orders ought we to make in determination of this appeal.
 15. As to the first issue, the Sale Agreement speaks for itself. Clause H sub-clause (r) c of the said Agreement obligated the 1st respondent to obtain the requisite spousal consent to facilitate the proposed sale in view of the fact that the subject matter of the Agreement was matrimonial property. The proposed sale and transfer to the appellant by the 1st respondent of the suit property was subject to a condition precedent, to wit, the 4th respondent's spousal consent without which the sale Agreement would be stripped of its legal force and cease to bind the parties.
 16. *Chitty on Contracts* (32nd edn.) sets out the general effect of agreements subject to contingent conditions precedent at paragraph 2-159 as follows:

“Where an agreement is subject to a contingent condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by him ..., But an agreement subject to such a condition may impose some degree of obligation on the parties or on one of them. Whether it has this effect, and if so what



degree of obligation is imposed, depends on the true construction of the term specifying condition.”

17. At paragraph 2-161, the restricted right to withdraw from such contracts is elucidated as follows:

“A second possibility is that, before the event occurs, the main obligations have not accrued; but that, so long as the event can still occur, one (or both) of the parties cannot withdraw However, if it becomes clear that the condition has not occurred, or that it can no longer occur, within the time specified in the contract, the parties will be under no further obligations under the contract. In such a case, the effect of the non-occurrence of the condition is that the parties are “no longer bound” by the contract, or that the contract is “discharged”. What the parties have called a “condition precedent” can thus operate as, or have the effect of, a condition subsequent.”

18. In *Wagichiengo vs. Gerald* [1988] eKLR, the appellant sued the respondent seeking specific performance of an alleged agreement for the sale of land or, in lieu thereof, damages for breach of contract. The respondent denied the breach and pleaded that the agreement had been subject to a condition that the appellant would deposit a sum of £20,000 in the account of the respondent, and that the appellant had failed to fulfil that condition. The Court of Appeal found that there was a condition precedent to the contract between the parties that that the appellant would deposit some £20,000 in the respondent’s foreign bank account, and this condition was not fulfilled by the appellant. The Court also agreed with the High Court’s holding that there was a valid contract but that that contract had become unenforceable by the appellant because of his own failure to comply with an essential term thereof, namely the condition precedent.

19. The condition precedent in this case was the 1st respondent’s obligation to secure the requisite spousal consent from the 2nd respondent, which he failed to. Consequently, the appellant and the 1st respondent were under no contractual obligation to render the principal performance. Moreover, refund and acceptance by the appellant’s counsel of the deposit made on account of the purchase price together with accrued interest and costs released the 1st respondent from all legal obligations arising from the Agreement. That settles the first issue.

20. The suit property having been sold to a third party in whose favour it was duly registered, put it beyond the appellant’s reach to claim. The injunctive orders sought in an attempt to enforce specific performance were not merited. The appellant had not demonstrated to the learned Judge that he had established a prima facie case with a probability of success. Indeed, there was no probability of enforcing an Agreement that had not taken effect on account of failure on the part of the 1st respondent to fulfil a condition precedent, not to mention that the proposed sale had been overtaken by events, to wit, sale and transfer to a bona fide purchaser for value without notice of the previous Agreement. That settles the second issue.

21. What then is the relief (if any) available to the appellant?

We agree with the learned Judge that, if any, the appellant’s claim lies in damages for breach of contract. In the circumstances, we find that the appellant’s appeal fails and the same is hereby dismissed with costs to the 1st, 2nd and 4th respondents. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

