



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 5 OF 2014

BETWEEN

MBURUGU K. MURINGA.....APPELLANT

AND

MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa, (Kasango, J.) dated 26th July 2012 in HCCC No. 62 of 2006)

JUDGMENT OF THE COURT

In this appeal from the High Court in the exercise of its original jurisdiction, the appellant, **Mburugu K. Muringa** challenges the judgment of that court at Mombasa (**Kasango, J.**) dated 26th July 2012 by which the learned judge dismissed his claim against the respondent, the predecessor of **Mombasa County**, for breach of contract. He contends that the learned judge erred by misapprehending the pleadings and the evidence; by failing to address the real issues in dispute; and by ignoring the evidence of his expert witness.

The background to the appeal is as follows. By a plaint dated 1st April 2006, the appellant instituted suit against the respondent for breach of contract, pleading that he was the registered owner of four Plots at **Miritini Site and Service Scheme, Mombasa**, namely **Plot Nos. 24, 551, 552 and 553**, having lawfully purchased them from the respondent. He further pleaded that when he took possession of the plots, he found a perimeter wall constructed across Plot No 24, whose effect was to unlawfully reduce its size by half. As regards Plot Nos. 552 and 553, he found that the respondent had unlawfully shifted them from their prime and level location to an unsuitable one below a sewer line. He accordingly prayed, as regards Plot No 24, for demolition of the perimeter wall or an order compelling the respondent to allocate him another plot or to pay for reduction of the size of the plot. Regarding Plot Nos. 552 and 553, he prayed for an order restoring them to their original location or in the alternative an order compelling the respondent to allocate him two plots in a suitable location far from the sewer line. Lastly he prayed for damages for the respondent's interference with the three plots.

By a defence dated 10th May 2006, the respondent denied liability, contending that the allocation of the plots to the appellant was on terms and conditions that were contrary to the appellant's averments, the true tenor of which it would establish at the hearing. In particular the respondent denied that the size of

Plot No 24 had been reduced or the location of Plot Nos. 552 and 553 altered. **Okwengu, J.** (as she then was) heard the appellant's case and left the station, after which **Kasango, J.** took over and heard the respondent's case and wrote the judgment. The learned judge framed four issues for determination, namely whether there was a binding agreement between the parties relating to the three plots; if so, whether the appellant was entitled to compensation for reduction of the size of Plot No. 24; whether the respondent had relocated Plot Nos. 552 and 553 and lastly if so, whether the appellant was entitled to compensation.

In dismissing the suit with costs the learned judge found that there was no binding contract between the parties and hence the appellant was not entitled to compensation for reduction of the size of Plot No. 24. Similarly the learned judge found that Plots Nos. 552 and 553 had not been relocated and therefore the appellant was not entitled to any compensation.

As this is a first appeal, we are expected to reconsider the evidence, assess it and make our own conclusions, but always remembering that we did not have the advantage of the trial court of hearing and seeing the witnesses as they testified. (See ***Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123***). Accordingly we propose to first re-appraise the evidence adduced before the trial court.

The appellant testified on his own behalf and called one witness, **Maina Chege (PW1)**, a valuation surveyor. The substance of the appellant's evidence was that on 13th July 1986, following advertisement by the respondent, he applied for and was allocated 4 residential plots at Miritini Site and Service Scheme, namely Plot Nos. 24, 551, 552 and 553. He paid the required deposit and the balance of the purchase price in instalments within 5 years as demanded by the respondent. He produced in evidence the letter of allocation and a further letter from the respondent confirming full payment for the plots.

After allocation of the plots to him, he found that Plot No. 24 had been encroached upon and a perimeter wall constructed across it, thus reducing its size by almost half. The original size was 12 x 18 meters but now it is 9 x 18 meters. He also found that Plot Nos. 552 and 553 had been relocated and moved to an area below the service line, which was inaccessible and without a sewer. He demanded that the plots be restored to their original sizes and location, but the respondent refused, leading to the suit.

PW1 testified that he was instructed by the appellant to establish the loss in value of the plots. As regards Plot No. 24, he testified that due to reduction in size, its value was reduced by **Kshs 284,167/=**. As a result of allocation to a different person of an open space next to it, the witness added, the plot further lost 15% of its value, resulting in total loss of value of **Kshs. 326,762/=**. As regards Plot Nos. 552 and 553 the witness testified that the relocation from a level ground to a sloppy one without services resulted in loss of value of Kshs 1,952,190/=.

The respondent countered the appellant's case by the evidence of **Bartholomew Chakuli Mwanyungu (DW1)**, its acting Director of Housing Development, who is also a licensed land surveyor. According to that witness, when the plots in the Scheme were allocated, they were unsurveyed and were only indicated in a **Part Development Plan (PDP)**, meaning that they were only proposed plots, most of them measuring 18 x 12 meters. Initially Plot No. 24 was intended to be 18 x 12 meters, but when perimeter survey setting the limits of the Scheme was ultimately done, it was established that there had been an earlier survey and title issued by the Commissioner of Lands, which could not be interfered with and whose effect was to reduce the size of Plot No. 24.

It was DW1's further evidence that when the respondent allocated the plots, it did not give their size or measurements and that allottees had to wait for title survey to be conducted. He explained that the procedure entailed application for a plot, issuance of a letter of allotment by the respondent with conditions to be met, conduct of survey when beacons of the plot are established, and lastly, signing of an agreement between the allottee and the respondent in respect of a plot. Before survey, the location of plots was only approximate but after survey, the plots were confirmed and given new numbers by the Director of Survey (Title Numbers), different from the numbers in the PDP, which were intended as mere guides. Accordingly after survey, Plot No 24 became Plot No 225. Although the appellant paid for the plots, the witness said, he did not sign the agreement. It was his evidence that the letter of allotment was subject to

ground survey, which was done only in 1996.

As regards the relocation of Plot Nos. 552 and 553, the witness maintained that they still remain where they were proposed to be and had never been shifted. In terms of size, they were bigger than most of the other plots, measuring 20.5 x 19.82 meters. He disagreed with PW1 that Plot Nos. 552 and 553 had been changed to Plot Nos. 91 and 92 respectively, contending that Plot Nos. 552 and 553 were not affected by the survey because it did not extend to them. The survey covered only Plot Nos. 1 to 419. He faulted PW1 for relying on the PDP in reaching his conclusions. Otherwise, he maintained that Plot Nos. 552 and 553 were duly serviced by roads, power, water and a sewer.

In his submissions in support of the appeal, the appellant contended, through his learned counsel **Mr. Nyongesa** that the learned judge had erred in finding that there was no binding contract between the appellant and the respondent because that was not an issue in the suit. In his view, the only issues in the suit were whether the size of Plot No. 24 had been reduced and whether Plot Nos. 552 and 553 had been relocated. Relying on the judgments of Supreme Court of Uganda in **Bank of Uganda v. Masaba & Others [1991] EA 2**, and of the High Court in **Eldo City v. Corn Products (K) Ltd & Another, HCCC No. 37 of 2013** counsel submitted that regard must be had to the words and conduct of the parties to establish whether they intended to create binding legal relations. In the instant case it was urged that by their conduct and dealings the appellant and the respondent had created binding legal relations as regards the plots, contrary to the conclusion by the learned judge. It was further submitted, on the authority of **Smith v. Hughes [1871] LR 597** that having made representations to the appellant upon which he had acted and made payments for the plots, the respondent was estopped from holding that there was no contract between it and the appellant regarding the plots.

Next counsel submitted that the learned judge erred by ignoring the evidence on record that showed that the size of Plot. No 24 was reduced. It was urged that the respondent had indeed admitted such reduction, which was further confirmed by the valuation report prepared by PW1. In the circumstances the appellant contended that the learned judge erred by refusing to award him Kshs 284,167/= being the value of the portion of Plot 24 that the appellant lost.

Turning to relocation of Plot Nos. 552 and 553, the appellant submitted that there was evidence on record, including that of PW1 to show that those plots were relocated to an inaccessible location outside the service area. Accordingly, we were urged to find that he was entitled to compensation due to loss of value arising from the relocation.

Lastly the appellant submitted that PW1 was an expert witness whose evidence the learned judge should not have disregarded because it was not contradicted by evidence of another expert. As far as the appellant was concerned, DW1 testified in his capacity as an employee of the respondent and not as an expert. Accordingly we were urged to allow the appeal.

The respondent, through its learned counsel, **Mr. Kibara** opposed the appeal arguing that it was totally lacking in merit. It was submitted that the learned judge had identified the real issues in dispute and had properly analyzed the evidence adduced by both parties, but found the evidence by DW1 more compelling and believable and gave reasons why she did not believe PW1's evidence. Counsel emphasized that PW1 had not visited the plots and merely relied on information that they had been relocated. In addition, he relied on the outdated PDP document, which was superseded after the survey.

As regards the evidence of the appellant, it was submitted that the learned judge properly found that he was not sure about the location of his plot, even going so far as to assume that his plot was commercial rather than residential. On the basis of the judgment in **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88] 1 KAR 278** the respondent submitted that the appellant had failed to establish any basis, upon which this Court could interfere with the findings of the trial court.

We have anxiously considered this appeal and have carefully re-appraised the evidence on record, the material part of which we have summarized above. We agree with the appellant that the question whether there was a contract between the appellant and the respondent regarding the three plots was not an issue

that was raised in the pleadings. The respondent, from its pleadings and evidence readily admitted having allotted the four plots to the appellant, who duly paid for them. Accordingly there was no dispute that the appellant had agreed to sell to the appellant four plots. Even from their own conduct, there was no dispute that the parties intended to enter into binding legal relationship. The real issue before the court, however, was not whether there was a contract between the parties as regards the four plots; it was whether there was an agreement between the parties as regards the size of Plot No. 24 and the location of Plot Nos. 552 and 553, which the respondent had violated by reducing the size of the former and relocating the latter.

It cannot be gainsaid that the purpose of pleadings is to inform both parties the issues in dispute so that they can prepare themselves and lead evidence on those issues. (See ***Gandy v. Caspar Air Charters Ltd [1956] 23 EACA, 139***). Accordingly it is a misdirection for the court to frame and determine issues which do not flow from the pleadings or which the parties have not addressed. A court can only so proceed if it is clear that the parties have canvassed a matter, which was not in the pleadings, made it an issue and left it to the court to decide. (See ***Odd Jobs v. Mubia, (1970) EA 476***). In this appeal, the parties had not made the existence of a binding contract between them an issue for determination, and did not leave it to the judge to decide. Accordingly the learned judge ought not to have ventured into that thicket.

Turning to Plot No. 24, did the appellant adduce evidence to prove that he was offered and accepted a plot of specified dimensions? It is not in dispute that as of the date the respondent invited applications for purchase of the plots, the plots were identified on the basis of the PDP, which the appellant states was for guideline purposes only. The respondent's letter dated 15th July 1986 which informed the appellant that his application for four plots was successful was very categorical that before his application was considered further, he had to pay specified deposit for each plot and pay the balance of the purchase price within 5 years from 12th August 1986. Clause 4 informed the appellant that his deposit would be refunded should his application prove unsuccessful. It is instructive that the letter did not identify any particular plot, its location in the scheme or its size.

The evidence on record supports the respondent's contention that the locations of the plots and their dimensions were to be determined only after ground survey, after which the successful allottee was to enter into a written agreement with the respondent. The appellant did not enter into such agreement, though the respondent admits that having paid fully for the plots, he is entitled to the four plots as identified on the basis of the PDP. From the standard form agreement for the purchase of the plots, which was produced in evidence, there is no doubt that it is in that agreement that the particulars of the plot, including its measurement in square meters and its number were to be set. The appellant, upon whom the burden of proof lay, did not adduce evidence to show that the respondent, by the letter of 15th July 1986 sold to him a particular plot of determinate dimensions. He could not have done so because as of that date, the survey of the plots had not been done and the beacons set. Accordingly we would come to the same conclusion that the learned judge reached, namely that by the letter of 15th July 1986, the respondent did not sell to the appellant a specific plot with ascertained measurement and that he was not entitled to compensation when ultimately it turned out, after actual survey, the plot was smaller than anticipated by him or the respondent. The clear intention of the parties was that the plots and their sizes would be determined after ground survey, after which a formal agreement was to be made.

As regards the alleged relocation of Plot Nos. 552 and 553, we once again agree with the respondent that there is no evidence on record to support the appellant's assertions. The survey that was conducted, being for Plots 1 to 419 did not extend to those two plots. The appellant himself was not too certain of the location of those plots to the point that he even thought they were commercial plots, never mind the fact that the advertised plots, which he applied for, were residential. His witness, in addition to relying on the PDP to claim that the plots were moved, readily admitted in his report that his view that the plots were relocated was on the basis of information. Again to the extent that the letter of 15th July 1986 did not allocate specific plots to the appellant, and in the absence of post-ground survey agreement, there is no evidence on the basis of which we can find that the plots were relocated to unsuitable locations so as to entitle the appellant to compensation.

We do not think that there is any substance in the contention that the learned judge erred by refusing to

rely on the evidence and the reports prepared by PW1. She rejected the evidence of PW1 and gave convincing reasons why she preferred the evidence of DW1. Upon re-evaluation of the evidence of the two witnesses we do not find it difficult to agree with the learned judge that indeed the evidence of DW1 was more cogent and credible. While one was a licensed surveyor who was involved in the development of the scheme, the other was a valuer. While one produced detailed documents on the evolution and development of the scheme, the other relied, as regards important aspects of the dispute, on what he was told and an outdated PDP.

As far as we understand the law, the learned judge was not bound to accept the evidence of PW1 merely because he was or claimed to be an expert. In Amosam Builders Developers Ltd v. Betty Ngendo Gachie & 2 Others, CA. No.193 of 2001, this Court expressed itself thus, regarding expert witness:

“There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it along with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it...In the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it. In a case as this where evidence of experts is conflicting a decision one way or the other depends on the credibility of witnesses.”

(See Ndolo v. Ndolo [2008] 1 KLR (G&F) 742).

Lastly, we entertain serious doubt whether the appellant would otherwise have succeeded in the claim for compensation, which was in the nature of special damages. He was required to specially plead the loss because it had crystallized or was capable of being measured with accuracy at the time the suit was filed. He was also required to strictly prove the loss. This, the appellant did not do. (See Ouma v. Nairobi City Council [1976] KLR 207 and Coast Bus Services Ltd v. Murunga Danyi & 2 Others, CA No. 192 of 1992).

For all the above reasons, save for the misdirection regarding the contract, which does not affect the outcome of this appeal, we are not persuaded that the learned judge misdirected herself or committed any error which could justify interference with her conclusion. Accordingly, this appeal is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 22nd day of June, 2017

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR