IN COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 58 OF 2012

BETWEEN

NELSON MUTAI T/A KANDIE

MUTAI & CO. ADVOCATES............................APPELLANT

AND

BENSON MBUVI KATHENGE.......................RESPONDENT

(An appeal from the Ruling of the High Court at Nairobi (M. Koome, J.), as she then was, dated 22nd October, 2010

in

H.C.C.C (O.S) No.189 of 2010)

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JUDGMENT OF THE COURT

The appellant, a firm of advocates, acted for the vendor in a sale of land transaction in which Benson Mbuvi Kathenge (the respondent) agreed to buy LR No. 209/8275/20 (the suit premises) from the vendor, George Kiprotich Mackenzie. According to the agreement, the purchase price was Kshs. 6.5 million whereby, Kshs. 3.25 million would be paid as deposit upon execution of the agreement and the balance to be settled within 7 days of the date of registration of the transfer in favour of the purchaser. The deposit of Kshs. 3.25 million was duly paid to the appellant upon execution as agreed.

Unfortunately, the certificate of title to the suit premises that the vendor had intended to transfer to the respondent was canceled by the Registrar of Titles before the transfer. That action by itself frustrated the contract rendering it null and void on account of lack of capacity by the vendor to sell the suit premises. Naturally, the respondent sought to obtain a refund of the deposit from the appellant who was holding it as a stakeholder. Instead, on 2nd December, 2008 the appellant only paid Kshs. 300,000 and failed to reimburse the rest, forcing the respondent to move the High Court by originating summons on 18th March, 2010. He asked the High Court to orders the appellant to **".. pay the applicant a sum of Kshs. 2,980,975, being the balance of a refund of the deposit in respect of the sale of L.R NO. 2009/8275/20 between one George Kiprotich and the plaintiff"**

The appellant in response to the summons contended that he was at liberty, subject to clause 4.1 of the agreement, to apply and did apply the deposit to obtain title documents. Pursuant to this, he had to pay to the vendor the deposit of Kshs. 2.5 million which he had been holding as a stakeholder.

On 22nd October, 2010 Koome, J. (as she then was) after considering arguments by both parties rendered a ruling in which she concluded that clause 4.1 upon which the appellant relied did not give him liberty to pay the vendor the entire purchase price before completion; that the appellant did not seek the respondent's advocates' consent before releasing the deposit; that the agreement was subject to the LSK conditions of sale which require a deposit towards a sale of land to be held by an advocate as a "*stakeholder*"; and that in accordance with those conditions, the vendor's advocate could only release the deposit to the vendor before completion with the express consent of the respondent's advocate.

The learned Judge then went on to deliver a conditional judgment in which she ordered the appellant to deposit the sum of Kshs. 2.9 million in court within 15 days failing which the judgment would be entered against the appellant for the said sum with interest and costs. The appellant neither deposited the sum nor did he seek an extension of time to comply with those orders. As a result, judgment was entered in

terms of the prayers in the application.

This aggrieved the appellant who has lodged this appeal on 10 grounds whose combined effect is that the learned Judge erred by: failing to render a proper interpretation to clauses 2 and 4 of the agreement; re-writing the contract for the parties; not making a finding on how much expenses the vendor’s advocate was authorized to incur on rates, rent and completion documents; not finding that part of the deposit was utilized to have the title released by a third party who was holding it as *lien*; proceeding to order the appellant to refund Kshs. 2.9 million even after finding that part of the deposit was to be utilized to pay rates and rent; not considering that Kshs. 300,000 had already been refunded; and arriving at an erroneous conclusion based on an improper analysis of the evidence.

At the hearing, both Mr. Ongoto, holding brief for Mr. Kabue for the appellant and Mr. Nzioka holding brief for Mr. Mulekyo for the respondent fully relied on their written submissions with no need for oral highlights.

We have considered the arguments in those submissions and the authorities cited, for instance, the case of **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Limited and Anor** (2002) 2 EA.503, for the proposition that a court cannot rewrite the contract for the parties. See also: **Pius Kimaiyo Langat V. Co-operative Bank of Kenya Limited**, Civil Appeal No. 48 of 2015.

In a nutshell, the appellant maintained that he was not liable after utilizing the deposit to settle rates, rent and to obtain transfer documents; that after these payments he remained with a balance of Kshs. 300,000 which upon failure of completion he promptly refunded to the respondent; that the learned Judge ought to have deducted that amount from the decretal sum.

On the other hand the respondent submitted that clause 4 of the sale agreement was explicit that the deposit would be held by the vendor’s advocate as stakeholder and no part was to be released to the vendor directly; that had the parties intended that the deposit be released to the vendor directly as opposed to his advocate, the parties would have expressly made such provision. As a matter of fact, under **clause 14.2 (d)** and **(e),** the appellant guaranteed that the property was being sold free of encumbrances and with no claim from any third party.

In a first appeal, this Court has a primary role to re-evaluate the evidence on the record in order to determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates**, Civil Appeal No. 161 of 1999.

In our judgment, there are two issues for consideration: whether the appellant could, by the terms of the agreement, release the deposit to the vendor and pay for rates and for the release of documents of title from the deposit. Second, which is an offshoot of the first question, is whether the appellant was liable to refund to the respondent the deposit. The following are the relevant considerations in answering those two broad questions.

Clause 2.1 reads:

> **“The sale and purchase of the Property is subject to the LSK Conditions which shall be deemed incorporated herein *in extenso* save in so far as the LSK conditions are not inconsistent with the provisions of this Agreement or are varied or excluded by the terms of this agreement.”**

Clause 4.1 reads:

> **“The purchaser shall upon execution of this Agreement pay to the Vendor’s advocate the sum of Kenya Shillings Three million two hundred and fifty thousand) Ksh. 3,250.000/-). The vendor is at liberty to apply the said sum towards rates and the rents and to subsequently obtaining the relevant transfer documents.”**

It is common factor that the appellant duly received the said deposit of Kshs. 3,250,000 from the respondent. The vendor was required by Clause 4.1 “...**to apply the said sum towards rates and the rents and subsequently obtaining the relevant transfer documents.”** With regard to the land rates and rents, there is evidence of a property rates payment request dated 11th September, 2008 from the then City Council of Nairobi showing that the amount due was Kshs. 279,108. There is a receipt for Kshs. 5,000 for a rates clearance certificate with respect to the suit premises. There is a rent clearance certificate dated 23rd October 2008 confirming payment. These in aggregate amount to Kshs. 284,108. Although the agreement permitted the appellant to incur rates and rent expenses in respect of the suit premises, the clearance receipts relied on for this purpose were in the name of one Dharam Vil Kohil (a third party whose name appears on the payment request for property rates issued by the City Council) and not the vendor. The certificate of title also shows that the suit property was transferred to the said Dharam Vil Kohil in violation of clause 2.1 of the agreement.

We are unable to agree with the appellant’s argument that the certificate of title formed part of the completion documents on which the sum of Kshs. 2.5 million could be applied and was in fact applied in order to have the title released by a third party who was holding it as *lien*. By **Clause 4.1**, which we have reproduced earlier, the vendor was permitted only to apply the deposit towards rates and the rents. He was subsequently required to obtain the relevant transfer documents. It did not permit him to pay some other third party to release the title.

Secondly under **Clause 4.1.**, the appellant undertook as follows;

> **“d) There is no encumbrance or equity on, over or affecting the whole or any part of the property and there is no agreement or commitment to give or create any such commitment of whatever nature.**
>
> **e) The Vendor is solely entitled at law and in equity to the property for an unencumbered estate in possession and has a good marketable interest in it.”**

Having assured the respondent that the suit premises was free from any encumbrances while knowing that there was a third party one Mr. Ken who was holding the certificate of title as *lien*, the vendor was in breach of the agreement. Notably on the record as correctly observed by the learned Judge, there is no documentation to support the allegation that the said Mr. Ken had been paid Kshs. 2,000,000 as alleged by the appellant. This was a clear case of misrepresentation. The appellant is to blame for concealing all these material facts from the respondent and for going ahead to pay the sum of Kshs. 2 million, if pay he did, to a third party who was not privy to or even envisaged in the sale agreement.

The appellant was a stakeholder, and the learned Judge correctly found him as one. The agreement was subject to the LSK conditions of sale requiring the deposit be held by an advocate as a stakeholder. LSK Conditions of Sale (1989) clause 5.2 provides as follows:

> **"5.2 Stakeholder**
>
> **5.2.1 The Purchase Price or any part thereof including the Deposit is to be held by the Vendor's Advocate or auctioneer (in the case of auctions) as stakeholder and if demanded by any party in an interest earning account and the principal and Accrued Interest will be dealt with in the manner set out in the Conditions and the Agreement.**
>
> **5.2.2 Where the <u>transaction does not proceed to</u> <u>completion through no fault of the Purchaser the Deposit with Accrued Interest but less any applicable withholding costs charged by the bank is to be paid to the Purchaser or as per the Purchaser's instructions</u>."** (Emphasis supplied)

We have said that the transaction was frustrated by no fault on the part of the respondent. The appellant was under an obligation to hold the deposit until the right to legal ownership had been established between the appellant and respondent. See the passage in **<u>George Muriaini Muhoro t/a A.M. Muhoro Advocate V. George Ndungu Kamiti</u>**, Civil Appeal No. 233 of 2003 where this Court expressed itself as follows on the duty of a stakeholder:

> **"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.'***
>
> **However, a stakeholder has a duty to deliver the money or property to the owner or owners once the right to legal possession or ownership has been established by judgment or by an agreement between competing parties. In the case the subject of this appeal the appellant was not a party to the agreement dated 3rd March, 2000. The parties thereto have been stated elsewhere in this judgment. It is said the vendor failed to obtain the consent of the Land Control Board (see special condition 4 of the agreement).**
>
> **If this be so, then the Kshs.90,000/= deposit held by the appellant as stakeholder was not liable to be forfeited to the vendor as provided in special condition No. 2 of the agreement. Instead it was refundable to the respondent/purchaser, see special condition No. 3 of the agreement."**

We reiterate that the transaction having been frustrated and rescinded, the LSK conditions of sale above require that the deposit, less any applicable withholding costs charged by the bank, be paid over to the purchaser (the appellant). Additionally, **clause 14.1 (b)** provides:

> **"Extend from time to time the Completion Date provided always that the Purchaser and the Vendor may in their sole discretion rescind this Agreement at any time if at such time the Vendor shall not be ready, able or willing to complete and upon such rescission the Purchaser shall have the right, without prejudice to any other rights or remedies available to the Purchaser, to demand from the Vendor the refund forthwith of all monies paid by or behalf of the Purchaser but less costs incurred performing the purchaser's instruction."**

Further, **clause 6.4.3** of the LSK Conditions of Sale provides:

> **"6.4.3 On rescission the Vendor shall repay to the Purchaser the Deposit and any payment of Purchase Price and Accrued Interest and the Purchaser shall return to the Vendor all documents belonging to the Vendor upon which neither Party shall have a claim against the other for costs, compensation or otherwise."**

The appellant was obliged to hold the deposit and not to release any part of it to the vendor or anyone else before the transfer unless there was express authorization of the respondent. The duty of care imposed on an advocate in such transactions was considered in the case of **<u>Kinluc Holdings Ltd V. Mint Holdings</u> <u>Limited & Anor,</u>** Civil Appeal No. 264 of 1997, where this Court held that:

> **"The obligation of the purchaser to pay the balance of the purchase price and the obligation of the advocate to receive the said sum as a stakeholder and hold the same until successful completion are two factors closely interwoven and it would be prudent for the superior court to decide on all issues at the same time to bring finality to the litigation".**

As far back in time as 1830 in the case of **<u>Stevenson V. Rowand</u>** 6, English Reports, 668, the House of Lords in England stated the position 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."

It is common ground that the appellant made part reimbursement of Kshs. 300,000 to the respondent upon frustration of the agreement; and that the appellant made unauthorized payments of rates and rent in favour of strangers, Dharam Vil Kohil and Ken. Being of the opinion that the appellant was to hold the deposit as a stakeholder, we come to the conclusion that the learned Judge with respect reached the correct determination that the appellant was to reimburse to the respondent the unpaid balance of Kshs. 2,950,000 which sum takes into account Kshs. 300,000 the former paid over to the latter.

Accordingly, the appeal is bereft of any substance and we dismiss it with costs.

Dated and delivered at Nairobi this 5th day of February, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

P.O KIAGE

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JUDGE OF APPEAL

A K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR