IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, OKWENGU & SICHALE, JJA]

CIVIL APPEAL NO. 221 OF 2016

BETWEEN

LOISE M. WAMBUA ……...…….APPELLANT/RESPONDENT

AND

KENYATTA UNIVERSITY ……..…… 1ST RESPONDENT/APPLICANT

KENYATTA UNIVERSITY BOMA

CO-OPERATIVE SOCIETY LIMITED ..... 2ND RESPONDENT/APPLICANT

(Being an appeal from the judgment of the Environment and Land Court (l. Onguto, J) dated 17th February, 2015 IN **ELC CASE**

NO. 367 OF 2009

JUDGMENT OF THE COURT

Loise Wambua, the appellant herein (the then plaintiff) filed a plaint dated **27th July, 2009**. The 1st and 2nd respondents herein were named as the 1st and 2nd defendants in the suit at the High Court. The dispute between the appellant and the respondents was heard by **Onguto, J** who in a judgment rendered on **17th February,2015** dismissed the appellant's suit save for entering judgment "…***in favour of the plaintiff for … Kshs 316,250.00 together with interest at the rate of 12% p.a for (sic) 1st January,2008 till payment in full***".

The appellant was aggrieved by the said outcome and preferred this appeal. In a Memorandum of Appeal dated **3rd October, 2016**, the appellant listed seven (7) grounds of appeal faulting the outcome of the trial before **Onguto, J** in several respects. We shall advert to these grounds later.

The background facts leading to the institution of the suit by the appellant are fairly straight forward.

The appellant was one of the employees of the 1st respondent who got together in 1998, raised money which they paid to their employer (the 1st respondent) with a view to purchasing a piece of land. Thereafter, the 2nd respondent was incorporated for purposes of managing the project. Suffice to state that all who had contributed towards the purchase of the land were to become members of the 2nd respondent. The appellant however contended that she did not join the membership of the 2nd respondent. This became a bone of contention as the 2nd

respondent demanded money from its members for purposes of running the affairs of the society as well as the cost of improvement of the land. The appellant would hear none of that as all she wanted was to be allocated her plot free of any charges demanded by the 2nd respondent as she maintained that she was not a member of the 2nd respondent. As the warring parties could not agree, the 2nd respondent put up for sale the plot which the appellant claimed

was hers on the basis that there were costs incurred in managing the affairs of the 2nd respondent as well as costs for the development of the infrastructure of the land. It is the above background that led to the institution of the suit by the appellant in which she sought the following orders:

> ***"An order of permanent injunction restraining the 1st and 2nd defendants whether by themselves individually or jointly, their servants and /or agents or any of them from doing the following acts or any (sic) them that is to say from:***
>
> ***(i) entering into any Sale Agreement, selling, transferring, disposing of, pledging, leasing, charging in any other manner howsoever alienating or dealing with that piece of land known as L.R. Number 13136, Nairobi.***
>
> ***(ii) Effecting any charge whatsoever in the state, condition, ownership and occupation of the plaintiff's portion or any party (sic) thereof***
>
> ***(iii) Interfering in any manner whatsoever in the plaintiff's interest in the suit property including the plaintiff's right of occupation and enjoyment of the suit property.***
>
> ***(b) Allocation of the plaintiff's plot to the plaintiff by the 1st defendant.***
>
> ***(c) General damages.***
>
> ***(d) Costs of this suit together with interests thereon at courts rate".***

In the judgment delivered on **17th February, 2015, Onguto, J**, found in favour ofthe respondents save as stated above. In the penultimate part he rendered himself as follows:

> ***"I should however be judicious enough to consider and appreciate the fact that the 2nd defendant has offered to refund the plaintiff her entire paid up share in form of Kshs 316,250.00. This amount ought to be refunded to the plaintiff with interest at court rates from 1st January, 2008 until payment".***

It is this outcome that aggrieved the appellant who filed the appeal before us listing the 7 grounds of appeal which were urged before us on **27th November, 2019**, when the appeal came up for plenary hearing. In his submissions, **Mr. Njengo**, learned counsel for the appellant relied on the appellant's written submissions and list of authorities dated **12th July, 2019**. It was his submissions that the appellant worked for the 1st respondent for seventeen (17) years; that in 1998, the 1st respondent sourced for land for its senior staff; that the appellant began paying for her share in the land from 1998 upto 2003 and was duly issued with receipts by the 1st respondent acknowledging her payments; that these payments were made long before the 2nd respondent was incorporated in the year 2005; that the appellant opted not to be a member of the 2nd respondent; that when the appellant refused to pay the 2nd respondent's dues, the latter advertised her plot for sale at a reserve price of Kshs 2,000,000.00. Counsel faulted the trial judge for finding that there was no sale agreement between the appellant and the 1st respondent as according to him, the receipts for payment constituted a memorandum in writing. Secondly, it was counsel's view that the non-payment of the 2nd respondent's dues did not vitiate the contract between the 1st respondent and the appellant. Reliance was placed on the decision of ***Storer vs. Manchester City [1974] 1 W.L.R. 1403*** cited with approval in the decision of ***Esther Nyambura Kariuki vs. Simeon Muthuku Munjuga [2018] eKLR*** wherein **Lord Denning M.R.** stated:

> ***"In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his***

letters convey. If they show a concluded contract that is enough".

Finally, it was the appellant's position that the judge erred in ordering a refund of the purchase price of Kshs 316,250.00 without taking into consideration the current market value of the plot.

In opposing the appeal, **Miss Kabuthi**, learned counsel for the respondents relied on the respondent's written submissions and list of authorities, both dated **21st November**, **2019.** In her view, the appeal was not merited given that the appellant attended the 2nd respondent's meetings, paid her subscription fees upto **May, 2007**; that the Sacco was formed by the appellant's co-employees; that no plot had been allocated to the appellant to warrant her claim and finally, that the appellant cannot claim to be entitled to the enhanced value of the plot as she did not contribute to the increased value of the land.

In a brief rejoinder, **Mr. Njengo** contended that the receipts issued to the appellant did indicate the plot numbers, contrary to the respondents' assertion that the appellant had not been allocated a plot.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

The appeal before us is a first appeal. Our mandate as a first appellate court is as set out in ***Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:

> ***"I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.***
> ***An appeal to this court from a trial by the High Court is by way of a re-trial 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 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 necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs-Ali Mohamed Sholan (1955)22 EACA 270".***

We shall revisit the evidence in light of our above mandate.

It is not in dispute that the appellant was an employee of the 1st respondent when several employees of the 1st respondent mooted an idea of purchasing land. A suitable land was identified and several employees paid sums of money towards purchasing the land. Receipts of acknowledgment of payments were made by the 1st respondent.

Indeed, the receipts exhibited by the appellant issued by the 1st respondent did indicate that the payments were for "***Sale of plot 900-112***" (see receipt of **4th January, 2002** and **18th June, 1998**) and for "***Sale of plot 1500 – 734***" (see receipt dated **25th February, 2003**). The appellant also paid survey fees of Kshs 8,000.00 vide a receipt dated 6th January, 1999 issued to her by the 1st respondent.

Be that as it may, in the year 2003, the 2nd respondent (a co-operative society) was incorporated for purposes of taking charge and management of the land purchased by the 1st respondent's employees. The incorporation of the 2nd respondent wa preceded by a meeting of **7th August, 2002** at the "***Science Complex Boardroom***" attended by the appellant in which issues including registration of KU-Boma were discussed and indeed, in Min. 6/2002, it was stated:

> ***"The Committee has paid Kshs 3,500 for the registration of KU Boma. The Certificate is expected soon".***

One of the objectives of the 2nd respondent was to:

> ***"provide for its members living accommodation within the area of its operation at a fair and reasonable price together with such***

ancillary services as roads, drainage, water and light and together with facilities for physical and cultural recreation and all such other matters as are usual, customary and desirous for building estates, blocks of flats or single dwellings".

Upon incorporation of the 2nd respondent, the appellant paid the monthly subscription fees of Kshs 200.00 from **2003 upto May, 2007**. She also attended meetings of the 2nd respondent and although she told the trial court that she attended the meetings of the 2nd respondent for the sole purpose of protecting her interests in her plot, the minutes of the several meetings do not attest to this, in addition to the fact that she paid the subscription fees of Kshs 200.00. Indeed, we are in agreement with the judge's findings that:

"***In all the minutes availed in evidence, the quorum reflected included and record the plaintiff's attendance and presence. The plaintiff herself produced the minutes in evidence and did not object to any one of them. The plaintiff was present in the meeting of 7th August, 2002 as those present discussed the promotion and registration of the 2nd defendant. The plaintiff was also present in meetings of the 2nd defendant and held on 19th August, 2005 and 31st March, 2006 when the subject plots were extensively discussed. Why the plaintiff would be attending these meetings if she had nothing to do with the 2nd defendant, as she told the court, is not comprehensible. I find as a fact that the plaintiff was a member of the 2nd defendant at all material times".***

In the course of time, it was resolved that each member pays Kshs 215,000.00 for the development of the land. The appellant did not pay this sum. In the meeting of **19th August, 2005** attended by the appellant**,** the treasurer's report was tabled. From the Treasurer's Report, it was noted:

" ***(i) That if all members had paid for services (102 members x 215,000.00) the total would be Kshs 21,930,000.00***

(ii) That as at 19th August, 2005, the total received from members for services was Kshs 17,051,960.00
(iii) That members who had balloted before the general Meeting of 19th August, 2005 were 52.

(iv) That 19 members had paid some money for services.

(v) That 9 members had paid nil for services.

(vi) That one member had withdrawn.

(vii) That 20 members had completed payment for services before 30th June, or soon after and would ballot for their plots.
(viii) That the outstanding payment for services by the 9 who had paid nothing and the 19 who had partially paid was Kshs 4,878,040.00".

It was also agreed:

" ***the new deadline be the 28th of February, 2006.***

(ii) ***That those who would not have paid by then be invited individually to explain their circumstances.***

(iii) ***That after (i) and (ii) above, the plots be repossessed. The proposal was made by Dr. H.N. Gatumu and seconded by Mrs. R. N. Karanja.***

(iv) ***That resolutions made in such a meeting (General Meeting) were binding to the general membership"***

It was a resolution of the members of the 2nd respondent in the meeting of **19th August, 2005** that failure to pay one's dues to the 2nd respondent would lead to repossession of his/her plot. In the impugned judgment, the learned judge concluded:

"***Conversely, the consequence of nonpayment was that the defendant's plot would be forfeited and repossessed. Once***

again this binding resolution was passed in a meeting held on 19th August, 2005 of the members of the 2nd defendant which meeting was also attended by the plaintiff. The plaintiff was bound by such resolutions passed at the general meetings. Despite another extension of the time limited for payment by a General meeting convened on 31st March, 2006, the plaintiff did not effect payment. The resolve, once again of the meeting on 31st March, 2006 was that the plot would be repossessed".

It is certainly simple to understand why this resolve for repossession. The membership simply did not want a situation where some expended and developed infrastructure whilst others did not but would then insist on the services".

We agree. The appellant was bound by the resolutions made in the meetings of the 2nd respondent. One such resolution was that plots of those who had refused "***to board***" would be sold.

Subsequently, in an Annual General Meeting held on **29th April, 2008**, it was resolved:

"The two members who had failed to comply with the 2006 AGM directive that they complete paying the Kshs 215,000.00 for services by December, 31st, 2007 while paying for the additional Kshs 100,000.00 for services as well as the Kshs 200.00 monthly contribution be given 14 days to pay the entire amount failing which they cease to be members of the KU-Boma Housing Cooperative Society".

It was this non-payment by the appellant that led to the advertisement of the plot which action by the 2nd respondent provoked the institution of the suit by the appellant.

Counsel for the appellant urged us to find that the receipts evidencing payments by the appellant be construed to be a sale agreement. Firstly, in our view and as stated by the judge, the 1st respondent had no land to sell, it merely facilitated the

"….. organization and financial requirements to enable the 1st defendant's employees including the plaintiff acquire property. It is clear from the minutes of a meeting held by the employees and the plaintiff was present thereat that the 1st defendant actually paid for a property and the same was to be transferred to the members. At no time did the 1st defendant own any property. It simply provided the finances for acquisition of the property which the employees were obligated to refund. I accept the evidence by the two defence witnesses in these respects. The evidence was not challenged in any way and remains uncontroverted".

Further, the judge found that:

"The defence availed a copy of the 2nd defendant's Certificate of Registration No. CS/10072 dated 25th March, 2003, an extract of a ledger showing the deductions of the plaintiff's membership subscription fee which she ceased paying in June,2007, minutes of several meetings and that of an AGM showing that the plaintiff was in attendance on every occasion, a copy of the site plan showing the sub-division of the land to 102 plots, a bundle of transfer documents showing that the property was directly transferred to the 2nd defendant, (emphasis ours) demand letters addressed to the plaintiff giving notices of compliance with the requirements, and a copy of the cheque in favour of the plaintiff for the refund of her contribution".

The appellant was one of the 102 persons who expressed the desire to purchase land. The 1st respondent, as an employer, not a vendor, helped in organizing them.

When the 2nd respondent was incorporated, the land LR No. 13136/36 was transferred directly to the 2nd respondent from the vendor. At no time was the 1st respondent seized of the land. It is in view of this that we reject the appellant's contention that the receipts issued to her by the 1st respondent constituted a memorandum in writing as the 1st respondent had no land to sell and hence it had no capacity to issue a sale agreement.

The appellant's other complaint is that whereas the 1st respondent advertised "***the plot***" and gave a reserve price of Kshs 2 million, the

learned judge in awarding her Kshs 316,250.00 failed to take into account the enhanced value of the plot. We have no doubts in our minds that the value of plots escalate upwards from the date of purchase. However, the resolutions of meetings, some of which were attended by the appellant required that additional sums of money be paid for construction of roads, perimeter wall, drilling of a borehole and storm water drains. The appellant failed to pay these additional sums. As stated above, the value of the land was enhanced due to the developments carried out from sums of money paid by the members of the 2nd respondent. The appellant refused to pay Kshs 215,000.00 towards the development of the infrastructure save for Kshs 100,000.00 that was paid in 2008 by her son. The
appellant cannot expect to benefit from these developments that enhanced the value of the plot(s) when she made no contributions towards it. The value of a plot having gone up, the 2nd respondent advertised the plot for sale giving a reserve price of Kshs 2 million as the ½ acre was then a serviced plot, ready for controlled development, courtesy of contributions made by the 2nd respondent's members to the exclusion of the appellant. The appellant does not expect to reap where she did not sow. In our view, the order for payment of interest as directed by the judge was sufficient to cater for inflation.
In conclusion, we find that the appellant is to blame for the situation she finds herself in. The upshot of the above is that we find no merit in this appeal. It is hereby dismissed.

However, given the unfortunate behavior of the appellant and given that she has ended up with no plot, we direct that each party shall bear their own costs.

It is so ordered.

Dated and Delivered at Nairobi this 22nd Day of May, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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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