



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

**(CORAM: KOOME, GATEMBU, & SICHALE, J.J.A)**

**CIVIL APPEAL NO 18 OF 2017**

**BETWEEN**

**JULIUS MUNYURI MUTURIA.....1<sup>ST</sup> APPELLANT**

**CYPRIAN KUBAI.....2<sup>ND</sup> APPELLANT**

**AND**

**KRISHNA KUMAR SHIVLAL LAKHANI.....RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Meru (J.A. Makau, J.) dated 13<sup>th</sup> December, 2016***

***in***

**MERU H.C.C.C. NO 67 OF 2008**

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**JUDGMENT OF THE COURT**

This is an appeal against the judgment of **Makau, J.** delivered on 13<sup>th</sup> June, 2016.

A brief background of this appeal is that by a plaint dated 5<sup>th</sup> June, 2018 **Krishna Kumar Shivlal Lakhani**, the respondent herein filed suit against **Julius Munyuri Mutoria** and **Cypriano Kubai**, the then 1<sup>st</sup> and 2<sup>nd</sup> defendants and now the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively.

In the plaint, the respondent averred that by a written sale agreement dated 28<sup>th</sup> June, 2007 the appellants agreed to sell Plot. **No. Block 11/36 Meru Town B** (hereinafter suit land), at a consideration of Ksh.8 million. The purchase price was to be paid directly to **Consolidated Bank of Kenya Ltd-Maua Branch** (the bank) to offset a loan owed by the appellants. The respondent contended that in part performance of the sale agreement, he paid a sum of Ksh.2,500,000/-; that thereafter the appellants reneged on the agreement and that it was a specific term of the agreement that whoever was to breach the agreement would pay a penalty of 500,000/- to the innocent party. The respondent sought judgment against the appellants jointly and severally for:

**“ a) Ksh.3,000,000/= plus interest,**

**b) Costs of this suit,**

**c) any other or such better relief that this Hon Court may deem fit and just to grant.”**

In a statement of defence dated and filed on 16<sup>th</sup> July, 2008, the appellants admitted having entered into a sale agreement with the respondent on 28<sup>th</sup> June, 2007. They further admitted that the purchase price was to be paid directly to the Bank to settle an outstanding loan. However, the appellants contended that the respondent was unable to pay the full purchase price and he (the respondent) authorised the 2<sup>nd</sup> appellant to look for an alternative buyer. According to the appellants, it was the respondent who had breached the sale agreement and thus he was not entitled to the sum of Ksh.500,000/- being damages for breach of the agreement.

Be that as it may, on 4<sup>th</sup> June, 2009 the Bank filed a motion to be enjoined in the suit as an interested party. The motion was allowed and the Bank filed a statement of defence dated 26<sup>th</sup> August, 2009. In the main, the Bank contended that it was not privy to the sale agreement between the appellants and the respondent and that the intended sale of the suit land was illegal, null and void as the suit land was charged to the Bank.

Following a chamber summons application, in a ruling delivered on 7<sup>th</sup> May, 2010 the appellants were allowed to amend their statement of defence to include a counter claim. In the counter claim, the appellants prayed to be paid a sum of Ksh.4,961,831.66 as accrued back interest, Ksh. 500,000/- liquidated damages for breach of contract and costs of the suit. In a defence to the counter claim dated 26<sup>th</sup> August, 2010, the respondent denied the averments in the amended statement of defence and counter claim.

The dispute between the parties was heard by **Makau, J.** who in a judgment dated 13<sup>th</sup> December, 2016 found in favour of the respondents and ordered:

**“a) Refund of purchase price of Ksh.2.5 million.**

**b) Payment of Ksh.500,000/- to the plaintiff being sum stipulated in sale agreement as penalty for breach of contract.**

**c) Counterclaim for Ksh.4,961,831/66 is dismissed with costs.**

**d) Costs of the suit with interest to the plaintiff from the time of filing the suit till payment in full.”**

The appellant was dissatisfied with the said outcome and in a Memorandum of Appeal dated 27<sup>th</sup> February, 2017 listed 7 grounds of appeal. However, in the appellants' written submissions dated 27<sup>th</sup> October, 2017, these grounds were condensed into 3 main grounds. In grounds 1, 2 and 3 the appellants contended that the respondent breached the sale agreement by failing to pay the full purchase price of Ksh.8 million to the Bank. In respect of grounds 4 and 5, the appellants submitted that on 10<sup>th</sup> June, 2008, the respondent obtained orders of inhibition that remained in force until 4<sup>th</sup> June, 2009 and that the interest that accrued until the inhibition was lifted on 4<sup>th</sup> June, 2009 was Ksh.4,961,181.66. Further that it was wrong for the trial judge to dismiss the appellant's counter claim. In respect of grounds 6 & 7, the appellant submitted that there was no mis-representation made to the respondents on the outstanding loan owed to the Bank.

On his part, the respondent filed his written submissions dated 19<sup>th</sup> January, 2017 and maintained that it was the appellants who breached the sale agreement; that the respondent was not given the exact amount of money owed to the Bank and that upon a search carried out on 26<sup>th</sup> July, 2007, the respondent found that the appellants owed the Bank a sum of Ksh.16 m.

On 30<sup>th</sup> October, 2018 the appeal came before us for plenary hearing. Learned counsel **Mr. Wainana** appearing for the appellants and **Miss Kithaka** for the respondents. Both counsel wholly relied on their written submissions.

The appeal before us is a first appeal. Our mandate as a first appellate court is to re-evaluate and re-analyse the evidence so as to draw our own inferences of fact and to arrive at our own independent conclusions. In so doing, however, we are cognizant that unlike the trial court we did not have the benefit of hearing and seeing the witnesses and we shall give due consideration and defer to the learned trial Judge's factual findings only to depart from them where they are based on no evidence, or there is a misapprehension of the evidence or where the findings of the Judge are not supported by the evidence. See **SELLE V. ASSOCIATED MOTOR BOAT CO LTD & OTHERS [1968] E.A. 123.**

In line with our mandate, we have considered the record, the memorandum of appeal, the rival written submissions, the authorities cited and the law.

The facts of the dispute are fairly straight forward. The parties herein entered into a sale/purchase agreement. The terms of the 1<sup>st</sup> agreement dated 28<sup>th</sup> June, 2007 and that of the 2<sup>nd</sup> agreement dated 3<sup>rd</sup> December, 2007 were not dissimilar save that the agreement of 3<sup>rd</sup> December, 2009 had two additional clauses reflecting the payments of Ksh.2m and Ksh500,000/- It is also not in dispute that in the two agreements, it was stipulated that the sum of Ksh.8m would be paid directly to the Bank. However, there was non-disclosure on the part of the appellants that the sum owed to the Bank was Ksh. 16m. The respondent got to know of the outstanding sum when he carried out a search on 22<sup>nd</sup> December, 2006 and found that the property was charged to the Bank for Ksh.16 m.

In his oral testimony in court, **Cypriano Kubai Iringo** (the 2<sup>nd</sup> appellant herein) told the trial court **“as of the time of the agreement the debt was 8 million. I was selling the property to clear the loan.”** This assertion is in stark contrast with the depositions of **Erastus Wanjohi** the then Maua Branch Manager of the Bank. In an affidavit in support of the Notice of Motion dated 4<sup>th</sup> June, 2009 seeking to have the Bank enjoined in the suit, in paragraph 4 thereof he deposes:-

**“That the applicant had registered a legal charge over the subject matter and advanced financial facilities to the defendant now (sic) outstanding at Ksh.16 M”**

Clearly, the appellants entered into a sale/purchase agreement knowing very well that the suit land was charged to the Bank and secondly, they misrepresented the factual position to the effect that on payment of Ksh.8m, the Bank would transfer the property to the appellant. The appellants having not been candid, and on learning of the outstanding sum of Ksh.16m the respondent had every reason to be wary and he was justified in pulling out of the arrangement as a payment of Ksh.8 m would still not have freed the title from the Bank. The learned trial Judge considered the lack of disclosure on the part of the appellants and rendered himself as follows:

***“The defendants did not in their evidence produce any evidence from the bank to show the outstanding loan with the bank as by 3rd December 2007, or that of such time it had been reduced to Ksh.8 million. The defendants deliberately failed to disclose material facts pertaining to performance of the contract and further deliberately implied by misrepresentation the plaintiff that by paying Ksh.8 million to the consolidated Bank of Kenya Limited the property would be transferred to him notwithstanding the loan was above Ksh.8million.”***

We are fully in agreement with the summation made by the trial judge in concluding that the breach of the sale agreement was by the appellants and not the respondent.

As regards the sum of Ksh.4,961,831.66, we too find that no explanation was given as to how this sum was arrived at. Was it interest for the entire sum of Ksh.16m? As rightly pointed out by the learned judge, the documents produced in court in support of this claim lacked material particulars and one would not relate it to the sum borrowed by the appellants. Besides, the respondent cannot be faulted for placing a caveat on the property. The appellants had failed to disclose to respondent that the property was charged to the Bank. Having paid 2.5 m and on learning of the charge, the respondent had every reason to place a caveat in a bid to safeguard the sum of Ksh.2.5 m he had paid towards the purchase of the suit land. Therefore, any interest accruing during the pendency of the inhibition cannot be visited upon the respondent.

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

***Dated and delivered at Meru this 6<sup>th</sup> day of February, 2019***

**M. K. KOOME**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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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.*

**DEPUTY REGISTRAR**