



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & MURGOR, JJA)

CIVIL APPEAL NO. 69 OF 2011

BETWEEN

KINLUCK HOLDINGS LIMITED.....APPELLANT

AND

MINT HOLDINGS LIMITED.....1ST RESPONDENT

MACHARIA NJERU.....2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court

at Nairobi (Rawal, J.) delivered on 15th October, 2009

in

HCCC No. 3698 of 1995

JUDGMENT OF THE COURT

By an amended plaint dated 18th October, 2007, **KINLUCK HOLDINGS LIMITED**, (the appellant) filed a suit before the High Court at Nairobi against **MINT HOLDINGS LIMITED** (the 1st respondent) and **MACHARIA NJERU** (the 2nd respondent). In the amended plaint the appellant sought *inter alia*, the following orders against the respondents: judgment for KShs.5,400,000/= together with interest at 18% as from 18th October, 1995 or in the alternative a declaration that the 1st respondent holds L.R. No. 12494/10 in trust for the appellant, or that the appellant is a holder of an unpaid vendor's lien and an order that the 1st respondent do transfer/retransfer L.R. No. 12494/10 to the appellant.

Briefly the facts of this appeal are that, on 29th August, 1995 the appellant and the 1st respondent entered into a sale agreement whereby the appellant agreed to sell to the 1st respondent its parcel of land known as Land Reference Number 12494/10 (the suit property). The 2nd respondent, who is an advocate of the High court of Kenya, was to act for both the appellant and the 1st respondent in the sale transaction. Under the said agreement the sale price was agreed at Kshs.6,000,000/=, out of which 10% thereof amounting to Kshs.600,000/= was to be paid by the 1st respondent on execution of the agreement. The balance thereof being Kshs.5,400,000/= was to be deposited with the 2nd respondent within 30 days of execution of the agreement to hold as stakeholders pending successful transfer of the property in favour of the 1st respondent.

On the same day that is 29th August, 1995, the appellant and the 1st respondent also executed the transfer of the suit property in favour of the 1st respondent. The 2nd respondent issued the appellant with a professional undertaking dated 28th August, 1995, under which he undertook not to release the registered transfer and title documents relating to the suit property to the 1st respondent. It is important to note here, because it is one of the main issues raised by the parties herein, that the said undertaking was contradictory to clause 5 of the agreement of sale. On 18th October, 1995, the transfer was registered in favour of the 1st respondent. However, the 1st respondent failed to remit the balance of the purchase price to the 2nd respondent as agreed. From the evidence on record it appears that after the registration of the transfer the appellant made several follow ups and visits to the 2nd respondent's office, wherein he was advised that the 1st respondent was yet to make payment as agreed.

Later, the 1st respondent issued the 2nd respondent with two post-dated cheques for Kshs.2,400,000/= and Kshs.3,000,000/= in payment of the balance of the purchase price. However, the first cheque upon being banked by the 2nd respondent was returned unpaid and the 1st

respondent advised the 2nd respondent not to bank the 2nd cheque. Subsequently, the 1st respondent remitted Kshs.1,500,000/= to the 2nd respondent in part payment of the balance, which amount the appellant refused to accept. According to the 2nd respondent upon refusal by the appellant to accept this amount, he retained the same as lien for various services rendered to the 1st respondent.

Aggrieved by the foregoing state of affairs, the appellant opted to file the suit before the High Court. Upon hearing the parties the High Court (Rawal, J. as she then was) entered judgment in favour of the appellant for the amount of Kshs.5,400,000/=. Out of the said amount the 1st respondent was to pay Kshs.3,900,000/= with interest at 18% with effect from 18th October, 1995 whereas the 2nd respondent was to pay Kshs.1,500,000/= with interest at court rates with effect from 6th December, 1995. Dissatisfied with that judgment, the appellant proffered this appeal against the High Court's decision, raising twenty three grounds of appeal in its memorandum of appeal. The 2nd respondent filed a notice of cross appeal. In the cross appeal, the 2nd respondent complained that the learned Judge fell into error when she failed to appreciate that the amount of Kshs.1,500,000/= was not in issue between the parties; in holding that Kshs.1,500,000/= was held on trust for the appellant and which the 2nd respondent was obliged to retain as such; in failing to appreciate that once the appellant declined to accept the sum of Kshs.1,500,000/= the 2nd respondent was entitled to refund the amount to the 1st respondent or apply it towards its legal fees; in awarding interest to the appellant notwithstanding that the appellant had refused to accept the Kshs.1,500,000/=: which the 2nd respondent had proffered to the appellant and in condemning the 2nd respondent to pay 10% of the appellant's costs.

Parties filed written submissions in support of their positions and respective counsel highlighted the submissions before us.

The appellant submitted that the 2nd respondent could not through his letter dated 28th August, 1995 unilaterally vary clauses 1 and 5 of the agreement for sale. The appellant argued that the agreement was between the appellant and itself and that the doctrine of privity of contract prevented the 2nd respondent from altering it. The appellant further argued that through the same letter the 2nd respondent as an advocate could not contract out of his contractual duty under a retainer to use reasonable care and skill in acting for the appellant. The appellant contended that the letter of undertaking from the 2nd respondent was of no effect and the respondents' obligations under the sale agreement and retainer remained.

The appellant submitted that the transfer of the land before payment of the entire purchase price was through an unconscionable conduct by the respondents with the result that the 1st respondent holds the property upon a constructive trust for the beneficial owner. The appellant contended that the transfer of the property fundamentally altered the relationship between itself and the respondents and that the doctrine of rescission of contract by abandonment should be inferred from that action.

The appellant argued that under land law a vendor does not part with possession of land before the purchase price is paid and therefore the purported sale of the suit property is null and void. The appellant further argued that the 1st respondent does not hold a good title to the suit property because it was transferred to him fraudulently within the meaning of Section 23 of the repealed Registration of Titles Act. The appellant contended that it did not vary the contract of sale with the 1st respondent and it had never agreed to the property being transferred before it was paid the balance of the purchase price. The appellant further contended that it did not vary the contract of retainer which it entered with the 2nd respondent.

The appellant contended that the High Court's award of payment of the balance of the purchase price together with interest was based on a misapprehension of the law because the contracts of sale and of retainer came to an end on 18th October, 1995. The appellant contended that the appropriate award is an order that the 1st respondent retransfers the suit property to the appellant and the respondents jointly pay it *mesne* profits.

The appellant submitted that a party to a suit has the right at any time or stage of proceeding to abandon any prayers it has sought or change the ranking of prayers. The appellant argued that in its written submissions before the High Court, it had abandoned prayer A which sought payment of the balance of the purchase price in favour of prayer B (a) which sought re-transfer of the property. It therefore contended that the learned Judge misdirected herself in holding that the alternative prayers can only be granted if the primary prayers are not available. The appellant argued that the learned Judge erred in failing to find that failure to grant the alternative remedies of rescission and re-transfer of the suit property would unjustly enrich the 1st respondent.

The appellant submitted that there was no need for it to issue a notice of rescission because the suit property had already been transferred to the 1st respondent. The appellant argued that this was a case where the High Court should have concluded that the parties had agreed to abandon the contract and therefore the doctrine of rescission by abandonment was applicable.

On its part, the 1st respondent submitted that clause 11 of the agreement for sale incorporated the Law Society Conditions of Sale and that because time was not of essence in the agreement, clause 4 (7) of the Law Society Conditions of Sale made it mandatory for the appellant to serve a 21 days completion notice. The 1st respondent argued that the learned Judge was correct in holding that the appellant did not serve it with a completion notice after expiry of the term fixed for payment of the purchase price. The 1st respondent contended that the appellant was granted the principal prayer with it prayed for in its amended plaint.

The 1st respondent argued that the appellant having abandoned the principal prayer in its evidence in chief and submissions and sought the alternative remedy and the court having held that alternative prayers can only be granted if the primary prayer is not available, the court should have dismissed the appellant's case. The 1st respondent contended that the appellant had demonstrated by evidence and specifically

the failure to issue a completion notice, its refusal to accept part payment and resistance to execute the decree granted to it. As such, it waived its right to claim the remedy of rescission or retransfer of property.

The 1st respondent further contended that the evidence on record or the conduct of the parties on, before or after execution of the sale agreement did not prove express or implied trustee/beneficiary relationship. The 1st respondent submitted that under Section 23 of the Registration of Titles Act (repealed), a title is indefeasible and can only be challenged on the ground of fraud or misrepresentation. It argued that fraud was not specifically pleaded in the plaint and that in cross examination the appellant admitted he was not implying fraud or misrepresentation on the part of the purchaser.

On his part the 2nd respondent started by submitting that he had been wrongly enjoined in the proceedings since he is holding the certificate of title as counsel who was entrusted to hold the same and has at all times been ready and willing to release it to whichever party the court decrees to be entitled to it. The 2nd respondent implored us not to deviate from the finding of fact by the trial court that after observing the evidence and the demeanor of the witnesses, the trial court accepted his evidence as more credible than that of the appellant.

The 2nd respondent submitted that the appellant by authorizing payment of the 10% deposit in a manner other than what was prescribed in the agreement proved that the appellant intended to and actually varied the sale agreement. The 2nd respondent contended that when the appellant refused to accept the payment of Kshs.1,500,000/= it ceased to be part of the purchase price and instead became the property of the 1st respondent on which he could exercise his right of lien for outstanding fees. He argued that the trial court after reaching the conclusion that he was not guilty of professional negligence, it had no basis to order that he pays the appellant the Kshs.1,500,000/= plus interest. He argued that neither the appellant nor the 1st respondent paid his legal fees and he was therefore within his right to exercise lien over the amount.

The 2nd respondent conceded that he has no objection to the judgment by the High Court being set aside and the property being re-transferred to the appellant. He argued that since the 1st respondent failed to fulfill its obligations to the appellant, justice and equity demanded that the suit property be retransferred to the appellant.

The 2nd respondent, while relying on a host of cases, argued that he was not guilty of breach of his duty of care owed to the appellant. He contended that throughout the transaction he exercised such skill above and beyond what an ordinary lawyer would have been expected to exercise.

In a rejoinder, the appellant whilst relying on the case of *Nabro Properties Limited vs. Sky Structures Limited & Others (2002) KLR 299*, submitted that the law does not allow a party to base its claim on its own wrongs. The appellant argued that the submission by the 1st respondent offended that rule by seeking to retain the suit property despite not having paid 90% of the purchase price.

We have considered the record; respective submissions by learned counsel and the authorities cited by learned counsel and are now at an opportune moment to render our decision. Our mandate on a first appeal is set out in **Rule 29 (1)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in *Selle vs Associated Motor Boat Company Limited [1968] EA 123*; where it was stated that:-

“An appeal to this court from a trial by the High Court is by way of retrial 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 if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan. (1955), 22 E.A.C.A. 270).”

We are of the view that the single issue that we should consider is whether the appellant is entitled to a retransfer of the property or whether the order by the trial court for payment to the appellant of the balance of the purchase price was satisfactory. In order to answer this question it is important to look into the circumstances surrounding the agreement to sell the suit property dated 29th August, 1995.

As noted above, under the agreement the appellant offered to sell the suit property to the 1st respondent for Kshs.6,000,000/=. The 1st respondent accepted the offer and pursuant to clause 4 of the agreement, the 1st respondent paid Kshs.600,000/= being 10% of the purchase price. Under clause 5 of the agreement it was agreed that the balance thereof would be paid within 30 days to the 2nd respondent to hold as stakeholders and release the same to the appellant upon successful registration of the transfer in favour of the 1st respondent. The agreement was dated 29th August, 1995 and therefore by virtue of clause 5 the 1st respondent should have deposited the balance of the purchase amount with the 2nd respondent on or about 29th September, 1995. Obviously the 1st respondent failed to deposit the balance as aforesaid.

However, there is another document that threw a spanner in the works, this is the letter dated 28th August, 1995 from the 2nd respondent to the appellant. Under the said letter the 2nd respondent undertook not to release the registered transfer and title documents to the 1st respondent until the appellant had been paid the purchase price in full. The 2nd respondent further undertook to release the balance of the purchase price upon receipt of the same. It is clear that that letter from the 2nd respondent which extracted clause 5 of the sale agreement which obligated the 1st respondent to deposit the balance of the purchase price with the 2nd respondent. According to the appellant's evidence the 2nd respondent was to give it a letter of undertaking not to transfer the suit property before he, the 2nd respondent, receives the balance of the purchase price from the 1st respondent. Apparently, the appellant complained to the 2nd respondent who

assured him that he would not transfer the suit property before he received payment. The transfer was however effected before the 2nd respondent received the balance.

The appellant in his submissions contended that the 2nd respondent could not alter the sale agreement by the letter of undertaking. The 2nd respondent on the other hand averred that it was the appellant himself who varied the sale agreement. The issue of variation of a contract is as much a question of law as it is of fact. It is not in dispute that immediately after the execution of the agreement the appellant authored a letter authorizing payment of the 10% deposit of the purchase price to one of its directors. This in itself was a variation of the sale agreement by the appellant. However, we think that nothing much turns on this because the appellant as the owner of the suit property was well within its powers to give direction on how the deposit was to be paid.

Of importance to us is the fact that contrary to clause 14 of the sale agreement the appellant gave possession of the suit property to the 1st respondent before it had received the entire purchase price. Two other things that further concern us is the fact that not only did the appellant execute the transfer of the suit property at the same time as the sale agreement but one of its directors accompanied the 2nd respondent to the now defunct Nairobi City Council to procure the Rates Clearance Certificate which was an essential document without which transfer of the property could not be effected. Further, even after the undertaking it sought to impugn was issued, and the suit property was transferred, the appellant authored a letter dated 5th December, 1995 authorizing the 1st respondent to pay the balance of the purchase price directly to itself. This letter was authored after the transfer was done and we are of the view that the appellant more or less acquiesced to the transfer and to the terms of the professional undertaking. The above conduct by the appellant leaves us in no doubt that the appellant in one way or another varied the agreement to its detriment to wit; giving out possession contrary to clause 14 of the agreement, facilitated the transfer of the property to the 1st respondent by procuring the land rates clearance certificate, executing the transfer and the sale agreement on the same date. We therefore agree with the trial court that the evidence by the 2nd respondent that the appellant varied the contract is more credible than that of the appellant, and that the 2nd respondent unilaterally varied the contract. Our conclusion is further strengthened by the fact that the conduct of the appellant was at odds with what it was saying. One would wonder why it would express reservations of signing the transfer, but on the other hand go ahead and help in procuring the rates clearance certificate.

The 1st respondent took advantage of the said variations and failed to pay the balance of the purchase price knowing full well that not only was it in possession of the suit property, but the same had also been transferred to it. It knew that at this juncture the appellant could not cancel the transaction and was clearly unmotivated or had no inclination to demand the balance. However, the question that begs an answer is, did the conduct of the appellant justify the failure by the 1st respondent not to pay the balance of the purchase price? We think not. As we have stated above, by virtue of clause 5 of the sale agreement, the appellant was to pay the balance of the purchase price to the 2nd respondent within 30 days. We have keenly analysed the professional undertaking given by the 2nd respondent and what is clear in our minds is that the same did not contradict clause 5 of the sale agreement as far as the obligation by the 1st respondent to deposit the balance of the purchase price with the 2nd respondent is concerned. What we are saying is that despite the contents of the undertaking, the 1st respondent was still under an obligation to comply with clause 5 on depositing the balance of the purchase price with the 2nd respondent. We are of the view that the failure by the 1st respondent to deposit the balance with the 2nd respondent resulted in a fundamental breach of an important term of the contract by the 1st respondent. That failure is a clear manifestation of a party seeking to benefit from his unlawful conduct.

It is very important to note that since the inception of the suit to date the 1st respondent has made no attempt to pay the balance of the purchase price. The last attempt at payment was the Kshs.1,500,000/= which the appellant obviously refused. Even after the High Court had directed it to pay the Kshs.3,900,000/= plus interest no attempt at payment was made. The fact that a person can fail to pay 90% of the purchase price of someone else's property which it has sought to acquire in a deceitful manner and has been in possession of the property for more than twenty years is unjustifiable. In essence, the 1st respondent, wishes to retain the suit property, which was illegally transferred to it on 18th October, 1995 contrary to the clear terms of the agreement. Thereafter, several opportunities were granted to make good the terms of the agreement, to which it failed or neglected to comply. Clearly, the conduct of the 1st respondent smacks of bad faith, since it had breached its obligation, and thereafter sought to benefit from its unlawful conduct. The law recognizes, and we reiterate that no man shall be allowed to benefit from his/her wrong doing with a view to prejudicing or injuring the rights and interests of another party. That is what the 1st respondent has succeeded in doing for the last 20 years. The transfer of the property and subsequent conduct of refusing either to retransfer or pay the balance of the purchase price in reasonable time was not only unconscionable, but fraudulent. For this Court to countenance such behavior would

result in absurdity, and more importantly, unjust enrichment on the part of 1st respondent.

The 1st respondent is clearly unremorseful and the rights of the appellant are of no concern to it. This is clearly demonstrated in its submissions before us where it cavalierly stated that the High Court should have dismissed the appellant's case and not granted the appellant the relief it was granted. This is a clear case of unjustifiable enrichment by the 1st respondent to the detriment of the appellant. We are of the firm view that even if the appellant accepted the terms of the undertaking, the 1st respondent is guilty of breach of a fundamental term of the agreement, non-payment of the balance of the purchase price for a prolonged period stretching over twenty years. The 1st respondent has thereby deprived the appellant of the said balance as well as user of the property. Such action is not supported by fact and law and cannot be countenanced by this Court.

What then is the best remedy that can be granted to the appellant? The appellant is only interested in the property being transferred back to it. The 2nd respondent, who still holds the title documents to the suit property, is also of the opinion that the property should be retransferred to the appellant. We are also of the view that substantive justice demands that the property be retransferred to the appellant. It is evident that the property has obviously appreciated in value and we agree with the 2nd respondent that the appellant should enjoy the benefit of that appreciation. Accordingly, we order the retransfer of the suit property from the 1st respondent to the appellant.

Turning to the issue of the cross appeal, the learned Judge ordered that the 2nd respondent pay the appellant Kshs.1,500,000/= together with interest at court rates with effect from 6th December, 1995. In his submissions the 2nd respondent argues that after the appellant rejected the part payment of Kshs.1,500,000/= it had no option but to continue to hold the sum pending the outcome of the suit.

Having found as we have that the suit property should be retransferred to the appellant, to avoid unjustly enriching the appellant, we order that the 2nd respondent returns the amount of Kshs.1,500,000/= to the 1st respondent. As interest on this amount was not a matter that was before the learned Judge, the court ought not to have ordered the 2nd respondent to pay the amount together with interest.

For the above stated reasons, we find that there is considerable merit in this appeal. We accordingly allow it with costs to the appellant against the 1st respondent and set aside the orders of the High Court. We substitute therefor an order that the property be retransferred to the appellant forthwith. We also grant costs of the High Court proceedings and of this appeal to the appellant and to the 2nd respondent.

Orders accordingly.

Dated and Delivered at Nairobi this 5th day of April, 2019.

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

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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