REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, P.C.A., KARANJA & AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 139 OF 2014

BETWEEN

ALICE WANGUI MWANIKI..…………………………….. 1ST APPELLANT

AGNES WAMBUI KIRITU…….…………….…………..2ND APPELLANT

AND

MILELE VENTURES LIMITED…………………………….. RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Gacheru, J.) dated 25th February, 2014

in

HC. E.L.C. No. 414 of 2010)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the High Court (Environment and Land Division, Milimani), (L. N. Gacheru, J.), dated 25th February, 2014, in ***Nairobi Environment and Land Case No. 414 of 2010***.

[2] The subject matter of the suit was originally ***Nairobi L.R. No. 10916; IR 19200*** which was amalgamated ***with Nairobi L.R. No. 4299 creating L.R. No. 28318*** which was in turn also sub-divided into various portions including L***.R. No. 28318/15*** and ***L.R. No. 28318/24***. The respondent became the owner of the said pieces of land subsequent to a purchase from one, ***Stanley Githunguri***.

[3] By separate agreements entered into between the appellants, who were plaintiffs in that suit, and the respondent, the respondent agreed to sell and the appellants agreed to buy 10 acres and 50 acres respectively of the said piece of land at the consideration of Kshs. 15,000,000/- and Kshs. 75,000,000/- respectively. The completion date stipulated in the agreements was "*five (5) days from the date of issue of Land Control Board Consent to transfer whichever the later*".

[4] ***M/s J. M. Theuri & Associates*** acted for both the purchasers/appellants and the vendor/respondent. The purchasers/appellants deposited ten (10) per cent of the purchase price with Equity Bank which was the bank appointed by the respondent to receive the purchase price. There were further payments made by the purchasers which the parties considered to be part performance of the said agreements. These facts are not in contention.

[5] The sale agreements were not completed as envisaged in the agreements. The parties blamed each other. The appellants accused the respondents for breach of the agreements claiming that they had paid the entire consideration but the respondent had failed to meet its part of the bargain. The 1st appellant claimed that she had paid the entire Kshs. 15,000,000/= to the respondent but the latter had failed to facilitate transfer of the ten (10) acres to her and was instead disposing of the suit property to other parties. The 1st appellant, therefore, successfully sought an interim injunction to restrain the respondent from disposing of the property.

[6] The 2nd appellant, on her part, claimed that she had paid the entire purchase price of Kshs. 75,000,000/=, yet the respondent failed to transfer to her the 50 acres of land she had purchased.

[7] The respondent on the other hand claimed that the 1st appellant had not paid Kshs. 6,500,000/= of the purchase price and could not be entitled to transfer of the ten (10) acres she claimed. With regard to the 2nd appellant's claim, the respondent claimed that the former had not paid Kshs.7,500,000/= of the purchase price and could not, therefore, be entitled to the 50 acres she claimed.

[8] The two claims by the appellants were consolidated and heard together. In a considered judgment dated 25th February, 2014, the learned Judge found that the appellants had not proved payment of full purchase price and were not, therefore, entitled to specific performance of the agreements of sale as they sought. Notwithstanding this finding, the learned Judge stated:

> ***"However, the plaintiffs have proved payment of some money to the defendant and it has acknowledged receipt of the same. Specifically, the undisputed amounts are Kshs. 8.5 Million for PW 1 and Kshs. 59 Million for PW 2. The defendant is willing to give 5 acres to PW 1 and 35 acres to PW 2, respectively, what it regards as commensurate to the money received".***

In the end, the learned Judge made the following order:

> ***"I, therefore, find that the plaintiffs are entitled to 5 acres and 35 acres respectively and the same should be curved out of the land that was preserved pursuant to the directions of the Court on 12th October, 2011".***

[9] The appellants were aggrieved by the judgment of the learned Judge and, therefore, lodged this appeal premised upon some thirteen (13) grounds of appeal. At the hearing of the appeal, learned counsel, ***Mr. Kelvin Mogeni*** appeared for the appellants. The respondent was, however, not represented as its counsel was absent. As we were satisfied that counsel had been served, we ordered the appeal to proceed without representation for the respondent.

Mr. Kevin Mogeni, condensed the thirteen (13) grounds into five (5) grounds by arguing grounds 7 to 9 together; grounds 1, 2, 3 and 12 together; grounds 4, 5 and 6 together; grounds 10 and 11 together and ground 5 (costs) separately.

[10] The first cluster of grounds related to the order of the learned Judge regarding location of the portions to be curved out for the appellants. It was learned counsel's submission that the learned Judge misconstrued the record and made an order which could not be enforced. Learned counsel made that submission because the order of 12th October, 2011, did not preserve any part of the suit property as it related to the application for committal for contempt of court. In learned counsel's view, the property affected by the judgment and from which the appellants' portions are to be curved out is ***LR No.***

28318/15, which was the subject of an injunction application made by the 1st appellant and the subsequent order of the court made on 25th January, 2011.

[11] The second cluster of grounds related to the sums of money allegedly paid by the appellants. In learned counsel's view, certain sums were not taken into account by the learned Judge and that had they been taken into consideration, an order for specific performance would have been made as sought by the appellants.

[12] The 3rd cluster of grounds related to notices issued by the respondent and to the failure of the respondent to perform its part of the bargain. In learned counsel's view, no valid notices under the agreements of sale were issued by the respondent and further that the respondent unilaterally altered the terms of the agreement. It was learned counsel's further view that as the appellants were not in breach of any term of the agreement of sale, they were entitled to their respective claims to the suit piece of land.

[13] The 4th cluster of grounds related to the finding by the learned Judge that the appellants had not completed payment of consideration for their respective portions of land. In counsel's view, that finding was incorrect as the respondent did not dispute the payment by the 1st appellant and that the 2nd appellant's payment of Kshs. 7.5 Million had been acknowledged.

[14] The 5th and last ground, related to the learned Judge's order that each party bears their own costs of the suit. Learned counsel contended that there was no basis for denying the appellants their costs as they were not to blame for the failure of the respondent to perform its part of the bargain.

[15] We have considered the grounds of appeal and the submissions of learned counsel as well as the judgment of the trial court and the applicable law. This is a first appeal and we are obliged to re-evaluate the evidence and arrive at our own conclusions. (See (***Selle –v- Associated Motor Boat Co., [1968] EA 123***; and ***Abdul Hameed Saif –v- Ali Mohameed Sholan, [1955] 22 E.A.C.A. 270*** among many).

Starting with the first cluster of grounds argued before us by ***Mr. Mogeni***, we have ourselves perused the record and agree with learned counsel that on 12th October, 2011, ***Mbogholi Msagha, J.,*** declined an application to punish the respondent for disobedience of an order of injunction which had earlier been issued in favour of the appellants. The injunction order restrained the respondents from selling, transferring, disposing or offering for sale ***LR No. 10916 (I. R. 19200)*** or any sub-division thereof to any person, if such sub-division formed part of the portions of the land subject matter of the sale agreements between the parties.

It is plain that the order of ***Mbogholi Msagha, J.,*** did not preserve any portions of the suit land. We must, therefore, agree with learned counsel that the final order of the learned trial Judge may be incapable of implementation.

[17] The appellants in their amended pleadings and in their evidence before the trial court claimed portions of ***L.R. No. 28318/15,*** which was a sub-division of the piece of land stated in the agreements of sale. From the record, it would appear that this piece of land comprises about 60 acres. In the premises, the order of the learned Judge should have referred to ***L.R. No. 28318/15***. The first cluster of grounds 7, 8 and 9 must, therefore, be and are hereby allowed.

[18] The second cluster of grounds challenge the learned trial Judge's appreciation of the sums paid by the appellants to the respondent. With regard to payments made by the 1st appellant, the learned Judge found that she had not demonstrated that she had paid Kshs.6,500,000/= to the respondent. The learned Judge made that finding because the 1st appellant did not produce documentary evidence that the bank which she instructed to effect the payment had indeed, done so.

In her testimony at the trial, the 1st appellant stated, with respect to that sum as follows: -

"The other amount of Kshs. 6.5 M was done through Bank Transfer".

And in cross-examination on the same payment, she stated:

"I got all the receipts but not for Kshs. 6.5 Million".

[19] The respondent denied receipt of this payment***. Simon Mwaura Wacheru (DW 1), (Mwaura)***, one of the directors of the respondent, testified, *inter alia*, that the 1st appellant did not pay Kshs. 6.5 Million. ***Juliet Mukami Theuri, (DW 4), (Theuri),*** stated first that the 1st appellant paid Kshs. 8,500,000/=, and later that the 1st appellant had paid Kshs. 5,000,000/= and not Kshs. 15,000,000/=.

[20] Turning to the payments made by the 2nd appellant, the learned trial Judge accepted the testimony which was given on behalf of the respondent that the 2nd appellant paid Kshs. 59.5 Million and not the agreed purchase price of Kshs. 75 Million. The respondent disputed a payment of Kshs. 7.5 Million which the 2nd appellant claimed she paid alongside a similar payment on the same date, 26th May, 2009.

[21] With regard to this payment, the 2nd appellant testified that she deposited the same to the respondent's account on the same date. She in fact produced receipts numbers 157 and 230 dated 26th May, 2009 for the two payments. In her own words:

"I did the deposits of Kshs. 7.5 Million and another 7.5 Million".

A little later in her evidence in chief, she stated:-

"I deposited Kshs. 7.5 Million to Equity Bank. I was given a receipt. The paying slip is here in court. I paid Kshs. 75,000,000/- to Milele Venture".

And in cross-examination, the 2nd appellant stated in part: -

"I paid Kshs. 7.5 Million in cash and deposited similar amount in the defendant's account. I have receipts to that effect ……………The receipts were issued by Juliet Theuri for Milele Ventures".

[22] The respondent denied one of these payments. ***Mwaura*** testified that the 2nd appellant made a deposit of Kshs. 7.5 Million but obtained two receipts for the same payment issued by the respondent and ***Theuri's firm of Advocates***. ***Eunice Nyakio, DW II (Eunice)***, then a secretary with the respondent at their Nairobi South "C" office, acknowledged receiving photo copies of bank pay-in-slips for Kshs. 7.5 Million against which she issued a receipt to the 2nd appellant.

Theuri's secretary, ***Helen Wambui Ngige (DW III), (Wambui)***, also testified for the respondent. She acknowledged issuing the 2nd appellant with a receipt for Kshs. 7.5 Million after she presented to her banking deposit slips in favour of the respondent for the said sum. Wambui denied receiving cash from the the 2nd appellant.

The last witness for the respondent was ***Juliet Mukami Theuri, (PW 4), (Theuri)***. She is the proprietor of ***J. M. Theuri & Company Advocates***. She testified that she acted for all the three contestants: the 1st and 2nd appellants and the respondent. She drew the agreements of sale and issued some of the receipts acknowledging payments made to the respondent. She further testified that her offices did not receive actual payments but issued receipts on being satisfied that deposits had been made into the respondent's bank account. She supported ***Mwaura*** that the 1st appellant paid Kshs.8,500,000/- only towards the purchase price while the 2nd appellant, on her part, paid only Kshs. 59,500,000/=. She too testified that the 2nd appellant made one payment of Kshs. 7,500,000/= only on 26th May, 2009 and not two as she claimed.

In cross-examination, ***Theuri*** acknowledged that none of the parties performed their respective parts before the completion date. On the part of the respondent, it did not have completion documents such as the title documents and the Land Control Board Consent as stipulated in the sale agreements. She further admitted that notices she issued to the appellants to complete payment of balance of purchase price did not conform to the clause in the sale agreements with respect to notices.

[23] Having considered the evidence which the parties presented before the trial Judge regarding payments made towards purchase price, we have come to the conclusion that the issue was straight forward and not complex. In our view, the appellants' respective claims rest on our determination of this issue. The respondent denied that the appellants had paid consideration for their respective portions in full.

It led evidence of the persons whose responsibility the appellant's admitted was to acknowledge payments and issue receipts for those payments. It also called, as a witness, the parties' then common advocate, ***Theuri*** who supported the respondent's claim that the appellants failed to complete payment of purchase price.

[24] As against that evidence of the respondent, the appellants relied upon their own testimonies and the acknowledgements of payments which they claimed they made. With respect to the 1st appellant, the respondent disputed payment of Kshs.6,500,000/= which the 1st appellant claimed was made through a bank transfer. This payment was, therefore, not difficult to demonstrate. The appellant could have done so, at the trial because long before the trial, ***Mwaura*** had denied that she had completed payment of purchase price in his witness statements. She could even have done so before us by applying to adduce additional evidence. A bank transfer is normally effected on the instructions given by the account holder. Even if evidence of instructions is absent, the transfer would be reflected in a bank statement. The 1st appellant did not adduce such evidence before the trial court or before us.

[27] In the premises, we are unable to fault the learned trial Judge on her finding that she had no way of ascertaining whether the 1st appellant made the payment of Kshs. 6,500,000/=.

[26] The 2nd appellant, on her part, testified that she paid Kshs. 75,000,000/= to the respondent in full settlement of purchase price for the 50 acres she was buying. She testified at the trial and produced several receipts including receipts numbers 157 for Kshs. 7.5 Million and 236 for another Kshs. 7.5 Million both dated 26th May, 2009. She testified that one of these payments was in cash and the other was deposited in the respondent's bank account. In her evidence in chief, she stated that the cash payment was paid to the respondent but the cross-examination of the respondent's witnesses seemed to suggest that the payment could have been made to Theuri's office.

[27] The respondent denied the cash payment through its witnesses, ***Mwaura, Eunice, Wambui*** and ***Theuri*** as already observed elsewhere in this judgment. The learned trial Judge accepted the version given by the respondent as opposed to that of the 2nd appellant. In doing so, the learned Judge stated:

> ***"…All the defendant's witnesses categorically stated that they did not acknowledge any cash payments as they had no authority to do so. In any event, they testified there was no involvement of cash or cheque deposit in respect of this particular payment.***
>
> ***It is noteworthy that PW 2 did not give details as to who she gave the cash to. PW 2 did not specify whether she gave the cash in the defendant's office at South C or its advocate's office. Just as in the case of PW 1, this Court finds that the plaintiff has not established on a balance of probabilities that she made a payment of Kshs. 7.5 Million in cash either to the defendant, its advocates or its agents".***

[28] We have ourselves perused the record and considered the evidence relied upon by either side and we find it difficult to fault the learned trial Judge on her conclusion on that aspect of the case. Given the testimonies of ***Mwaura, Eunice, Wambui and Theuri***, the learned Judge had basis for doubting the

authenticity of the receipt for cash for Kshs. 7.5 Million produced by the 2nd appellant.

In the end, we find the 2nd cluster of the grounds of appeal without merit and we reject them.

[29] The above finding in fact, determines the 3rd cluster of grounds which in essence fault the learned trial Judge's conclusions regarding notices to complete the transactions; failing to find that the respondent had unilaterally altered the terms of the agreements and failing to find that the appellants had complied with the terms of the agreements.

[30] With our finding that the appellants failed to complete payment of purchase price, it is not necessary to examine whether notices were issued in terms of the agreements or whether the respondent unilaterally altered the terms of the agreements of sale.

[31] The 4th cluster of grounds is related to the 2nd cluster and faults the learned trial Judge for failing to find that the appellants had paid the purchase price in full. Our conclusion on the disputed payments has been covered in our analysis of the same in our consideration of the 2nd cluster of grounds. We do not find it necessary to repeat the same. Suffice it to say that we find no merit in this cluster and reject it accordingly.

[32] The last ground of appeal faults the learned trial Judge for failing to award costs of the suit to the appellants. Given our conclusion that the appellants failed on a balance of probability to prove that they had paid purchase price in full and that they were not entitled to specific performance, we find no basis to interfere with the finding of the learned trial Judge that each party bears their own costs of the suit.

This ground is, therefore, without merit and is rejected.

[33] In the end, save for the limited success, the appellants have achieved with respect to identification of the property awarded to them, being ***L.R. No. 28318/15***, we find no merit in this appeal. We, however, specify that the appellants are entitled to 5 acres and 35 acres respectively which portions should be curved out of ***L.R. No. 28318/15***.

[34] As respondent's representative or counsel did not attend at the hearing of this appeal, we order each party to bear their own costs of the appeal.

Dated and delivered at Nairobi this 13th day of May, 2016.

P. KIHARA KARIUKI - P.C.A.

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR