



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & SICHALE, J.J.A.)

CIVIL APPEAL NO. 67 OF 2018

BETWEEN

DOROTHY MARGARET WANJIKU KUNG'U.....APPELLANT

AND

AKASH HIMATLAL DODHIA.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of

Kenya at Nairobi (K. Bor, J.) delivered on 12th October 2017 in E.L.C No. 1577 of 2014.)

JUDGMENT OF THE COURT

1. The appellant is the Executrix of the estate of her late husband, **Samuel Ndung'u Kungu**, (“deceased”). The deceased’s will provided, *inter alia*, that all the properties of the deceased were to be held in trust by the appellant, for the benefit of herself (one fourth thereof), and that of the deceased’s two sons, who were to share equally the other three fourths of the net estate.
2. On 26th May 2011, the respondent and the appellant entered into a sale agreement for sale of **L.R. No. 7741/442** (“the suit property”) a sub-division of **L.R. 7741/163** measuring 2.05 hectares; which forms part of the deceased’s estate. The consideration was Kshs.20,000,000/ and the appellant was paid a deposit of Kshs.2,000,000/. The balance of Kshs.18,000,000/ was to be paid upon transfer of the suit property. The appellant did not complete the sale transaction within the agreed contractual period or at all. Consequently, on 4th June 2012, the 1st respondent’s advocate issued a completion notice and asked the appellant to pay interest on the deposit as stipulated in the sale agreement.
3. When the appellant failed to complete the transaction, the 1st respondent filed a suit against the appellant and the 2nd respondent seeking, *inter alia*, a permanent injunction to restrain the appellant from selling, transferring or dealing with the suit property; an order for specific performance to compel the appellant to transfer the suit property to him; an order to compel the 2nd respondent to issue a certificate of title to the 1st respondent, and an order requiring the Deputy Registrar of the High Court to execute any necessary document to complete the transaction.
4. In the alternative, the 1st respondent sought a refund of the sum of Kshs.2,000,000/ paid to the appellant as deposit together with interest thereon at 12% per annum from the date of payment, 26th May 2011 until payment in full. The 1st respondent further prayed for damages for loss of bargain and costs of the suit.
5. Regarding the prayer for specific performance of the contract of sale, the 1st respondent contended that the suit property is of unique character and of high sentimental value to him; is close to his aged parents’ home and he wanted to be close to them to be able to take care of them easily.
6. In her statement of defence, the appellant admitted that she entered into the sale agreement with the 1st respondent and received a deposit of Kshs.2,000,000/. She however contended that the sale agreement cannot be enforced and is null and void for reasons, *inter alia*, that the suit property is non-existent as it does not have a certificate of title; the original mother title has never been surrendered for cancellation; and that the appellant lacked capacity to enter into the sale agreement with the 1st respondent because at the time of drawing the agreement the appellant’s share of the deceased’s estate had not been determined.

7. The appellant denied the 1st respondent's claim for specific performance but stated that she was ready to refund the deposit paid to her but without interest.

8. By way of a counterclaim, the appellant sought a declaration that the sale agreement was null and void; an order to compel the respondents to remove a caveat that the 1st respondent had filed against the mother title; general damages and costs of the suit.

9. In its judgment, the trial court held that the 1st respondent had proved his case and ordered specific performance of the contract of sale; that there was no mistake when the parties entered into the sale agreement; and dismissed the appellant's counterclaim with costs. The 1st respondent was granted costs of the suit.

10. Being aggrieved by the said decision, the appellant preferred this appeal, raising 12 grounds, but which may be compressed into three main issues as follows: -

(i) Whether the learned judge erred in law in holding that the appellant had capacity to enter into the sale agreement with the 1st respondent and finding that they were clear on the subject matter of the agreement.

(ii) Whether the learned judge erred in law in holding that the appellant was in breach of the sale agreement.

(iii) Whether the learned judge erred in law in ordering specific performance of the contract of sale.

11. The appellant urged the Court to allow the appeal, set aside the trial court's judgment and instead grant the prayers in the counterclaim. Alternatively, the appellant prayed that the appeal be allowed.

12. During the hearing of the appeal, both **Mr. Gikandi Ngibuini**, learned counsel for the appellant, and **Mr. Queenton Ochieng**, learned counsel for the 1st respondent, relied on their respective written submissions and list of authorities, which they briefly highlighted. **Mr. Erechi**, learned counsel for the 2nd respondent, opted not to make any submissions because the 2nd respondent has no interest in the matter.

13. This being the first appellate court, we are duty bound to re-evaluate, re-assess and re-analyse the evidence that was tendered before the trial court and determine whether the conclusions reached by the learned judge were correct. See ***Selle v Associated Motor Boat Company Ltd [1968] E.A. 123***.

14. We equally remind ourselves of the often-repeated principle that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding. See ***Mwangi v Wambugu [1984] KLR 453***.

15. Bearing these principles in mind, we start by considering whether the appellant had capacity to enter into the sale agreement with the 1st respondent. From the evidence on record, there is no dispute that the appellant is the Executrix of the deceased; that prior to the execution of the sale agreement she had obtained a grant of probate and a certificate of confirmation of the grant; and that she entered into the sale agreement dated 26th May 2011 in respect of the suit property, which is described as a subdivision of L.R No. 7741/163.

16. The sale agreement was explicit that the appellant was selling her right, title and interest in the suit property at an agreed purchase price of Kshs.20,000,000/, whose mode of payment was agreed upon.

17. Under Clause 7 of the sale agreement, the appellant warranted that: -

“a) She holds unencumbered title to the property which is sold free from any third party claim, dispute or inhibition.

(b) She has full capacity and authority to enter into this agreement and that the execution of this agreement and the performance by her of her obligations hereunder constitute legal, valid and binding obligations enforceable in accordance with the terms set out herein.”

18. The appellant now contends that the sale agreement was invalid because her entitlement to the estate of the deceased had not been determined and could not tell her portion of entering into the sale agreement. We disagree. The appellant entered into the sale agreement as the Executrix of the deceased and not as a beneficiary. Under **section 82(b)(ii)** of the **Law of Succession Act**, the holder of a confirmed grant of probate has power to sell immovable property belonging to a deceased's estate. See ***Re Estate of Thiongo Nginyayu Muthiora (Deceased) [2013] eKLR***.

19. We therefore find and hold that the appellant had capacity to enter into the sale agreement with the 1st respondent. The sale agreement expressly stated that the appellant had full capacity and authority to enter into the sale agreement. The subject matter of the agreement was also well defined. It matters not that the title document in respect of the suit property was not available at the time the agreement was executed. It was clear to the two parties that the suit property was a subdivision of the parent title, **L.R No.7741/163**, that and been subdivided into five subdivisions. Each of those subdivisions had a deed plan. It is apparent that some or all the other subdivisions had not been sold.

20. We do not agree that there was any mistake as to the subject matter of the sale agreement. There was a deed plan showing subdivision L.R No.7741/422. In ***Kiplangat Arap Biator v Esther Tala Cheyegon, [2016] eKLR***, this Court was called upon to decide whether there was a mutual mistake made by the parties in a land transaction, and if so, the consequences thereof. The Court cited the passage by **Lord Denning** in ***Solle Butcher [1949] 2 ALL ER 1107*** at page 1119: -

“...once a contract has been made, that is to say, once the parties, whatever their inmost

states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, is set aside or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake.”

We respectively adopt that position in this matter.

21. We now turn to consider whether the learned judge erred in holding that the appellant was in breach of the sale agreement. Clause 4 of the sale agreement dated 26th May 2011 provided that the completion date is 30 days from the date of issuance of the provisional certificate of title to the appellant. It was the responsibility of the appellant to obtain the provisional title. Under Clause 12, time was of the essence for purposes of the agreement.

22. However, more than one year from the date of the agreement, the appellant had not obtained the provisional title, had not cleared the outstanding rates, notwithstanding the fact that she had express permission to utilize the deposit of Kshs.2,000,000/ towards paying the land rates; and she had also not availed several completion documents as specified under Clause 5. To the contrary, the appellant was demanding an additional deposit of Kshs.7,500,000/, which was not a term of the agreement, failing which she would sell the suit property to another person. We therefore agree that the appellant was in breach of the sale agreement.

23. Was the learned judge right in law to order specific performance of the contract of sale, or should she have granted the alternative relief of refund of the deposit of Kshs.2,000,000/ together with interest at 12% per annum from 26th May, 2011 until payment in full?

24. In the impugned judgment, the learned judge stated, *inter alia*:

“The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy.”

25. The learned judge then went on to state: -

“52. Having found in this case that the sale agreement was valid and that there was no mistake when parties entered into the sale agreement, the court is of the view that an order for specific performance ought to issue. It has not been shown that there is an adequate alternative remedy for the plaintiff who avers that the suit property is unique and of high sentimental value to him.”

26. During the hearing of the appeal, the appellant’s counsel submitted that the appellant was willing to refund the deposit of Kshs.2,000,000/ together with all the accrued interest at the rate of 12% per annum from 26th May, 2011 until payment in full. He further drew the Court’s attention to a letter written to the appellant by the 1st respondent’s advocate before the suit was filed where the respondent had sought refund of the deposit and all the accrued interest.

27. The 1st respondent submitted that specific performance is a discretionary remedy and is granted on the basis that damages recoverable at law will not afford a complete remedy. For that proposition, he cited *Snell’s Equity, 31st Edition (Thomson Sweet & Maxwell) 2005* at page 352. Counsel submitted that in granting the relief of specific performance, the learned judge exercised her discretion judiciously and urged us not to interfere with the exercise of the same.

28. Both parties are agreed that the relief of specific performance is a discretionary remedy and ordinarily, it will not be granted if there is an alternative adequate remedy that is available. In the matter that gave rise to this appeal, the learned judge’s view was that there was no alternative remedy that would suit the 1st respondent in the circumstances of the case.

29. It is trite law that the Court of Appeal will not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. See *Mbogo v Shah [1967] E.A. 93*.

30. The learned judge having rightly held, as we have found, there was a valid sale agreement and that the appellant was in breach, did she exercise her discretion judiciously in ordering specific performance? Was there an available alternative remedy?

31. In granting the order of specific performance, the learned judge agreed with the 1st respondent that the suit property is unique and of high sentimental value to him. The 1st respondent had stated in his witness statement that: -

“22. The suit property is of a unique character and of high sentimental value to me. It is about half an acre of prime undeveloped property within Kitusuru, in Nairobi. Currently, it is not easy to get a similar property in the same area at the price negotiated and agreed upon by the parties at the time of entering into the sale agreement.

23. The property is about 2 to 3 plots away from my parents’ home. And it was my hope that owing to the fact that my parents are in their late 60’s, I would be close enough to them to be able to take care of them easily. There is no other property in the vicinity with the above unique attributes and no amount of damages will be sufficient to compensate me in the circumstances.”

32. The 1st respondent told the court that he was ready, able and willing to complete the sale; and that his prayer for the alternative remedy was without prejudice to his substantive prayer for specific performance.

33. During the hearing of the suit, the 1st respondent was cross examined on the issue of the uniqueness of the suit property and he reiterated his earlier position as quoted above. The appellant did not adduce any evidence to discount the 1st respondent's contention regarding the uniqueness of the suit property.

34. The learned judge also took into account that the appellant was not only in breach of the sale agreement but had also threatened to sell the suit property to someone else unless the 1st respondent was willing to pay her a further deposit of Kshs.7,500,000/ contrary to the provisions of the sale agreement. Sample what the appellant's advocate told the 1st respondent in the email dated 22nd May 2012:

"It is for you and your advocate to decide whether you want to finalise this sale and meet the two conditions 4 and 5 above. OTHERWISE our client will have no option but to proceed to sell to the other buyers who are also interested and who are willing to advance her the rates and other monies she needs and furthermore they are even prepared to pay her the current market value." [Emphasis supplied].

35. From the foregoing, it is evident that the appellant simply wanted to edge out the 1st respondent from the transaction so that she could sell the suit property to a different person at a higher price, yet the 1st respondent was not in any default at all. It is common knowledge that prices of prime properties in urban centres have considerably gone up over the last 9 years or so. The market value of the suit property at the time of the hearing was not at all comparable to the deposit paid and the accrued interest. And in any event, the 1st respondent's objective in purchase of the suit property was to live close to his aging parents. The appellant did not lead any evidence to controvert that.

36. The appellant's argument against specific performance was captured by the learned judge in the following words: -

"54. The 1st Defendant argued that the court should never award specific performance when it is incapable of enforcing the order or where it entertains any serious doubt that the contract is capable of performance (See Gitanga Mwaniki v. Annuncita Waithira Kibue [2013] eKLR). The court has no doubt that the contract is capable of performance, the grant of probate having been made to the 1st Defendant way back in 2006."

37. We respectfully agree with the learned judge. The order of specific performance is enforceable and the contract is capable of performance. In ***Gharib Suleiman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998***, this Court held:

"The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages, the focus being whether or not specific performance will do more perfect and complete justice than an award of damages."

We are persuaded that the learned judge exercised her discretion judiciously and there is no basis of interfering with her judgment.

38. Consequently, we find this appeal lacking in merit and dismiss it with costs to the 1st respondent.

Dated and delivered at Nairobi this 29th day of January, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR