



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MAKHANDIA & SICHALE, JJA

CIVIL APPEAL NO. 58 OF 2019

BETWEEN

JOSEPH MUTUA MUINDE.....1ST APPELLANT

DOMINIC MUSEI IKOMBO..... 2ND APPELLANT

AND

GEOFFREY KITHUKA MWANGANGI.....1ST RESPONDENT

HELLENA CHESEREM..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Machakos (O.A. Angote, J) dated 2nd March, 2018

IN

ENVIRONMENT AND LAND COURT

CASE NO. 112 OF 2009

JUDGMENT OF THE COURT

The appellants, **Joseph Mutua Muinde** and **Dominic Musei Ikombo** filed the appeal herein against the decision of the Environment and Land Court (**Angote J.**) delivered on **2nd March, 2018**.

Briefly, the background to this appeal revolves around the ownership of Title No. **Mavoko Town Block 2/199** (the suit property). The appellants filed a plaint dated **20th April, 2009**, in which they (the then plaintiffs suing as trustees and on behalf of **Mitaboni Katani Co. Ltd**) (the Company) averred that by an agreement dated **7th December, 2007** between themselves and the respondents herein (the then defendants), the suit property was sold to the respondents for Kshs 3,420,000.00. On execution of the agreement, the respondents paid a deposit of Kshs 342,000.00 leaving a balance of the purchase price of Kshs 3,078,000.00 to be paid upon completion; that in anticipation of payment of the purchase price in terms of the agreement, the appellants transferred the title of the suit property to the respondents. The appellants further averred that the respondents have fundamentally breached the agreement by failing and /or refusing to pay the balance of the purchase price upon completion.

The sale agreement was subject to the Law Society Conditions of Sale [1989].

In the plaint, the appellant prayed for:

“ (i) An order directing the Land Registrar Machakos to rectify the register in respect of title Mavoko town Block 2/199 by reinstating the plaintiffs as registered proprietors thereof as trustees of Mitaboni Katani Company Limited.

(ii) An order compelling the Defendants to avail the title deed in respect of title Mavoko Town Block 2/199 to the Land Registrar Machakos for cancellation failing which the Land Registrar be at liberty to effect the rectification notwithstanding that the title deed will not have been availed to him.

(iii) General damages for breach of contract and interest thereon at court rates.

(iv) Costs of this suit and interest on the decretal amount at court rates”.

On their part, the 1st and 2nd respondents filed a defence to the plaint as well as a counter-claim dated **2nd June, 2009**. They blamed the appellants for eaching the sale agreement. The respondents asserted that it was the appellants who were in continuing breach of clause 14 (1) of the Law Society conditions of sale [1989] as the respondents have **“at all times been and are still ready and willing to pay the balance of the purchase price, which they have deposited with their advocates, save only that vacant possession be given and beacons be pointed out by the plaintiffs”**. In the Counter-Claim, the respondents prayed for; *inter alia* **“General damages for breach of contract, the plaintiffs be compelled to point out the beacons over MAVOKO TOWN BLOCK 2/199 and the plaintiffs be compelled to issue vacant possession over MAVOKO TOWN BLOCK 2/199”**.

Upon consideration of the evidence before him, the learned Judge (**Angote, J.**) found in favour of the respondents as follows:

“From the evidence before me it is obvious that the suit land is not free of encumbrances. It was a fundamental term of the agreement that the Plaintiffs were selling the suit land free of encumbrances. The Plaintiffs were required to hand to the Defendants vacant possession of the land before being paid the full purchase price.

Having not denied that the suit property is occupied by other third parties, and having not handed to the Defendants the suit land free of encumbrances, I find that it is the Plaintiffs who are in breach of the agreement of 7th December, 2007.

In any event, even if the Defendants are the ones who are in breach of the Sale Agreement, the Plaintiffs cannot rescind the agreement of sale before service on the Defendants the requisite completion notice as provided for under Clause 4 of the Law Society Conditions of Sale (1989). It is only upon service of a completion notice that it shall become a term of the contract that the transaction shall be completed within twenty one (21) days of service and, in respect of such period, time shall be of the essence of the contract. Having not done so, I find that the suit was a non-starter ab initio.

For those reasons, I find and hold that the Plaintiffs have failed to prove their case on a balance of probability. On the other hand, the Defendants have proved that it is the Plaintiffs, who are in breach of the agreement of 7th December, 2007”.

In his final orders, the judge dismissed the plaintiffs’ plaint dated **20th April, 2009** and allowed the defendants’ counter-claim dated **2nd June, 2009** and rendered himself as follows:

“(i) The Plaintiffs be and are hereby compelled to point out the beacons of land known as Mavoko Town Block 2/199 to the Defendants.

(ii) The Plaintiffs be and are hereby compelled to grant to the Defendants vacant possession of land known as Mavoko town Block 2/199.

(iii) The Plaintiffs to pay the costs of the suit and the Counter-claim”.

Aggrieved with the findings of **Angote, J.**, the appellants filed the appeal now before us. In a Memorandum of Appeal dated **19th February, 2019**, the appellants listed 6 grounds of appeal faulting the judge for finding that the appellants were required to hand over vacant possession of the suit property before full payment of the balance of the purchase price contrary to the express term of the sale agreement; for making a decision whose effect was allowing the respondents to own both the land and the purchase price after correctly making a finding that the respondents paid only Kshs 342,000.00 out of the purchase price of Kshs 3,420,000.00; for holding that the appellants were in breach of the agreement on allegation of occupation of the suit property by third parties without verification as to whether the alleged occupation was before or after registration of the transfer in favour of the respondents; for failing to find that the persons who allegedly repulsed the respondents from taking possession of the suit property were not members of the **Mitaboni Katani Company** as per the members’ register and that the respondents’ alleged repulsion was long after the transfer in favour of the respondents; for misdirecting himself on the issue of rescission and the applicability of completion notice since the appellants had complied with part of the agreement by transferring the suit property to the respondents whilst the respondents refused to pay the balance of the purchase price, and finally, for going against the weighty material evidence presented before him.

On **11th March, 2020**, the appeal came up for plenary hearing before us. **Mr. Mbarak** learned counsel holding brief for **Mr. Mulwa** appeared for the appellants whilst learned counsel **Mr. Mungla** appeared for the respondents. Both counsel relied on their written submissions and did not wish to make oral highlights.

In their written submissions filed on **15th July, 2019**, the appellants faulted the trial judge's interpretation of the provisions of the sale agreement and the Law Society Conditions of sale on which both parties were basing their respective cases. They also faulted the judge's finding that they were required to surrender vacant possession of the suit property to the respondents before the balance of the purchase price was paid in full, a finding which was contrary to the express terms of the agreement contained in the Law Society Conditions of Sale to which the transaction was subject and which expressly provides that a purchaser shall not be entitled to possession of the property until he has paid or (as the case may be) unconditionally authorized the release of the whole of the purchase money to the vendor. Condition number 5 of the Law Society Conditions of Sale provides as follows: ***"save as provided in condition 6 the purchaser shall not be entitled to possession of the until he has paid or (as the case may be) unconditionally authorized the release of the whole of the purchase money to the vendor"***. With regard to rescission, the appellants contended that the question of rescission could not arise at that stage since the transfer had already been effected and that the only relief available to them was restitution of their property for total failure of consideration and payment of damages for breach of the sale agreement; that it is not disputed that no further sums were paid other than the 10% of the purchase price and further, that the persons who have made it difficult for the respondents to take possession are third parties who are not members of **Mitaboni Katani Company Ltd.**

In opposing the appeal, the respondents filed written submissions on **23rd August, 2019** and submitted that the appellants had guaranteed that the suit property is vacant and free from any encumbrance whatsoever; that after the transfer of the suit property, the respondents severally asked the appellants for vacant possession vide letters dated **2nd, 10th and 15th July, 2008** in exchange of the balance of the purchase price to no avail; that they had been faced with unique circumstances in which transfer of title was done without vacant possession; that while the respondents were under obligation to pay the balance of the purchase price within the completion period, the appellants were equally obliged to transfer and grant vacant possession of the suit property; that the issue of vacant possession was at the centre of the whole agreement and finally, that the respondents' ability and /or willingness to settle the balance of the purchase price is a non-issue as they are ready and willing to pay the balance of the purchase price, subject to the suit property being vacant.

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

The appeal before us is a first appeal. Our mandate as a 1st appellate court is well articulated in the case of ***Selle & Another versus Associated Motor Board Company Ltd and others [1968] 1 EA 123***, wherein the Court of Appeal for Eastern

Africa set out the principles to be considered when determining an appeal from the High Court as follows:-

"An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally."

The undisputed facts of this appeal are that the parties entered into a sale agreement on **7th February, 2007**. It is also not disputed that the total purchase price of the suit property was Kshs 3,420,000 out of which the respondents paid a deposit of Kshs 342,000.00 (being the 10% of the purchase price). In paragraph 4 of the sale agreement, it was provided that the sale was subject to the Law Society of Kenya Conditions of Sale (1989). Further, the completion period ***"...shall be within Ninety (90) days from the date of execution of the agreement"***. It was a further term of the agreement that ***"The vendor guarantees that the property is vacant and free from any encumbrance whatsoever and he covenants that rates, land rent if any and electricity have been paid to date"***.

It is also not in dispute that the respondents (although the transfer was registered in their favour) have to-date not taken possession of the suit property.

It is also not denied that the suit property is occupied by persons whom the appellants contend are not members of their Company.

The learned judge considered the matter in view of the terms of the sale agreement and concluded:

"From the evidence before me, it is obvious that the suit land is not free of encumbrances. It was a fundamental term of the agreement that the plaintiffs were selling the suit land free of encumbrances. The plaintiffs were required to hand to the defendants vacant possession of the land before being paid the full purchase price."

Having not denied that the suit property is occupied by other third parties, and having not handed to the defendants the suit land free of encumbrances, I find that it is the plaintiffs who are in breach of the agreement of 7th December, 2007"

We agree. In our view, the appellants cannot blow hot and cold. The sale agreement specifically provided that the suit property was in vacant possession. The reality on the ground is that it is not in vacant possession. It is occupied by persons whom the appellants contend are not their members.

That may well be so but it was a specific term of the sale agreement that the appellants were to grant vacant possession and that the sale was

free from encumbrances. The appellants have failed to grant the vacant possession and to this extent, they are in breach of the agreement of sale dated 7th February, 2007.

In our view, the appellants who admit that the suit property is occupied by other persons, do not expect to be paid the balance of the purchase price and yet there are persons on the suit property. If vacant possession had been secured, then the appellants had every right to blame the respondents for failure to pay the balance of the purchase price and issue a completion notice as provided in clause 4 of the Law Society Conditions of Sale.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs.

Dated and Delivered at Nairobi this 7th Day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

A. MAKHANDIA

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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