



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A) CIVIL APPEAL NO. 285 OF 2016
BETWEEN

REDHILL HEIGHTS INVESTMENTS LIMITED.....APPELLANT

AND

SUZANNE ACHIENG BUTLER.....1ST RESPONDENT

MARTIN NJEMA MUTURA.....2ND RESPONDENT

MARGARET C. MURINGA IRERI.....3RD RESPONDENT

WILSON KIMUTAI MUGUNGEL.....4TH RESPONDENT

CONSTANCE ANJIRI ANYIKA.....5TH RESPONDENT

*(Being an appeal from the Ruling and Orders of the High Court of Kenya at Kiambu (Joel Ngugi, J.)
delivered on 12th October 2016 in*

H.C.C.C. No. 2 of 2016)

JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the High Court (**Joel Ngugi, J**) dismissing preliminary objections raised against the suit filed by the respondents herein against the appellant and another.

[2] Sometime in 2016, the respondents filed a suit against the appellants and another. They averred in the plaint *inter alia*, that:

(i) The 1st respondent as a developer sub-divided its land reference No. 20517/3 situated in South East Limuru Township into 28 residential units each measuring 0.25 of an acre which plots were sold to various purchasers including the respondents.

(ii) The 1st respondent was to develop the land into a gated residential estate comprising of 28 town houses with all access ways and ancillary infrastructure and that it was intended that the purchasers would after buying the land pay for the construction of town houses.

(iii) By various agreements entered into between the 1st respondent and the purchasers including

the respondents, the purchase price together with the cost of construction and ancillary infrastructure was agreed at shs. 14,800,000 notionally split as follows;

(iv) Shs. 6,000,000 being the land acquisition price and shs. 8,800,000 being the construction price of a town house and ancillary infrastructure

(v) Each of the respondents paid the Shs. 6,000,000 land acquisition price and the 1st respondent transferred the respective plots to each respondent and each was registered a proprietor of a Leasehold for 99 years.

(v) The construction price of Shs.8,800,000 was to be paid in instalments against the architect's certificates issued by the 2nd respondent who was the project architect at the time of construction as detailed in the schedule to the sale agreement. By the agreements, the 1st respondent was required to complete the construction of town houses and handover the houses by March, 2013.

(vi) The appellant in breach of the contract, fraudulently caused monies paid by respondents to the appellant to be paid to the architect – the 2nd respondent when corresponding works had not been carried out, and, or completed and has failed to carry out the construction as agreed.

[3] The respondents sought special and general damages for breach of contract *mense profits*, interest and costs of the suit.

[4] The appellant filed a comprehensive defence to the claims. In addition, the appellant pleaded that the court had no jurisdiction to determine the dispute on the ground that the dispute relates to land and the court with jurisdiction is the Environment and Land Court.

[5] Before this suit was heard and determined, the appellant and his co-defendant filed a notice of preliminary objection to the suit, contending, in essence, that, as the dispute related to land, the suit filed in the High Court was incompetent and the High Court lacked jurisdiction to determine the dispute.

[6] The High Court considered the preliminary objection and construed the respective contracts and held, in essence, that;

(a) the parties intended that contract evolve into two distinct parts – one for sale of land and the other for the construction of town houses and ancillary infrastructure.

(b) The parties also intended the contract to be dynamic in nature where pre-dominant purpose of the contract would change over the contractual period. While the contract was predominantly for sale of land at inception, it evolved in its present contractual form to become one for the construction of town houses and ancillary infrastructure.

(c) The land acquisition price having been paid and the title to the properties having been registered in the name of the plaintiffs, there is no dispute as to ownership of land - the only contest being whether there has been a breach of the construction contract between the parties, and if so, which party is in breach and what the consequences for breach are.

(d) The dispute between the parties as presented in court is a dispute that is not primarily about land.

With those findings, the High Court dismissed with costs the preliminary objection.

[7] The appellant appeals from the decision of the High Court on 12 grounds, the gist of which is that the court erred in fact and in law by finding that it had jurisdiction to determine the dispute. By the appeal, the appellant asks the Court to set aside the decision of the High Court and allow the preliminary objection.

[8] The appeal came for case management on 18th April 2017 before the Deputy Registrar when the advocate for the appellant attended. The advocate for the respondent did not attend as he was not served with a notice to attend. The advocate for the appellant indicated that he wished the appeal to proceed by way of written submissions and oral highlighting. The Deputy Registrar of the Court then directed that this appeal be heard on 21st June 2017 and that the advocates for the parties do file written submissions within the period specified. The appellant's counsel filed written submissions and a bundle of authorities on 20th June 2017 – a day before the hearing date.

[9] When the appeal came for hearing, **Mr. Karungo**, learned counsel for the appellant relied on the written submissions and the list of authorities. On his part, **Mr. Njuguna**, learned counsel for the respondents brought to the attention of the Court that the suit was mediated, resulting in a settlement which was recorded on 21st February, 2017. He produced a copy of the agreement reached by the parties and the resultant order of the High Court.

He submitted that in reaching a settlement, it was the intention of the parties that the appeal should be withdrawn; that he was surprised when he was served with written submissions and the list of authorities on the previous day; that the appeal has been overtaken by events; that there would be no purpose in proceeding with the appeal and that the appeal should be struck out.

While agreeing that the dispute has been settled and that there was no dispute between the parties currently outstanding, Mr. Karungo in response stated that the consent that the parties recorded did not touch on the question of jurisdiction and that the Court should give a decision to remove confusion on jurisdiction.

[10] We have studied the consent signed by the parties on 21st February, 2017 and perfected by an order of the court made on the same day and issued on 23rd March, 2017. By the consent, the dispute was marked as settled on the detailed terms specified therein.

[11] By contending that the appeal has been overtaken by events, the respondents' counsel is indirectly invoking the mootness doctrine which this Court discussed at some length in **The National Assembly of Kenya & Another v. The Institute for Social Accountability & 5 Others**, Civil Appeal No. 92 of 2015 consolidated with **Civil Appeal No. 97 of 2015**.

The Black's Law Dictionary Ninth Edition defines a moot case as:

“A matter in which a controversy no longer exists; a case that presents an abstract question that does not arise from the existing facts or rights.”

In **The National Assembly of Kenya** case, this Court said at para 14.1 in part:

“Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. It follows that the common law is the exclusive source of mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make laws by ensuring adequate adversity of the parties and judicial economy – that is, rationing scarce judicial resources amongst competing claimants.”

In its narrow technical meaning, mootness refers to cases in which a justiciable controversy once existing between the parties, is no longer an issue due to some change in circumstances after the case arose, so that judgment when rendered will have no practical effect upon a then existing controversy.

[12] The effect of a finding of mootness is that the Court is without jurisdiction to render a decision resulting in the dismissal of the suit. Nevertheless, as stated in para 14.3 of the **National Assembly of Kenya** case, (supra) the Court has a discretion to decide cases, otherwise moot, if some of the circumstances mentioned in that case obtain, including the need for formulation or illumination of the

controlling legal principles to guide the bench, the bar and the public.

[13] The underlying dispute in the High Court was whether or not the appellant was in breach of agreements for sale of land and construction of town houses and ancillary infrastructures and if so, whether the respondents were entitled to damages for breach of contract and *mesne profits*. Before the dispute was heard, the appellant contested the jurisdiction of the High Court to determine the dispute. The High Court overruled the preliminary objection. This appeal is about whether the High Court had jurisdiction to determine the dispute. If the appeal succeeds, the result is that the suit would have to be struck out on account of lack of jurisdiction. Yet during the pendency of the appeal, the parties settled the underlying dispute and rights accrued to the parties arising from that settlement. The settlement of the dispute leaves no controversy for determination including the issue of jurisdiction for determination by the High Court or by this Court. A judgment of this Court, either way, cannot operate to grant any practical relief to any of the parties due to the changed circumstances. As the suit no longer exists after being settled, the appeal has no foundation and has been rendered moot.

[14] Other than saying that a decision of this Court will remove confusion on jurisdiction, the appellant's counsel has not demonstrated that the appeal falls within the exceptions allowing the Court to decide a moot appeal. It is apparent from the ruling of the High Court under appeal that the decision on jurisdiction was based on the peculiar facts of the case and it was after the construction of the underlying contracts that the High Court concluded that the dispute was not land related but a construction dispute. The High Court appreciated the law that the jurisdiction to deal with land matters is vested upon the Environment and Land Court.

There is no uncertainty in law on jurisdiction in land matters and the decision of this Court would not advance the law any further. The insistence by the appellant that the appeal should be heard and the prosecution of the appeal in the changed circumstances has only increased the costs of litigation which the appellant should justly pay.

[15] In the premises, the appeal being moot is dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 9th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR