IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, OKWENGU & KIAGE, JJ.A)

CIVIL APPEAL NO. 157 OF 2012

BETWEEN

SOLOMON KIM KARIUKI ……APPELLANT

AND

ROSE POLYNE NYAMBURA .....RESPONDENT

(*Appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Maraga, J.) dated 15th April, 2011 In* ***H.C.C.C. No. 136 of 2007)***

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JUDGMENT OF THE COURT

This appeal is against the dismissal by Maraga, J (as he then was, now Chief Justice) of the appellant's suit filed in the High Court at Nakuru seeking from the respondent some Kshs. 1,110,000 being the balance of the purchase price for parcel number L.R. 13287/13 and a further Kshs. 1,185,000 being 10% penalty for breach of contract. He sought in the alternative a cancellation of the certificate of title to the suit property issued to the respondent, plus costs and interest.

The basis for that claim, as pleaded in the plaint, was that on or about 21st June 2016 the appellant, who was the registered owner of the suit property entered into an agreement for the sale of the same to the respondent at the price of Kshs. 11,850,000. The respondent paid some Kshs. 10,400,000 leaving a balance of Kshs. 1,450,000. The appellant demanded this sum but the respondent paid only Kshs. 340,000 leaving the balance sued for. The appellant averred that contrary to the stipulation in the agreement that transfer of title would be upon payment of the full purchase price, the respondent fraudulently and illegally caused the suit property to be transferred to herself. By way of particulars the appellant alleged that the respondent had obtained Land Control Board consent by deceit and had conspired with unnamed third parties to cause the transfer without the appellant's consent and/or authority.

To that claim the respondent filed a defence and stated that she paid the purchase price in full less funds necessarily required to pay the appellant's pre-existing debt due to the Agricultural Development Corporation (ADC) being consideration for the suit land. She denied the allegations and particulars of fraud and indicated that the appellant voluntarily signed transfer forms and applied for Land Board

consent for the transaction. She accused the appellant of breach for failing to fufill clause 11 of the agreement which required him to pay the pre-existing debt to the Agricultural Development Corporation. She therefore counterclaimed for the sum of Kshs. 1,185,000 being penalty for breach, as well as Kshs. 500,000 for destruction and removal of the respondent's property from the suit land. That counterclaim was dismissed alongside the claim but the respondent did not cross-appeal.

In the memorandum of appeal the appellant complains that the learned Judge erred as follows;

- ***Dismissing the appellant's suit against overwhelming evidence.***
- ***Finding the respondent to have been in breach of the sale agreement but failing to award the appellant damages.***
- ***Failing to hold that the respondent had not paid the whole purchase price when suit was filed and when she caused the suit property to be transferred to her on 30th October 2006.***
- ***Failing to appreciate the illegality of and justifying the respondent's payment of Kshs. 1,112,400 to ADC during the pendency of the suit, without the appellant's knowledge and without demand for it by ADC.***
- ***Holding that the appellant had not paid the purchase price of the suit land to ADC despite overwhelming evidence to the contrary.***
- ***Failing to appreciate that the sale agreement did not provide that the respondent would settle any claim against the appellant by ADC which would, moreover, have been time-barred.***
- ***Being biased and unfair and failing to consider the proper legal principles and the appellant's case fairly.***

The appellant prayed that the impugned judgment be set aside and be substituted with an order that the suit be allowed with costs. He also prayed for costs of this appeal.

In response to the appeal the respondent filed grounds for affirmation of the judgment and decree which are essentially a statement of the respondent's satisfaction with the learned Judge's findings on the various issues in dispute and in particular that the appellant was in breach of the agreement of failing to clear its debt with ADC; the respondent was justified to pay to the ADC, on counsel's advice, the sum of Kshs. 1,112,400 owed by the appellant; the transfer of the land to the respondent was proper after she paid the full purchase price; and that the suit was rightly dismissed, which fate should befall this appeal.

Arguing the appeal for the appellant, learned counsel **Mr. Waiganjo** took issue with the learned Judge for not following through with his finding that the respondent breached the agreement by registering the transfer on 30th October 2006 yet it was a term of the agreement that transfer was to be preceded by a payment of the full purchase price which was falling due in December of that year. Counsel criticized the learned Judge for finding the appellant in breach of the term to sort out certain issues with regard to payments to ADC stating that the appellant had paid all monies that were properly due. He maintained that the respondent was in breach of the agreement in going to pay the sum of Kshs. 1,110,000 to ADC on 17th March, 2008, during the pendency of the suit, without any prior demand for the same having been made. He submitted, rather obliquely, that the said payment was "against the rule of law", a statement we have difficulty comprehending. Counsel contended that the appellant was entitled to claim and recover the sum of Kshs. 1,110,400 from the respondent who would then be free to demand a refund from ADC. He rested by inviting us to consider his list and bundle of authorities including ***NATIONAL BANK OF KENYA vs. PIPEPLASTIC SAMKOLIT (K) LTD & ANOR*** [2001] eKLR which restated that it is not the function of a court of law to rewrite a contract between parties as the learned Judge did, in counsel's view.

For the respondent, learned counsel **Mr. Mwangi** contended that the entire purchase price was paid by the respondent and that it is the appellant who was in breach of the agreement by not paying the consideration that was owing to ADC. This necessitated payment of the balance by the respondent to ADC which had threatened to place a caveat on the land unless the outstanding money was paid and the appellant was unwilling to pay despite demand. The learned Judge was therefore right to disbelieve the

appellant's claims that he did not owe ADC money which PW2 and PW3, who were the Company Secretary and Accountant of ADC confirmed to have been owing. Counsel contended that the respondent was entitled to pay the money outstanding to ADC respectively, and free her title as the learned Judge found. He urged that the appeal be dismissed with costs.

In a brief rejoinder Mr. Waiganjo reiterated that parties are bound by their contracts and that the respondent should have complied with all the terms of the sale agreement. If she were minded to pay the balance of the purchase price to ADC, she was obligated to first notify the appellant of such intent, which she did not.

This being a first appeal, we proceed by way of a re-hearing in which we subject the whole of the evidence to a fresh and exhaustive re-evaluation before arriving at our own independent conclusions thereon while being mindful that we did not have the advantage of hearing and observing the testimony of the live witnesses which the learned Judge had. We therefore make due allowance for that. This approach was expressed thus in the case of ***SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD*** [1968] EA 123;

> ***"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 demeanour of a witness is inconsistent with the evidence in the case generally***."

Having considered the entire record, the submissions made before us and the authorities cited, this is the view we have taken of this matter. It is not in dispute that the purchase price for the disputed property was Kshs. 11,850,000 under the agreement dated 21st June 2006. It is also not in dispute that the respondent who was the buyer did pay to the appellant who was the seller the entire purchase price save Kshs. 1,100,000 for which the appellant sued. It is further not in dispute that during the pendency of the suit, the respondent paid that outstanding amount to ADC.

What falls for our decision is whether the payment to ADC was effective to absolve the respondent from paying the same amount to the appellant, or was of no effect and the respondent is still bound under the sale agreement to pay that sum to the appellant. The starting point of our analysis is the sale agreement itself which provided at clause 11 as follows;

> "**11.The vendor will sort out any claim by the ADC."**

Testifying about this clause, Mr. Wathigo, (DW4) the advocate who drew that agreement and was acting for both parties, stated as follows;

> ***"Clause 11 states that the vendor was to settle any claim by ADC on the property. This was because both parties knew that there was an outstanding claim on the property by ADC. The parties themselves raised the issue. I could not have included that clause in the agreement if there was nothing outstanding to ADC. I expected the vendor to get confirmation that he had sorted the claim. Clause 10 is a default clause of 10% penalty. The purchase price was Kshs. 11,850,000 that sum less what was paid to ADC Kshs. 1,112,400 was paid through my office. The purchaser brought to me a letter that that sum was due to ADC. I advised her to pay it to ADC otherwise she would had a default title-one which would be cautioned by ADC."***
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> (Our emphasis)

What emerged from the evidence is that whereas the appellant was selling the suit land to the respondent, he had never paid the requisite consideration of Kshs. 44,507.65 back in 1983 for its allocation to him by

ADC, which was the original owner. All he paid was the conveyancing, survey and registration fees amounting to Kshs. 14,974. The ADC board later in 2005 raised the price to Kshs. 30,000 per acre for all allottees who had not paid the original consideration and for the appellant the sum demanded was Kshs.1,112,400 vide a letter dated 17th June 2005. He was required to pay within ***fourteen (14)*** days or else **"the title shall be cancelled for nonpayment of consideration."**

The appellant responded to that demand by a letter dated 28th June 2005 (**DEX2**) in which he stated that he believed he did make some payments otherwise the title deed would not have been handed over to him, and sought to know how the amount of Kshs. 1,112,400 was arrived at. He then stated as follows;

> ***"For practical purposes 14 days given to raise the said amount of Kshs. 1,112,400 is unreasonably too short, taking into account that there has been no such earlier demand at all."***

He followed that letter with a visit to ADC's Company Secretary (D2), in June 2006 wherein he was informed that he had to pay the Kshs. 1,112,400 or else a caveat would be lodged against the title, but he did not do so.

It seems clear to us, as it was to the learned Judge, that the appellant was in clear breach of his duty to pay consideration for the suit land to the ADC. We are quite unable to fathom the temerity with which he seeks from the respondent the same money he knows was paid to ADC which he, the respondent was under obligation to pay but had not. It may well be that at the time he filed suit he had a legitimate claim for the balance of the purchase price against the respondent but he did also have a prior and still co-existing obligation to ADC and failure to settle that obligation clearly imperiled the respondent's title to the suit land, though transferred to her. In effect his insistence on the Kshs. 1,110,000 was an attempt to use the court process to not only burden the respondent doubly , but to evade his obligation to pay consideration to ADC for land that he had obtained, used and later disposed of to the respondent at a tidy profit. No court of conscience can aid in such a scheme and we find, as did the learned Judge, that the appellant was in breach of the agreement for failing to pay the Kshs. 1,112,400 he owed ADC forcing the respondent to pay it on his behalf. His claim against the respondent for that very sum was therefore wholly misconceived and was properly dismissed. The dismissal was not a re-writing of the contract for the parties but a giving effect to their true and express intentions.

Having so found on the central issue, we think that the learned Judge was right in holding that the breach by the respondent in effecting transfer of the suit land before making payment of the full purchase price and the irregularity in obtaining consent for such transfer did not go to the root of and did not entitle the appellant to rescission of the contract because he did accept part of the balance of the purchase price as late as April 2007. Those breaches and irregularities caused the appellant no injury at law and his suit was therefore properly dismissed.

The upshot is that this appeal lacks merit and it is dismissed with costs.

Dated and delivered at Nakuru this 21st day of June, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR