Michira v Kenya National Capital Corp (Civil Appeal 53 of 2017)
[2021] KECA 286 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 286 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 53 OF 2017

PO KIAGE, K M'INOTI & M NGUGI, JJA

DECEMBER 3, 2021

BETWEEN

ALFRED MOFFAT OMUNDI MICHIRA ..... APPELLANT

AND

KENYA NATIONAL CAPITAL CORP ..... RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court of Kenya at Kisii (Okong'o, J.) dated 14th October 2016 in E.L.C.C. NO. 403 of 1998)

JUDGMENT

1. This appeal concerns the property known as LR. No. Kisii Town Block 111/65 (the suit property). At all material times the suit property was registered in the name of Henry Onderi Misati (Misati) and was charged in favour of the Respondent, Kenya National Capital Corporation, to secure a loan advance to Misati. After Misati defaulted on the loan, the Respondent, in exercise of its statutory power of sale, sold the suit property by public auction to the appellant, Alfred Moffat Omundi Michira,on 11th September 1997 for Kshs. 6,000,000.00

2. After paying the agreed deposit, on 19th January 1998, the appellant charged the suit property in favour of the respondent to raise the balance of the purchase price of Kshs . 3,600,000.00. The said sum was to be repaid in 36 equal monthly instalments with effect from 30 days from the date of draw down, together with interest at the rate of 30 per cent per annum.

3. Subsequently the respondent served the sitting tenants in the suit premises with notices to vacate so that it could hand over vacant possession to the appellant, but the tenants contested the notices and obtained an injunction in Kisii High Court Civil Case No. 21 of 1998 that barred the respondent from evicting them from the suit premises. On his part, the appellant failed or refused to repay the respondent's loan on the basis that the respondent had undertaken or represented to give him vacant

possession of the suit property as soon as the suit property was charged in favour of the respondent and the loan disbursed.

4. On 2nd November 1998, the appellant filed suit against the respondent for, among others, a declaration that the loan agreement between the parties stood cancelled due to fundamental breach by the respondent, and an order for refund of the purchase price to the appellant, or in the alternative, an order suspending payment of the loan until the respondent gave the appellant vacant possession of the suit premises.

5. In its defence dated 21st January 1999, the respondent denied any undertaking or representation to the appellant, and averred that vacant possession of the suit premises was a condition of the sale by public auction and not a condition of the loan agreement between the parties. The respondent further pleaded that its efforts to obtain vacant possession were thwarted by a valid order of the court which it could not violate, and prayed for dismissal of the appellant's suit.

6. In or about 2001, the respondent gave the appellant vacant possession of the suit property and on 27th March 2003, before trial of the suit, the appellant and the respondent entered into a consent order by which judgment was entered for the respondent against the appellant for Kshs 5,145,633.99, payable in agreed instalments. Clause 2 of the consent order provided as follows:

    2. "The disputed interest ranging from January 1998 to December 2001 to go on trial."

    The trial court framed two issues for determination, namely:

    1. Whether the appellant was under obligation to pay interest to the respondent between January 1998 and December 2001 when he was not is possession of the suit property; and

    2. If so, the quantum.

7. After hearing the parties, the trial court, by the judgment impugned in this appeal, found that the agreement for sale of the suit property to the appellant was separate and distinct from the loan agreement between the appellant and the respondent and that there was no agreement between the parties that repayment of the loan was conditional on the appellant obtaining vacant possession of the suit property. Accordingly, the court found the appellant liable to pay the respondent interest of Kshs. 7,851, 284.83. The respondent was also awarded costs of the suit. The appellant was aggrieved and preferred this appeal.

8. The appeal was heard through written submissions and oral highlights. The appellant elected to argue his six ground of appeal globally, contending that he was under no obligation to repay interest on the loan from 1998 to December 2001 because the respondent assured him or warranted that it would give the appellant vacant possession of the suit property, which it failed to do. The appellant contended that without the respondent's assurance on vacant possession, he would not have entered into the loan agreement and relied on *Esso Petroleum Ltd v. Mardon (1976) 2 All ER 5* on the definition of warranty and negligent misrepresentation. The appellant further submitted that because he was not able to obtain vacant possession of the suit property between January 1998 and December 2001, he was under no obligation to pay interest for that period.

9. On the interest which the trial court awarded to the respondent, the appellant submitted that it was exaggerated and unconscionable. He added that the interest was awarded contrary to section 44A of the *Banking Act* and in support of the proposition the appellant relied on *James Muniu Mucheru v.*

National Bank of Kenya (2019) eKLR. For the foregoing reasons the appellant urged us to allow his appeal with costs.

10. The respondent opposed the appeal, submitting that it was not in breach of the loan agreement and that vacant possession of the suit property was neither a term of the agreement for sale of the suit property nor a condition for the loan that the respondent advanced to the appellant.

11. It was the respondent's further submission that the parties entered into and concluded two separate and distinct agreements in respect of which there was no warranty as contended by the appellant. In the respondent's view, the agreement for sale of the suit property was concluded first and separately when the appellant was declared the highest bidder and paid the prescribed deposit. The second agreement for the loan was concluded when the appellant accepted the terms of the loan on 21st October 1997 even before the parties had addressed the question of vacant possession. As regards the alleged warranty, the respondent maintained that the same was a mere assurance which did not have any specified timeline and was not intended by the parties to form part of the terms of the loan agreement, because it is the responsibility of all sellers of property by public auction to give vacant possession to the buyer.

12. Turning to its delay in giving the appellant vacant possession of the suit property, the respondent submitted that on 27th October 1997, it served a notice to vacate on the sitting tenants who in turn moved to the High Court in Kisii and obtained an injunction to stop their eviction. It was not until 4th July 2001 that the High Court allowed eviction of the tenants and vacant possession was subsequently given to the appellant. In these circumstances, the respondent submitted that it cannot be blamed for the delay in giving the appellant vacant possession as the option of disobeying a valid court order was not available to it. For those reasons the respondent urged us to dismiss the appeal with costs.

13. The straightforward issue in this appeal is whether the learned judge erred in holding that from the evidence on record, the appellant was not entitled to waiver of interest on account of the respondent's alleged violation of a warranty to give vacant possession of the suit premises. It is common ground that there were two agreements between the appellant and the respondent relating to the suit property. The first was for sale of the suit property to the appellant, which was entered into when the appellant's bid to purchase the suit property was accepted by the auctioneers. (See section 72(1) of the Registered *Land Act*, Cap 300 (repealed), which was the applicable law to the transaction). The question of warranty, representation or payment or non-payment of the loan or interest is not relevant to this agreement.

14. The second agreement is that between the appellant and the respondent for the loan of Kshs 3,600,000 to pay the balance of the purchase price. The appellant applied for the loan in writing on 24th September 1997 and offered the suit property as security. By a letter dated 2nd October 1997 the respondent offered the appellant the loan on set terms regarding interest, repayment and security. The offer was to be accepted within 30 days, otherwise it was to be deemed as withdrawn. On 21st October 1997, within the period of the offer, the respondent accepted the offer in writing. In the first paragraph of that letter, the appellant wrote thus:

> "First and foremost I would like to express my heartfelt gratitudes to you for approving my application for a term loan of Kshs 3,600,000/=.Consequently please note that in reference to your letter dated 2nd October 1997 I have accepted to comply with the terms and conditions thereof."
>
> (Emphasis added).

15. In the next paragraph, the reply to which the appellant contends constitutes the basis of the respondent's warranty, the appellant wrote:

> "Kindly let me have an assurance from you on how and when the house (suit premises) all be in vacant position (sic) before I sign the forms. Your quick response will assist me work fast." (Emphasis added).

16. The respondent replied as follows:

> " We have noted the contents of your letter dated 21.10.97. We would like to confirm that it is KENYAC's responsibility to give you vacant possession once the transfer is complete and the property is charged to KENYAC to secure the facility advanced to you. This process can only commence after execution and return of your letter of offer." (Emphasis added).

17. From the above correspondence, it is clear to us, as it was to the trial court, that the appellant accepted the terms upon which the loan was granted by the respondent before seeking assurance on vacant possession. The response indicates that the giving of vacant possession was understood to be a process, and though the appellant wanted a specific assurance on when the respondent would give him vacant possession, the respondent made no such assurance. The parties did not agree on a specific, verifiable date or time when vacant possession was to be given to the appellant. With due respect, the alleged warranty was so uncertain and open-ended to constitute a firm, specific and enforceable warranty as alleged by the appellant.

18. That even the appellant understood that he had an obligation to repay the respondent's loan is readily apparent from his willingness to pay the outstanding principal sum as evidenced by the consent judgment entered on 27th March 2003. If there was indeed a warranty not to pay until vacant possession was given to him, why did the appellant readily agree to pay the principal sum? For the appellant to make out a case for waver of interest, he was obliged to show a provision of the loan agreement that allowed him not to pay interest (as opposed to the principal sum) in the event of the respondent's failure to give him vacant possession on a definite date. There is clearly no such clause and the appellant cannot approbate and reprobate at the same time as regards payment of the principal sum and interest.

19. We do not think there is any basis upon which we can entertain the appellant's arguments founded on the alleged violation of section 44A of the *Banking Act* simply because the issue was neither pleaded nor addressed by the parties or the trial court. The second issue that the parties submitted to the trial court to determine, if it found that the appellant was not entitled to waver of interest, was the quantum of interest payable. The appellant neither pleaded nor raised the issue of the alleged violation of section 44A of the *Banking Act*.

    It has been stated time and again that a court must decide a matter on the basis of pleadings and evidence and that it has no jurisdiction to introduce and determine issues that are neither pleaded nor addressed by the parties. In *Chumo Arap Songok v. David Keigo Rotich[2006] eKLR*,the Court reiterated that:

> "The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties."

    (See also *Kenya Ports Authority v. Kuston (Kenya) Ltd (2009) 2EA 212* and *Baber Alibhai Mwaji v. Sultan Hashim Lalji & Another,* CA No 296 of 2001).

20. Indeed the record shows that on the issue of quantification of the interest, the appellant did not seriously raise any dispute, let alone rely on the Banking Act. This is what the learned judge observed:

> "The plaintiff (appellant) disputed neither the said sum of Kshs 7,851,282.83 nor the manner in which it was computed. When the court asked the plaintiff to comment on the statement, his response was that the defendant (respondent) was not supposed to levy interest during the period in question. I am satisfied by the material before me that a sum of Kshs 7,851,282.83 is due by the plaintiff to the defendant on account of interest on the loan amount that was advanced to him by the defendant for the period between January and December 2001."

21. Taking all the foregoing into account we have come to the conclusion that the learned judge did not err in holding that there was no warranty by the respondent to the appellant and that from the evidence on record, there was no basis for an order directing the appellant not to pay interest to the respondent for the period between January 1998 and December 2001. Accordingly, we find that this appeal has no merit and the same is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF DECEMBER 2021

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR