



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)**

**CIVIL APPEAL No. 135 of 2017**

**BETWEEN**

**BENARD NGANGA NDIRANGU ..... APPELLANT**

**AND**

**SAMUEL WAINAINA TIRAS ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Busia (Hon. A.K. Kaniaru J.) dated 18<sup>th</sup> October 2017*

**in**

**ELC No. 7 of 2014)**

**JUDGMENT OF THE COURT**

1. By a Plaintiff dated 13<sup>th</sup> August 2014 and amended on 3<sup>rd</sup> June 2016, the respondent filed suit against the appellant seeking *inter alia* an order for specific performance of the contract for sale of land dated 15<sup>th</sup> November 2012 signed between the parties. A further prayer sought was a mandatory injunction prohibiting the appellant, his agents or servants from demanding, collecting and or receiving rent in respect of the suit property namely BUSIA/MUNICIPALITY/530. The respondent also sought an order compelling the appellant to give up the sum of Ksh. 5,600,000 being rent collected from the suit property with effect from 1<sup>st</sup> July 2013 to 31<sup>st</sup> October 2013 and interest thereon at commercial rate of 18% per annum till payment in full.

**BACKGROUND FACTS**

2. By an agreement dated 15<sup>th</sup> November 2012, the appellant as the registered proprietor of all that parcel of land known as BUSIA/MUNICIPALITY /530, hereinafter “the property” entered into an agreement for sale with the respondent wherein the appellant agreed to sell and the respondent agreed to buy the property at a purchase price of Ksh. 24 million. Erected on the property is a single storey building comprising ground and first floors. At all material times, the property was charged to Eco Bank Limited by the appellant to secure a sum of Ksh. 11,000,000 which had been borrowed by the appellant from the Bank.

3. In his amended Plaintiff, the respondent averred that it was a term of the sale agreement that the total purchase price of Ksh. 24,000,000 was payable in instalments. Upon execution of the agreement, the respondent albeit late paid the appellant a deposit of Ksh. 10,000,000 receipt of which was acknowledged. It was a further term that whereas the property was encumbered by way of charge to Eco Bank Limited, the appellant would cause the charge to be discharged and thereafter the appellant would transfer the property to the respondent before receipt of the balance of the purchase price in the sum of Ksh. 14,000,000. It was thus a term of the sale agreement that the appellant would transfer the suit property to the respondent free from any encumbrance. The respondent through its financiers appointed the firm of Susan Kahoya & Co. Advocates to act for him in the sale transaction.

4. It was further averred that despite receiving the deposit of Ksh. 10 million, the appellant failed and or refused to discharge the property and to transfer the same to the respondent. Noting the recalcitrance of the appellant to transfer the property, on 27<sup>th</sup> June 2013, the respondent went ahead and paid Eco Bank the sum of Ksh. 12,948,913.85 to settle the appellant’s liability and to have the charge on the property discharged. Upon payment of the said sum of Ksh. 12,948,913.85, Eco Bank released the original title documents to the firm of Susan Kahoya & Co. Advocates. Upon receipt of the original documents from Eco Bank, the respondent communicated the same to the appellant so that he could sign the instrument of transfer and apply for consent to transfer to enable the parties to complete sale transaction.

5. Despite several requests, the appellant obstinately ignored, refused and or failed to sign and execute the completion documents and the

instrument of transfer. Despite the purchase price having been paid, the appellant failed to give possession of the property to the respondent and continued to receive rent from the 1<sup>st</sup> floor of the sold property. It is this state of affairs that led the respondent to file suit seeking an order for specific performance to compel the appellant to execute the instrument of transfer and an order to compel the appellant to give up all the rent received in relation to the property.

6. In opposing the suit, the appellant in his Statement of Defence denied ever receiving the sum of Ksh. 10,000,000, or ever instructing the respondent to discharge any loan facility he had with Eco Bank; or ever engaging the respondent through privity of contract to deal with Eco Bank; or receiving any document relating to transfer of the suit property to the respondent or any other third party; and finally denied entering into any enforceable contract with the respondent.

7. In prevarication, the appellant contended if at all any sale agreement was entered into, the respondent was in breach of the said agreement and failed to pay the instalments as agreed; that time was of essence to the contract and failure by the respondent to pay the purchase price as agreed rendered the agreement unenforceable; that the sale agreement no longer existed as both parties were in breach thereof. The appellant contended that the respondent should have claimed refund of the sum of Ksh. 12,948,913.85 that he paid, from Eco Bank since he violated privity of contract as he had no authority to pay the Bank.

8. Upon hearing the parties, the trial court delivered judgment dated 18<sup>th</sup> October 2017 and ordered specific performance of the sale agreement compelling the appellant to execute the instrument of transfer and to obtain all the necessary completion documents within 15 days of the date of judgment failing to which the Deputy Registrar was to execute the document in place of the appellant. A mandatory injunction was issued prohibiting the appellant from demanding or collecting or receiving any rent from the property. Judgment was also entered against the appellant in favour of the respondent in the sum of Ksh. 5,600,000 being the rent collected by the appellant from the property with effect from 1<sup>st</sup> July 2013 to 31<sup>st</sup> October 2015. The trial court further ordered the appellant to pay the respondent all further rent received from 1<sup>st</sup> October 2015. Interest on the judgment sum was to be calculated at court rates.

9. While making the order for specific performance, the trial judge expressed himself as follows:

*...the Defendant comes across as a less than honest person when he avers that he was not aware of the transaction between the plaintiff and Eco Bank or that he did not give a go-ahead to that transaction. The truth seems to be that the Plaintiff's (sic) cleared the Defendant's loan with the full knowledge of the Defendant. The Defendant's protestations on this issue therefore seem dishonest and/or hypocritical.*

*In my view... the Defendant's pleadings and evidence in rebuttal to the Plaintiff's suit and in support of his counter-claim is clearly shown as wishy-washy and unhelpful. It is all wind and fury but no substance. He enjoyed all the benefits of the Plaintiff's money but continues to hold onto the suit property deriving benefits thereof that should clearly be entitlements to the Plaintiff. I therefore hereby find and hold that the Defendants counter claim has no merit and I dismiss it with costs.*

## **GROUND OF APPEAL**

10. Aggrieved by the judgment of the trial court, the appellant has lodged the instant appeal citing the following grounds;

- (i) The judge erred in holding Eco Bank could lawfully and legally effect the transfer of the appellant's property to the respondent when the respondent's recourse was only to counterclaim for refund of the purchase price.
- (ii) The judge misdirected himself on the issue of privity of contract existing between the appellant and his bankers and thus arrived at a wrong conclusion of fact and law.
- (iii) The judge erred and arrived at a decision which was against the weight of evidence as pleaded.
- (iv) The judge erred and ignored the appellant's counter claim.

11. At the hearing of this appeal, the appellant was represented by learned counsel Mr. Ipapu while the respondent was represented by learned counsel Mr. Gachuna. Both parties filed written submissions and lists of authorities.

## **APPELLANT'S SUBMISSIONS**

12. The thrust of the appellant's case is whereas there was a sale agreement between the parties, the respondent was in breach of the agreement; that having breached the agreement, there is no enforceable contract between the parties that can be specifically performed. It is the appellant's case that the respondent was meant to pay the purchase price in instalments; the initial deposit of Ksh. 10,000,000 was to be paid in instalments of Ksh. 2,400,000 on 26<sup>th</sup> November 2012; Ksh. 4,000,000 on 15<sup>th</sup> December 2012 and Ksh. 3,600,000 on 27<sup>th</sup> December 2012. The balance of the purchase price of Ksh. 14 million was to be paid within 90 days from 27<sup>th</sup> December 2012.

13. The appellant urges that time was of the essence in the sale agreement; that having failed to pay the instalments as agreed, the respondent was in breach of the agreement and there is no enforceable contract between the parties that can be specifically enforced. Counsel submitted that the trial judge erred in failing to find that the respondent was in breach of the sale agreement and thus the agreement is unenforceable.

14. The appellant further submitted that the trial judge correctly found that both parties were in breach of the sale agreement. However, having made such finding, the judge erred in resolving the respondent's claim over the appellant's, that where there is breach of contract by both parties, the trial court ought to have applied the equitable maxim "*in pari delicto, potior est conditione defendantis et possidentis*" which

translates “in equal fault better is the condition of the possessor, whether malfeasance in question is a crime or not.” Counsel submitted that in arriving at its decision, the trial court was simply being compassionate and was never guided by the agreement between the parties or principles of law.

15. It was further submitted that the judge erred and ignored the doctrine of privity of contract; that there was privity of contract regarding the loan between the appellant and the Bank; the respondent was not party to the loan agreement with the Bank; the respondent had no authority to pay Eco Bank any monies to clear the appellant’s indebtedness; that the trial judge erred and ignored this fact when he concluded that the respondent could legally pay off appellant’s loan with the Bank.

16. A further ground urged is that the respondent in his amended plaint had abandoned the claim for specific performance. It was urged having deleted the claim for specific performance in the body of the amended plaint, the judge erred in issuing an order for specific performance when the same was not pleaded in the body. Counsel cited the case of **Galaxy Paints Limited – v- Falcon Guards Limited, Civil Appeal No. 219 of 1998** to support the proposition that parties are bound by their pleadings and a court cannot issue an order that is not in the pleadings. The appellant further submitted that the respondent having entered into a sale agreement knowing that the property had an encumbrance thereon, the respondent cannot raise the issue of specific performance.

## RESPONDENT’S SUBMISSION

17. In opposing the appeal, the respondent submitted that the trial court did not err in granting an order for specific performance. It was submitted that in the amended Plaint, there was an express prayer for specific performance of the sale agreement to compel the appellant to execute the instrument of transfer of the property.

18. On the contestation that the respondent’s recourse was to apply for refund of the purchase price from the Bank, counsel submitted that the trial court had power to issue an order for specific performance of the contract; the trial court properly evaluated the evidence on record and arrived at the correct conclusion that specific performance was the proper remedy to issue in the matter. It was urged that the trial court correctly took into account that the appellant had received the purchase price for the suit property; that Ksh. 10,000,000/= had been paid to the appellant upon execution of the sale agreement; that Ksh. 12, 948,913/85 was paid on 27<sup>th</sup> June 2013 to clear the appellant’s loan with the Bank; that the balance of Ksh. 1,051,085/15 had been deposited with the firm of Susan Kahoya & Co. Advocates to be released to the appellant in exchange of execution of the instruments of transfer. Grounded on the foregoing facts, the respondent submitted that the entire purchase price of Ksh. 24 million has been paid to the appellant. Counsel submitted that the respondent had not been in breach of the sale agreement as he had performed all his obligations under the agreement and paid the entire purchase price. Counsel cited dicta from the case of **Singh Birdi & Narinder Singh Ghatore – v- Abubakar Madhubti (1997)** to support the proposition that to obtain an order for specific performance, a party must show he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication.

19. The respondent further submitted that the suit property was sold as a developed commercial storey building fetching a monthly rent of Ksh. 200,000; that the appellant is in possession of the 1<sup>st</sup> floor of the property wherefrom he is receiving monthly rental income despite having sold the property and received the purchase price. Counsel submitted that the trial court properly evaluated the evidence on record and arrived at the conclusion that the appellant could not receive the purchase price of the property and continue receiving rent from the said property; that the trial court correctly found justice can only be attained through an order of specific performance to compel the appellant to give possession of the property to the respondent.

20. On the issue of privity of contract, it was submitted that the trial court did not err in finding that the appellant had approved and authorized Eco Bank to deal with the respondent. Counsel submitted that the trial court properly considered the appellant’s letter to the Bank dated 13<sup>th</sup> June 2013 in which the appellant affirmed to the Bank that it could continue with the sale transaction with the respondent.

21. The respondent further submitted that despite the appellant remaining the registered proprietor of the property, and having received the purchase price and consideration for sale of the property, the appellant was a constructive trustee and holds the title for the benefit of the respondent. Lord Denning in **Hussey – vs- Palmer (1972) 3 All ER 744** held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. The respondent concluded his submissions and urged us to dismiss the appeal with costs.

## ANALYSIS and DETERMINATION

22. We have considered the grounds of appeal as well as submissions by all counsel and the authorities cited in the matter. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed:

*“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 demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270**).”*

23. This appeal turns on three main issues: first, whether the trial judge erred in evaluating the evidence on record thereby arriving at a wrong conclusion. Second, whether the judge erred in granting an order for specific performance and an injunctive order prohibiting the appellant from receiving rent from the property. Third, whether the trial court considered the appellant’s counterclaim.

24. It is the appellant's contention that the judge erred in the evaluation of the evidence on record. More specifically, the appellant contends that the trial court erred in failing to find the respondent was in breach of the sale agreement dated 15<sup>th</sup> November 2012; it is contended further that having breached the sale agreement, there was no enforceable agreement between the parties that could attract an order of specific performance. Conversely, the respondent asserts that the sale agreement between the parties was valid and that he had performed all his obligations under the agreement. More specifically, he had paid the purchase price in full as agreed between the parties.

25. Central to the appellant's contestation is the submission that time was of essence in the sale agreement; that the respondent did not pay the purchase price within the stipulated timelines; the respondent had no authority to clear the loan outstanding with the Bank; that since the appellant had not authorized the respondent to pay the Bank Loan, the sum of Ksh. 12, 948,913/85 paid by the respondent to the Bank belonged to the respondent and he should claim a refund from the Bank. Based on this submission, it is the appellant's case that the purchase price of the property had never been paid in full and hence his counterclaim for the sum of Ksh. 14,000,000 allegedly being the balance of the purchase price.

26. The trial court in considering the submission that time was of essence in the sale agreement referred to Clause 5 of the agreement which stated that time was of essence. The judge also referred to Clause 13 which required variation to the sale agreement be in writing. The sale agreement stipulated that the balance of the purchase price was to be paid within 90 days from 27<sup>th</sup> December 2012. The trial court upon evaluating the evidence on record expressed itself as follows:

*Be that as it may, it is clear that no party was ready at the end of the 90-day period. What then was the import of this? In my view, if any party desired to terminate the sale because of the alleged default of the other, he required to issue a 21 day (sic) notice for that is what clearly clause 4.1 provided. No party issued such notice and that in effect meant that there was no termination of the agreement.*

*What appears apparent is that even after the expiry of the 90-day period, parties continued to engage each other concerning the sale. .... In a letter dated 30. 05. 2013 to ECO - BANK by the Defendant, the Defendant complained about computation of his loan by Eco-Bank and also expressed displeasure that the Bank had already released the title to the Plaintiff. He asked the Bank to stop dealing with the plaintiff until the issue of computation of his loan was resolved. The defendant promised a smooth handover of the premises after the issue of computation was resolved. Then in another letter dated 13/6/2013, the Defendant expressed himself as follows in a letter addressed to the Manager of Eco Bank, Busia Branch:*

***Re: Sale of Eco Bank Premises Branch in Busia***

*Reference is made to the above matter.*

*We have recomputed the figure of the amount of Ksh. 10,669,218. I hereby write to confirm that I have withdrawn the letter dated 30/5/2013.*

*The transaction may now proceed. (Emphasis supplied)*

27. Guided by the two letters from the appellant to the Bank and particularly the statement "the transaction may now proceed", the trial judge arrived at the conclusion that the appellant had authorized the Bank to proceed with the transaction involving sale of the suit property to the respondent.

28. On our part, we have re-examined the contents of the two letters addressed to the Bank by the appellant. We have also re-evaluated the evidence on record to ascertain if the trial court erred in arriving at the conclusion that the appellant authorized the Bank to proceed with the sale transaction with the respondent.

29. The title and reference of the two letters is stated as "sale of the suit property." From this reference, it is manifest that the appellant was selling the property. Further, the letter is copied to Susan Kahoya Advocate who was counsel for the respondent for purposes of the sale transaction. Why would the appellant copy the letter to the said Advocate? The letter expressly states the transaction may now proceed. In our considered view, the letter dated 13<sup>th</sup> June 2013 is an express confirmation by the appellant that the Bank and Susan Kahoya Advocate can proceed with the sale transaction. The appellant cannot approbate and reprobate. As was stated by Lord Reid in ***Steadman – vs- Steadman (1976) AC 536, 540***,

*"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable".*

30. In addition, the evidence on record shows that the appellant had received the purchase price and consideration for sale of the property. He initially received Ksh. 10,000,000/= being deposit towards the purchase price. He further received the benefit of the sum of Ksh. 12, 948,913/85 paid by the respondent to clear his loan with the Bank. The appellant having received the purchase price is estopped from recanting and repudiating the sale agreement. Indeed, the sale agreement states time was of essence but the conduct of the parties subsequent to the lapse of time shows that by implication the parties had agreed to continue with the sale agreement despite lapse of the 90-day period. The letters written by the appellant to the Bank are clear evidence that the parties were in agreement to continue with the sale transaction despite lapse of time. Founded on these letters, the record shows the parties had a mutual verbal understanding that the sale transaction was to go on despite the lapse of 90 days and they conducted themselves accordingly.

31. On the issue whether the trial court erred in issuing an order for specific performance, we reiterate that specific performance is an equitable remedy. In ***Thrift Homes Limited – v- Kenya Investments Limited [2015] eKLR*** it was stated that specific performance like any other equitable remedy is discretionary. The jurisdiction to grant specific performance is based on the existence of a valid enforceable

contract; specific performance will not be ordered if the contract suffers from some defect, mistake or illegality. Specific performance will also not be granted if there is an alternative effective remedy.

32. In this matter, there is no evidence on record pointing towards any defect, mistake or illegality in the sale agreement signed by the parties. The contention by the appellant is that both parties were in breach of the sale agreement thereby making the agreement unenforceable. Like all equitable remedies, the conduct of the party seeking or opposing such an order must be equitable. At the risk of repetition, the learned judge in appraising the conduct of the parties had this to say about the appellant's conduct:

*...the Defendant comes across as a less than honest person when he avers that he was not aware of the transaction between the plaintiff and Eco-Bank or that he did not give a go ahead to that transaction. The truth seems to be that the Plaintiff's (sic) cleared the Defendant's loan with the full knowledge of the Defendant. The Defendant's protestations on this issue therefore seem dishonest and/or hypocritical.*

33. In our considered view, the trial court had the benefit of evaluating the credibility and demeanor of the appellant. This Court has time and again stated that it will not interfere with findings of fact based on credibility and demeanor of witnesses. In the instant matter, the trial court made a finding of fact based on credibility of the appellant and concluded that the appellant was aware of the transaction between the Bank and the respondent; that the appellant was aware that the respondent would clear any outstanding loan and get the original title documents released to the respondent's advocate Messrs Susan Kahoya & Co. Advocates. We have no reason or basis to interfere with the trial court's finding on the demeanor of the appellant.

34. We find it is unconscionable for the appellant to raise the issue of privity of contract to circumvent his obligation under the sale agreement. In faulting the trial court, the appellant submitted that the judge acted on compassion rather than being guided by the evidence on record. Equity acts and operates on the conscience of the legal owner in matters involving specific performance. When it is unconscionable for a person who is the registered legal owner of a property to keep and retain the property, equity steps in to treat as done that which ought to be done. In this context, equity will order specific performance of the contract for sale of land; while treating as done that which ought to be done.

35. In this appeal, the appellant having received the purchase price and consideration for sale of the property, the only effective remedy is an order compelling the appellant to specifically perform the contract. From the facts established by the evidence on record, we are satisfied that the trial court did not err in issuing an order for specific performance directed at the appellant.

36. A further ground urged is that the trial court ignored the appellant's counterclaim. We have examined the appellant's amended statement of defence. In his counterclaim, the appellant claims the sum of Ksh. 14,000,000 being the balance of the purchase price and interest thereon at the rate of 18% per annum till payment in full. The appellant further counterclaimed that judgment be entered against the respondent for rent collected without authority from the property at Ksh. 200,000 per month for 36 months now standing at Ksh. 8,360,000 together with accrued interest at 18% per annum. The appellant also claimed general damages for breach of the sale agreement.

37. We have considered the contention that the trial judge ignored the appellant's counterclaim. We note in the trial court's judgment, there is an express finding and determination that the counterclaim has no merit.

38. The appellant's counterclaim is premised on the belief that the respondent had no proprietary claim or right to possession of the property. Both the trial court and this Court have made a determination that the respondent performed his obligation under the sale agreement and the respondent is entitled to possession of the property and execution thereof of the instruments of transfer of the property. The purchase price was paid and the respondent had a proprietary claim and interest over the property. Having received the purchase price, we are satisfied that the appellant's counterclaim has no merit; the appellant was neither entitled to possession of the property nor had he any proprietary right or interest left over the property. Recalling that the appellant had no right to possession of the property and no proprietary claim therein, we find that the appellant's counterclaim for judgment in the sum of Ksh. 8,360,000/= together with accrued interest at 18% per annum had no merit. Likewise, the counterclaim for general damages for breach of the sale agreement had no merit.

39. For avoidance of doubt, we find that the appellant was not entitled to the counterclaim for Ksh. 14 million being the alleged balance of the purchase price. The respondent paid the sum of Ksh. 12, 948,913/85 to the Bank to discharge the charge over the property. This sum was part of the purchase price due to the appellant. The appellant has received the benefit of this money and he cannot succeed by counterclaiming the sum to defeat the sale agreement between the parties.

40. Further, in this appeal, the appellant is latching on the doctrine of privity of contract. Yes, the doctrine of privity of contract applies in all contractual relations. It is only the appellant who received the benefit of the sum of Ksh. 12, 948,913/85 paid by the respondent to the Bank. Under privity of contract, it is only the appellant who is the holder of the loan account and it is only he who can claim any monies from the Bank. From the proven facts of this case, the respondent has no legal foothold to seek reimbursement or refund of any monies paid into the appellant's the Bank Account.

41. In totality, the upshot of our analysis and re-appraisal of the evidence on record lead us to conclude that the trial court did not err in arriving at its conclusions. We find this appeal to have no merit and is hereby dismissed with costs.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of May, 2019.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**