



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OKWENGU, KIAGE & SICHALE, JJA)

CIVIL APPEAL NO. 96 OF 2016

BETWEEN

EDWARD GITAH KIHIA.....APPELLANT

AND

THOMAS CAROLL.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at

Nakuru (Ouko, J.) dated 23rd January, 2014 inHCCC No. 217 of 2004)

JUDGMENT OF THE COURT

Edward Kihia, the appellant, was the registered proprietor of NAKURU MUNICIPALITY BLOCK 18/78 (suit property). The appellant had taken a loan facility amounting to Kshs. 975,000 from Kenya Commercial Bank (KCB). Unfortunately, after sometime, he was unable to service the loan, consequently KCB commenced the process of realizing the security. In a quick action to safeguard his interests, the appellant approached KCB and proposed to sell the suit property by private treaty for Kshs. 820,000. KCB accepted his offer on condition that he shall make a further proposal on how to pay the remaining balance of the loan.

The appellant then engaged the services of Muigai Commercial Agencies Ltd (Muigai) to solicit for prospective buyers. The agency then fronted the respondent, an Irish national who was married to a Kenyan lady, as a prospective buyer. As a result the parties herein entered into two contracts. The first, which was dated, 21st July 2003 provided in part as follows;

2. The purchase price is Kenya shillings One Million, One Hundred Thousand payable as follows;

a) Kshs. 110,000/= on execution of this agreement.

b) 2nd payment will be Kshs. 820,000/= to be paid to Kenya Commercial Bank Ltd.

c) Last payment of Kshs. 170,000/= will be paid on or before 18th October 2003. It is however agreed between the two parties that The Vendor will by this time give vacant possession of The Property and this payment will be held by The Purchaser if vacant possession is not granted.

d) All the above payments will be deposited with M/S Mungai Commercial Agencies Ltd as stakeholders.

3. The sale is made free from ALL EMCUMBRANCES and The Vendor will obtain all relevant clearances for land rent and rates from the respective Authorities.

4.

5. The Vendor will seek the consent of The Commissioner of Lands to transfer the property.

6. The Vendor will meet the cost of reinstating any missing beacon/s.

7. The Vendor will meet the cost of drawing and registering relevant discharge of Charge on the title....

Before executing the above agreement, the appellant sought for its review. Thus, a supplementary agreement was drawn. The same provided in part as follows;

1. Purchase price is increased from Kshs. One Million One Hundred Thousand to Kshs. One Million, Three Hundred and Fifty Thousand.

2. The last payment (referring to condition C of the 1st agreement) is increased to read Kshs. Four Hundred and Twenty Thousand (read Kshs. 420,000). This payment will be paid on or before 18th October 2003 by which time vacant possession will already be granted to the purchaser.

3. Encumbrances in this particular transaction are specified as:-

a) Rates

b) Land Rent

c) Water and Electricity Bills if any...

.....

All other terms/conditions remain as per the first agreement referred above.

The respondent then promptly executed both agreements in July 2003 and the same were forwarded to the appellant's advocate in August 2003. Prior to signing the agreements on 30th of October 2003, the appellant's advocate sought to amend the terms by directing that the deposit of Kshs. 1,100,000 be forwarded directly to them and not to the agency. That proposal was declined by the respondent through his advocates. Only when Muigai threatened to pull out of the transaction, did the appellant execute both agreements.

On 6th of April 2004, the appellant through his advocate sent a notice to the respondent. The said notice demanded that unless the balance of the purchase amounting to Kshs. 420,000 was remitted within 10 days, the sale would be cancelled due to what was termed a fundamental breach. This necessitated the respondent to file the suit which is subject to this appeal. In the Complaint, the respondent pleaded that the full purchase price had been paid to Muigai; the appellant had declined to sign and release the transfer forms and instead wanted to rescind and repudiate the contract; and the appellant had threatened to repossess the suit property unless a fresh agreement was entered into. Contending that the appellant was in breach of the contract, the respondent prayed for, among others, orders for a permanent injunction and of specific performance.

The appellant filed an amended defence and a counterclaim. In his defence he claimed that the respondent had breached the terms of the contract by; failing to fulfil his obligations within 3 months of signing the agreement i.e by 27th January 2004; by paying the deposit on 5th December 2003 as opposed to by 28th October 2003; by paying the Kshs. 820,000 to KCB on 05th February 2004 which was outside the purview of the 3 months; by unilaterally embarking on the appellant's obligations and misapplying Kshs. 94,000; and further by paying Kshs. 234,780 directly to Nakuru Municipality.

The appellant contended that he had no obligation to execute and release the transfer forms as no valid contract existed between the parties. He claimed that he had already communicated his intention to repudiate and rescind the contract therefore the sale agreement was not binding on him.

In the Counterclaim, the appellant sought for damages against the respondent for Kshs. 666,959 and further compensation. He claimed that due to delay caused by the respondent in the payment of the Kshs. 820,000 to KCB, the suit property was advertised for sale through M/S Legacy Auctioneering Services on 12th December 2003 at the cost of the appellant.

The matter proceeded to hearing, at the close of which the parties filed their written submissions which were considered by W. Ouko, J (as he was then). The learned Judge granted the respondent a permanent injunction and an order for specific performance directing the appellant to sign the transfer documents.

Dissatisfied with the judgment the appellant filed the instant appeal containing eight (8) grounds, which, condensed, are that the learned judge erred in law and in fact by;

- a) Failing to appreciate the merits of the ruling of Musinga, J (as he was then) which highlighted the fundamental breaches of the sale agreement.
- b) Failing to find that the contract was not valid therefore unenforceable.
- c) Finding that time was not of the essence with respect to the performance of the sale agreement.
- d) Finding that M/S Muigai Commercial Agencies Ltd were agents of the appellants and therefore had authority to act on his behalf,

During the hearing of the appeal, learned Counsel **Mr Kahiga** appeared for the appellant, while learned Counsel **Mr Kimatta** appeared for the respondent. Both parties had filed written submissions which Counsel highlighted the same before us.

Mr Kahiga submitted that the respondent failed to prove his case on a balance of probabilities. He failed to show evidence that he paid the entire purchase price to the agent. Neither did he prove that whatever monies paid was in favour of the appellant. This echoed the testimony of the appellant who claimed not to have received any part of the purchase price from Muigai. Counsel contended that the letter sent to the agent by the appellant expressly communicated that their duty was only to receive offers but did not give it any authority to receive money on its behalf. Further, there was a fundamental breach of the terms of the agreement since the completion date of 18th October 2003 was not varied or extended in writing. Therefore the learned Judge erred by holding that time was not of the essence yet the parties did not expressly alter or vary the completion date.

Mr. Kahiga maintained that since the appellant's signature was not witnessed, this was a gross violation of the requirements of **Section 3 (3)** of the **Law of Contract Act**. It was argued that the respondent claimed to have paid the balance of the same on 11th February 2004 to the agency, yet the appellant was never given any money hence he did not receive any consideration for the suit property. Counsel urged this Court to allow the appeal and set aside the judgment of the High Court.

In response, **Mr Kimatta** submitted that the respondent had proved its case on a balance of probabilities. It was sufficiently proved that the agency was duly appointed by the appellant and that the purchase price was fully paid by the respondent as was agreed upon in the sale agreement. Since the appellant delayed in signing the agreements, he could hold the respondent liable for any delay that resulted. Counsel clarified that **Section 3 (3)** of the **Law of Contract Act** does not provide that witnessing must be before an advocate. Therefore the appellant's own admission that he signed the same before the agents was sufficient.

Mr Kimatta affirmed that the respondent carried out all his duties as per the agreements despite the difficulties occasioned by the appellant. Counsel contended that the conduct of the respondent was just a calculated move to benefit himself to the detriment of the respondent. He rested by terming this appeal as frivolous, unmeritorious and a waste of the Court's time, which he urged us dismiss with costs to the respondent.

We have considered the record of this appeal, the rival submissions and authorities cited. The main issue for our consideration is whether the respondent was entitled to be granted an order of specific performance. As a court of first appeal, our mandate is to reconsider the evidence, re-evaluate it and reach our own independent conclusions. See **ABOK JAMES ODERA T/A A.J ODERA & ASSOCIATES V JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR.**

For a court to grant an order of specific performance, it must be satisfied that there existed valid and enforceable contract between the parties. This was held in **GHARIB SULEMAN GHARIB V ABDULRAHMAN MOHAMED AGIL L.L.R NO. 750 (CAK) Civil Appeal No. 112 of 1998** as follows;

“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.”

The appellant case is that there was no valid contract and therefore he was not obligated to transfer the suit property to the respondent. He claimed to have rescinded and repudiated the contract on various grounds that; the agreements were not properly witnessed, Muigai were not authorised to receive money on his behalf; the appellant took over his obligation in the contract and misused the purchase price; he did not receive any of the purchase and that the respondent delayed in performing his obligation under the agreement.

After perusing the amended defence and counterclaim, we find that the appellant did not raise the issue of the witnessing of the agreement by his advocate and therefore we shall not delve into it at the appeal level. It is trite that parties are bound by their pleadings and issues not canvassed during the trial cannot be advanced during an appeal.

The appellant claimed that the agency was only authorised to seek a buyer but not to receive any money on his behalf and so the respondent breached the contract by making payments through them and he did not receive any of the purchase price. Contrary to those assertions, however, the sale agreements entered into between the parties both refer to the agency as a stakeholder. The specific parts read that **“All the above payments will be deposited with M/S Muigai Commercial Agencies as stakeholders.”** This was unaltered by the supplementary agreement which clearly indicated that. **“All other terms/conditions remain as per the first agreement referred to above.”**

This Court in **GEORGE MURIAINI MUHORO T/A A.M. MUHORO ADVOCATE V GEORGE NDUNGU KAMITI [2011] Eklr** while expressing itself on the duty of a stakeholder quoted the following passage with which we firmly agree;

“According to the Dictionary of English Law by Earl Jowitt:

‘A stakeholder is a person with whom money is deposited pending the decision of a bet or a wager or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest.’”

Evidence was produced in court to affirm the status of Muigai as the appointed agents of the appellant, among them being a letter dated 13th April 2000 to Muigai stating, in part, as follows;

“I hereby appoint you as the sales and Management Agent for my property L.R No. Block 18/78 located in Nakuru

Municipality.”

Additionally, the appellant signed an irrevocable authority to Muigai dated 24th February 2003. He gave them authority to sell the suit property and committed to pay them a commission of 5% of the sale price. This is also demonstrated by the correspondence between Muigai and the appellant’s advocates. For instance, a letter dated 4th February 2004, from Muigai to the appellant’s advocate read in part as follows;

“We forward herewith a Bankers cheque No. 689339 for Kshs. 820,000/= in favour of the Kenya Commercial Bank Ltd for your onward transmission to their lawyers Mukite Musangi & Co. Advocates being final payment for the aforesaid concluded sale.”

From all the evidence on record, it is idle for the appellant to deny that he appointed Muigai to find him a buyer and also to receive the purchase price on his behalf. It is clear before us that he employed them as his agents to act for him in this transaction. The learned Judge therefore rightly held that the appellant is estopped from denying the fact that Muigai had authority to receive and disburse the funds as they did.

Moreover, the alleged misuse of the purchase price by the respondent by paying for the consent to transfer, land rates and rent is easily debunked by a letter dated 08th April 2004 from Muigai indicating how they disbursed the funds which included payment for the consent, the land rate and rent. The appellant cannot be heard to complain against the respondent for the actions of his own duly appointed agents. Any claims as the appellant may consider himself possessed of would be against his agents. This Court in **KINLUC HOLDINGS LTD vs MINT HOLDINGS LTD & ANOTHER [1998]eKLR** while pronouncing itself on the issue of agency, summarised the ratio decidendi of **STEVENSON V. ROWAND 6, English Reports, 668** as follows;

“A law-agent is bound to obey the instructions given to him by his employer, and if he exceed or fall short of these instructions, he may be justly made liable for the damages which result from his disregard of them.”

We now turn to the appellant’s argument that the respondent failed to make payments as per the required timelines under the sale agreement, thus breached the terms of the contract and entitling the appellant to terminate it. Thus a letter repudiating the sale agreement was written on 6th April 2004, which also demanded a payment of Kshs. 420,000 within 7 days.

In contracts, time is made of the essence by the express provisions therein and subsequently by the conduct of the parties therein. The sale agreements herein clearly stipulated that the last payment of the purchase price was to be made by 18th October 2003. Meanwhile, the respondent made payments to Muigai which were receipted as follows; Kshs. 130,000 on 22nd May 2003; Kshs 820,000 on 2nd August 2003; and Kshs. 400,000 on 11th February 2004. We note, as the learned Judge did, that the first two payments were made prior to what was the initial completion date as contemplated by the agreements.

It is evident that by the appellant’s own conduct time was rendered not of the essence. He deliberately delayed execution of the agreements until 30th October 2003, over three months after the respondent executed them and had already paid two instalments. It thus sounds ill for the appellant to purport that the new completion date was 27th January 2004, and to complain that the respondent failed to make the last instalment. Incontestably, it is the appellant who failed to fulfil his obligations as stipulated in the agreement. The fact was that vacant possession was to be given to the respondent before the final payment was made. The appellant’s breach led to a letter dated 14th May 2004 by which the respondent’s advocate was demanding that the appellant evicts his employee who was at the time living on the suit property. In short, the appellant die not meet his end of the bargain.

We concur with the learned Judge that initially time was of the essence and the respondent made an effort to keep the timelines. The appellant’s conduct of retaining the agreements for more than three months before executing and returning them rendered the completion date was stipulated in the agreements immaterial. In consequence the appellant’s purported repudiation had no legal effect as he was himself in breach.

We reiterate the holding in **GURDEV SINGH BIRDI & ANOTHER as Trustees of RAMGHARIA INSTITUTE OF MOMBASA v ABUBAKAR MADHBUTI [1997] eKLR**;

“It is trite that the element of notice I have referred to in a situation where time has not been made the essence of contract is especially important in that no court of law will allow one party suddenly to turn to the other and say: “time has elapsed, the agreement has been cancelled and the deposit has been forfeited.””

In the full circumstances of this case we find that the learned Judge properly directed himself and arrived at the correct decision.

The respondent was clearly deserving of the order for specific performance as it was clearly demonstrated in evidence that he had performed his part of the bargain and was always ready and willing to do so. See; **SISTO WAMBUGU V KAMAU NJUGUNA [1983] eKLR**.

The upshot is that this appeal is wholly devoid of merit. We accordingly dismiss it with costs to the respondent.

DATED and delivered at Nairobi this 24th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

*I certify that this is a true
copy of the original.*

Signed

DEPUTY REGISTRAR