



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, GATEMBU & M'INOTI, JJ.A)**

**CIVIL APPEAL NO. 93 OF 2013**

**BETWEEN**

**GRACE NEMAYIAN KONCHELLAH.....1<sup>ST</sup> APPELLANT**

**LEINA KONCHELLAH.....2<sup>ND</sup> APPELLANT**

**AND**

**GIDEON MWITI IREA.....RESPONDENT**

*(Appeal from the Judgment/Order of the High Court of Kenya at*

*Nairobi (Ougo, J dated 13<sup>th</sup> July, 2012 in ELC. NO. 659 OF 2009)*

**JUDGMENT OF THE COURT**

1. This is an appeal from the judgment of the High Court (R. Ougo, J) delivered on 13<sup>th</sup> July 2012 rejecting the appellants' suit for: a declaration that they are entitled to be registered as proprietors of the property known as Title Number Ngong/Ngong/20194 (the property); and an order directing the respondent to transfer the property to them.

**Background**

2. In a suit filed before the High Court at Machakos and later transferred to the ELC Division of the High Court in Nairobi, the appellants pleaded that by an agreement for sale dated 19th December 2002 they agreed to sell the property to the respondent, who agreed to purchase the same for a consideration of Kshs. 1,600,000.00; that the respondent paid a deposit of Kshs 200,000.00 on execution of the agreement; that the balance of shillings 1,400,000.00 was to be paid in three instalments the last of which was to be paid on the completion date on 31 March 2003.

3. The appellants pleaded that at the request of the respondent, they transferred the property to him on the basis of an undertaking given by a company known as Choice Credit International Ltd to pay the balance of the purchase price. The appellants asserted that despite having transferred the property to the respondent, he (the respondent) failed or refused to pay the balance of the purchase price.

4. On the basis of the foregoing, the appellants claimed that they are entitled to have the property transferred back to them and accordingly sought judgment against the respondent for a declaration that they are entitled to be registered as absolute proprietors of the property and an order directing the

respondent to transfer the property to them and in default such transfer be executed by the deputy registrar of the court.

5. In its statement of defence, the respondent admitted having entered into the agreement for sale as pleaded by the appellants. However, the respondent stated that he paid the balance of the purchase price in full and that the appellants' claim should therefore be dismissed.

6. Attempts by the appellants to have the suit disposed of summarily, was not successful. The respondent's attempt to have the suit struck out on the basis that the Limitation of Actions Act barred the claim was also unsuccessful. The matter proceeded for trial.

7. The issues framed by the parties for determination by the trial court included: whether the parties entered into the agreement for sale dated 19<sup>th</sup> December 2002; whether the respondent paid a deposit of Kshs. 200,000.00 and whether the respondent furnished the appellants with an undertaking for the payment of the purchase price; whether the appellants transferred the property to the respondent; whether the respondent paid the balance of the purchase price of Kshs. 1,400,000 and if not whether Choice Credit International Ltd honoured its undertaking to pay; and whether the appellants were entitled to the reliefs that they sought.

8. Only the first appellant testified before the trial court. The respondent did not testify, call any witnesses or otherwise adduce evidence before the trial court.

9. Having considered the pleadings, the evidence and the written submissions presented before her, the learned trial Judge was not satisfied that the appellants had made out a case justifying the reliefs that they sought. In the Judge's view it was incumbent on the appellants to produce the original title deed to support their claim and having failed to do so, the court was unable to find "that the plaintiff is the registered and absolute proprietor."

10. Though sympathetic with the appellants' plight, the learned Judge felt constrained to dismiss the appellants' suit. In doing so, the Judge had this to say:

***"I find that vital evidence of proof of ownership by producing title, proof of payment by availing the advocate who represented her in the sale transaction was left out which would have assisted this court to determine the suit.***

***The plaintiff could have a good case but has been poorly presented to court by way of pleadings and evidence she has exhibited. A certificate of search shows that the defendant is the proprietor. Without the evidence as stated above, I am unable to find for the plaintiff as the orders sought are very specific on title.***

***I must conclude by saying that this is a sad case where the plaintiff who claims to be the proprietor of the subject property has lost it."***

11. With that, the judge dismissed the appellant's claim and ordered each party to bear their own costs. Aggrieved, the appellants lodged the present appeal.

### **The appeal and submissions by counsel**

12. In their memorandum of appeal, the appellants complain that the Judge did not address all the issues; that the Judge failed to appreciate that the only basis upon which the appellants could have entered into an agreement for sale with the respondent was as owners of the property; that the judge misdirected herself in finding that the appellants should have produced the original title deed when the appellants had already transferred the property to the respondent; that the Judge also misdirected herself in finding that the appellants were required to establish that they were registered proprietors of the property when in fact the property had since been transferred to the respondent; that the Judge misdirected herself in concluding that the appellants were under duty to prove fraud or illegality when the case was not based on those

grounds; that the Judge ought to have appreciated that there was a failure of consideration when no evidence was tendered to show that the balance of purchase was paid; that the Judge erred by taking the view that the appellants' advocate should have testified to prove payment when the burden to do so lay with the respondent.

13. Learned counsel Mr. Anthony Burugu expounding on those grounds in his written submissions that he relied upon submitted: that the Judge failed to consider all the issues; that the Judge formulated issues not arising from the pleadings and proceeded to determine the suit on that basis; and that the appellants' claim was fundamentally one asserting breach of contract and unjust enrichment by the respondent and neither party had raised the question of fraud or illegality. In that regard, Mr. Burugu cited several authorities for the proposition the parties are bound by their pleadings and that suits should be determined on the basis of pleadings. See for example **Dakianga Distributors (K) Ltd vs. Kenyan Seed Company Ltd [2015] eKLR**; **Jones vs. National Coal Board [1957] 2 QB 55**

14. Counsel maintained that having failed to pay the balance of the purchase price which was substantial, the respondent was undoubtedly in breach of the contract and the appellants were entitled to rescind the agreement and to demand that the title to the property should revert to them. Asserting that the appellants had made out a case for unjust enrichment counsel relied on a decision of the High Court in the case of **Edward Mugambi vs Jason Mathiu [2007] eKLR** as well as the case of **Abdul Gayur Yusuf Hasham vs. National hospital insurance fund 2010 eKLR**.

15. Counsel went on to say that the respondent alleged in its defence that it paid the total purchase price but tendered no evidence to support that averment. Citing section 107 of the Evidence Act and the case of **Diamond Trust Bank Ltd vs Said Hamad Shamisi & 2 others [2015] eKLR** he submitted that the burden of proof of payment lay with the respondent. Accordingly, the Judge was wrong in taking the view that the appellants should have called their advocate to testify.

16. Opposing the appeal, Mr. J. Njengo, learned counsel for the respondent also relied on his written submissions. He urged that this appeal has been rendered nugatory for the reason that subsequent to the judgment of the High Court, the property was transferred to a third party and as a result the respondent is no longer registered as the owner of the property. It would therefore not be practical, counsel argued, to grant the prayers sought by the appellants in that a third party would be prejudiced by such orders without having been accorded a hearing.

17. Counsel argued that the grounds of appeal in the memorandum of appeal are vague and ambiguous and not in accordance with rule 86 of the rules of the Court which requires the points which are alleged to have been wrongly decided to be specified. It was further argued for the respondent that the appellants were under an obligation to prove ownership of the property in order to be granted the reliefs that they sought. Counsel referred to the case of

**Charterhouse Bank Limited vs. Frank Kamau [2016] eKLR** in support of his argument.

18. Counsel defended the finding by the Judge that the appellants should have established fraud or illegality on the basis that under Section 26 of the Land Registration Act, those are the grounds upon which the title of a proprietor of land can be challenged.

19. Counsel further submitted that the finding by the Judge that the appellants should have called the advocate as a witness cannot be faulted as it was incumbent upon the appellants to prove that the respondent did not pay the balance of the purchase price.

### **Analysis and determination**

20. We have considered the appeal and the submissions by learned counsel. Although the appellants have raised several grounds of appeal, the main question in this appeal is whether the respondent breached the terms and conditions of the agreement for sale by failing to pay the balance of the purchase price of shillings 1,400,000.00 and whether the appellants are entitled to the reliefs they sought before the High

Court.

21. In addressing those questions, we are mindful of our duty as a first appellate court. We are required to review the evidence and draw our own conclusions bearing in mind that we did not have an opportunity to hear the evidence or indeed observe the witness as she testified. As stated in **Selle and another vs. Associated Motor Boat Company Limited & 2 others [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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect.”***

22. What then was the evidence before the trial Court? In her testimony the 1<sup>st</sup> appellant stated that she entered into an agreement for sale in respect of the property with the respondent in November 2002. She produced as an exhibit the agreement for sale dated 19 December 2002.

23. It was her testimony that upon execution of the agreement for sale, the respondent paid a deposit of shillings 200,000.00; that the balance of shillings 1,400,000.00 was to be paid by three instalments as set out in the agreement for sale; that the last of the three installments was to be paid on completion, which was 31 March 2003; that despite being advised by her lawyers against it, she agreed to transfer the property to the respondent on the basis of an undertaking furnished by a company in which the respondent had an interest known as Choice Credit International Ltd. She produced before the court as an exhibit the letter of undertaking in that regard.

24. The witness went on to say that in the faith that the balance of the purchase price in the sum of shillings 1,400,000.00 would be paid, she provided the respondent with the necessary transfer documents including the original title deed, land control board consent, and the duly executed transfer after which the property was transferred to the respondent despite the balance of the purchase price not having been paid.

25. She stated that when the balance of the purchase price was not forthcoming, she instructed her lawyers to demand the property with a view to having the respondent transfer it back to her as she considered the sale transaction to have collapsed. She offered to refund the deposit of shillings 200,000.00 that the respondent had paid less 10% forfeiture. In that regard, she produced as an exhibit a demand letter addressed by her advocates M/s Anthony Burugu and company advocates to the respondent dated 28th of July 2009.

26. In response to that demand, the witness went on to say, the respondent through his advocates wrote a letter dated 3<sup>rd</sup> August 2009 and feigned ignorance of the claim. She produced the letter dated 3<sup>rd</sup> August 2009 as an exhibit. She stated further that she lodged a caution against the property when it became apparent that the respondent was not heeding her claims.

27. As already indicated, the respondent did not testify or adduce any evidence. Based on the pleadings and the evidence however, it is not disputed, that the parties entered into the agreement for sale dated 19 December 2002 in which the appellants as a vendors agreed to sell the property to the respondent as the purchaser for a price of the Shillings 1,600,000.00. It is also not contested that the respondent paid a deposit of shillings 200,000.00 on or before execution of the agreement.

28. Clause 4 of the agreement for sale provided that the balance of Kshs. 1,400,000.00 was to be paid by 3 instalments. The first installment of Kshs. 600,000.00 was to be paid on or before 31<sup>st</sup> January 2003. The second installment of Kshs. 400,000.00 was to be paid on or before 28<sup>th</sup> February 2003. The third and final installment of Kshs. 400,000.00 was to be paid on or before the completion date, which was 31st March 2003.

29. Under special condition 3 of the agreement for sale, the respondent was entitled to take possession of

the property after payment of the initial deposit of Kshs. 200,000.00. Special condition 1 of the agreement for sale provided that the appellants would furnish the completion documents, namely the consent to transfer issued by the relevant land control board, the original title deed of the property and all other relevant documents necessary for the transfer of the property to the respondent on completion. It was therefore not envisaged under the agreement for sale that the property would be transferred to the respondent prior to the payment of the purchase price in full.

30. Notwithstanding the provisions of the agreement for sale, it was the appellants' case, as already stated, that they transferred the property to the respondent prior to the payment of the balance of the purchase price at the request of the respondent and on the strength of guarantee undertaking given by Choice Credit International Ltd.

31. The respondent pleaded in his statement of defence that "he paid the balance of the purchase price hence the transfer." The appellants denied that claim. As the person asserting that he paid the balance of the purchase price, the respondent had the burden, under Section 109 of the Evidence Act, to prove that assertion. He did not do so. In our view, the learned Judge appears to have proceeded on the basis that it was incumbent upon the appellants to prove that they had not received the balance of the purchase price. In our view, that was a misdirection. The burden lay with the respondent, as the party wishing the trial court to believe that he had paid the balance of the purchase price, to prove it. [See Section 109 of the Evidence Act and the decision of this Court in **Diamond Trust Bank Kenya Ltd vs. Said Hamad Shamisi & 2 others [2015] eKLR.**]

32. Based on our evaluation of the evidence, we are satisfied and find that the appellants transferred the property to the respondent prior to receiving the full purchase price. We also find, based on the evidence, that the respondent failed to pay the balance of the purchase price in the amount of Kshs. 1,400,000.00.

33. Being of that view, what remedies did the appellants seek before the trial court and are those remedies available? The appellants were in effect seeking orders from the trial court to have the property transferred back to them on the basis that the respondent had failed or refused to pay the balance of the purchase price. While we appreciate that the appellants' pleading in the plaint would have better articulated their case, the learned trial Judge does not, with respect, appear to have fully appreciated the appellants grievance. That is clear from her judgment where she stated:

***"It is correct as submitted by the defendant that the plaintiff does not claim ownership. Her claim against the defendant in the plaint and evidence in court is on the strength that she was the owner. In her plaint she does not specifically plead she is the owner though she wants to be declared as the absolute owner of the suit property. It was vital for her to establish this by way of pleadings and evidence. I further note that she did not produce the original title or state that she forwarded the title to the defendant. I am therefore unable to find that the plaintiff is the registered and absolute proprietor. It is correctly submitted by the defendant that the plaintiff has not proved fraud or illegality on the part of the defendant."*** (Emphasis)

34. It was clear from the plaint and from the testimony that appellants were seeking a re-transfer of the property to vest the ownership back to them on the basis that a substantial part of the purchase was not paid. Having already surrendered the completion documents, including the original title documents to the respondent, and the property having already been transferred to the respondent, the question of the appellants producing the original title or proving that they were registered owner did not arise.

35. One of the issues that the parties framed for the trial court was the question whether the respondent paid the balance of the purchase price of Kshs. 1,400,000.00. That issue arose from the pleadings. Evidence was led by the appellants on that issue and both parties made submissions on it. Although the appellants did not seek judgment for the payment of the balance of the purchase price, it was, in the circumstances of this case, a matter that was placed before the trial court for determination.

36. Where, as here, the parties have by their pleadings, evidence and submissions canvassed an issue and referred the same for determination, the court can pronounce judgment on it. In **Odd Jobs vs. Mubia**

**[1970] EA 476** the court held that:

***“A court may base its decision on unpleaded issue if it appears from the course followed at the trial court that the issue has been left to the court for decision.”***

37. We have found as a fact that the respondent did not pay the balance of the purchase price of Kshs. 1,400,000.00 yet the property was transferred to him. His advocates now state from the bar that the respondent has since transferred the property to a third party although that was not a matter before the trial court. The respondent cannot keep the balance of the purchase price and at the same time keep or benefit from the property. He cannot have it both ways. It is unjust. Given that the status of the property is unclear, the order that commends itself to us, is to order, which we hereby do, that the respondent shall pay to the appellants the sum of Kshs. 1,400,000.00 with interest thereon at court rates from 31<sup>st</sup> March 2003 until payment in full.

38. In the result, we allow the appeal and set aside the judgment of the High Court given on 13<sup>th</sup> July 2012. We substitute the judgment in favour of the appellants against the respondent for Kshs. 1,400,000.00 with interest at court rates from 31<sup>st</sup> March 2003 until payment in full. The appellant shall have the costs of the proceedings before the High Court and the costs of this appeal.

Orders accordingly.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of November, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**