



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), VISRAM & KARANJA, JJ.A)

Civil Appeal No. 132 Of 2006

Between

JOHN BOSCO GATHECHA.....1ST APPELLANT

JOSEPH GATHONGO NGUGI2ND
APPELLANT

AND

HIRAM BERE KINUTHIA.....1ST
RESPONDENT

FRANCIS NGIGI MATATHIA2ND
RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi,
(Khamoni, J.) dated 19th March, 1999 in H C. C. C. No. 306 of 1994)*

JUDGMENT OF THE COURT

1. This is an appeal from the decision of the High Court of Kenya at Nairobi (Khamoni, J.) given on the 19th March 1999. The learned judge dismissed a suit filed by **John Bosco Gathecha** and **Joseph Gathogo Ngugi** (the appellants) against **Hiram Bere Kinuthia** and **Francis Ngugi Matathia** (the respondents), seeking among other reliefs, specific performance of a Sale Agreement entered into on 27th January, 1988, and general damages for breach of contract. After hearing the parties and their advocates, the learned judge dismissed the suit with no order as to costs. It is against that decision that the appellants have appealed to this Court.
2. In their Memorandum of Appeal dated 3rd July, 2004, the appellants raised 15 grounds of appeal namely;
 1. **THAT the learned judge erred in law and in fact, in failing to appreciate that the sub-divisional scheme over Title LR No. 28/17 and 28/20 was a lawful scheme undertaken by the defendants who offered a part thereof being sub-plot no. 14 comprising 0.4 hectares to the plaintiff/appellants.**

2. ***THAT the learned judge erred in law and in fact, in viewing the sub-division as a technical impossibility with the result that he failed to consider the admissions of the defendants that they offered and duly signed a sale of the said sub-division plot to the plaintiffs.***
3. ***THAT the learned judge having found that the 1st defendant/respondent was not candid (on the grounds of failing to obtain requisite consents from Nairobi City Council and the Commissioner of Lands) totally misguided himself in refusing to find that the defendants had invalid grounds for failing to complete the sale.***
4. ***THAT the findings of the learned judge that the appellants entered a Sale Agreement with persons having no capacity to complete are contrary to the pleadings and evidence on record.***
5. ***THAT the learned judge wholly misapprehended the testimony and pleadings when he found that the plaintiffs had not ascertained that the defendants were the registered proprietors of the suit land; such misapprehension occasioning miscarriage of justice.***
6. ***THAT the decision of the learned judge was wholly against the weight of the evidence.***
7. ***THAT the learned judge erred in fact in basing his decision on matter not raised in the pleadings or issues framed before the court.***
8. ***THAT the learned judge erred in law and in fact in deciding the suit on hypothetical issues that had not arisen either in evidence or in the submissions tendered before him.***
9. ***THAT having found as a fact that the defendants were untruthful in their evidence, the learned judge erred in relying on their testimony to the detriment of the plaintiffs.***
10. ***THAT the learned judge failed to appreciate that the equitable relief of specific performance in this suit was an appropriate remedy in the circumstances of the case made out before him.***
11. ***THAT the learned judge failed in law and in fact, to appreciate that hardship was not a defence available to the defendants.***
12. ***THAT the learned judge erred in law and in fact, in failing to enter judgment for the plaintiffs despite his finding that the defendants had been inconsistent in their defence which inconsistencies were irreconcilable; yet the plaintiffs had been wholly consistent.***
13. ***THAT the learned judge erred in law and in fact in arriving at the conclusion that the defendants were unable to perform due to acts of the Nairobi City Council and the Commissioner of Lands yet there were admissions of the defendants that they had been able to transfer other plots to other buyers except to the plaintiffs.***
14. ***THAT the learned judge erred in law and in fact, in failing to appreciate that the 1st defendant's hatred/dislike of the 1st plaintiff clearly led the defendants to fail to transfer the suit property.***
15. ***THAT that learned judge made an error in failing to appreciate sufficiently or at all that the respondents liability had not and could not be rescinded on account of hardship or inflation as alleged by the respondents or at all.***

(3) As this is a first appeal, we shall undertake our duty to re-evaluate the evidence adduced before the trial court and arrive at our own independent conclusion. See *Nicholas Njeru v Attorney General & 8 others* [2013] eKLR (Civil Appeal of 2011).

4. The appellants case as set out in their plaint was that on or about 27th January, 1998, they entered into a Sale Agreement jointly with the respondents agreed to purchase a piece of land being a

portion of Plot LR No. 28/17 and 28/20 (Number 14) for the sum of Kshs. 250,000/=. It was a term of the contract that the appellants would pay a deposit of Kshs. 25,000/= to the respondents on execution of the Agreement for Sale and the balance on completion, provided that the respondents would have the said portion of land duly demarcated and the necessary consents and clearances obtained by the respondents.

5. The appellants averred that at all material times, they have been ready and willing to pay the balance of the purchase price, but the respondents in breach of the Agreement for Sale failed and refused to:-
 - a. execute a conveyance of the property to the appellants.
 - b. obtain a Rate Clearance Certificate from the City Council of Nairobi.
 - c. obtain a Land Rent Certificate from the Commissioner of Lands.
 - d. obtain Consent of the Commissioner of Lands to the transfer.
 - e. Complete the Valuation Form.
6. Clause 3 of the Agreement for Sale provided that the completion of the sale and purchase shall take place at the offices of Shapley Barret & Company Advocates on:-
 - i. the 30th day of June 1988; or
 - ii. the 30th day after the date on which the Deed Plan in respect of the said property is produced to the purchaser's advocates; or
 - iii. the 7th day after the date on which valid Clearance Certificate in respect of the said property is issued by the City Council of Nairobi; whichever shall be the later (herein called the Completion Date).
7. The appellants now submit that the learned judge failed to appreciate that the duty to secure the required documentation lay upon the respondents. In addition, they contend that the learned judge made his determination after taking into consideration matters that he ought not to and erred in not considering if damages, and in this regard, the sum of Kshs 3 Million, in lieu of specific performance were an appropriate remedy.
8. The respondents on the other hand submit that the learned judge was correct in his finding that the contract was frustrated, and thus was incapable of being cured by specific performance; that the order of damages prayed for was in the form of special damages which must be specifically pleaded and proved; and that in any event, general damages cannot be awarded for a breach of contract.
9. This was a conditional Agreement for Sale whose performance depended on a number of things. The vendors did not have a registered title over Plot No. 14 which they could transfer to the appellants. Plot No. 14 was one among several plots the respondents were selling for buyers to build their homes. The respondents had a large piece of land and they sub-divided it into several small plots. The City Council of Nairobi and the Commissioner of Lands imposed certain conditions to be fulfilled by the respondents in order to permit development of residential units to proceed.
10. The learned judge found, on the evidence, that the respondents were not able to meet all the conditions for development of all the plots at once. This was because meeting the conditions required substantial investment of money which they did not have. They also found it difficult to comply with the conditions required by the Nairobi City Council which withheld the necessary

approval without which the Commissioner of Lands could not issue title deeds to enable respondents to transfer the plot to the appellants. This was clearly stated in the letter dated 11th June, 1993 from the respondents' advocates to the appellants' advocates. Because of that difficulty, the respondents rescinded the agreement.

11. The learned judge also found that the parties entered into an agreement whereby the completion depended on acts to be done by people over whom the respondents had no control, namely, the City Council of Nairobi and the Commissioner of Lands, more specifically Nairobi City Council. The judge observed that both the City Council of Nairobi and the Commissioner of Lands were not parties to the suit and even if the court were to grant an order for specific performance against the respondent, such an order could not be enforced against the City Council of Nairobi and Commissioner of Lands. For the appellants to succeed, they had to show that the City Council of Nairobi gave clearance but the respondents failed to effect the required transfer thereby breaching the contract. There was no such evidence before the judge.
12. The respondents were being asked to transfer a piece of land in respect of which they were not registered proprietors. A person who is not a registered proprietor cannot transfer registered land. The appellants knew from day one that the respondents were not the registered proprietors of the piece of land they were buying and this was obvious from the way the completion date was defined in the Agreement for Sale which they all signed. As the learned judge correctly observed in his judgment;

“It follows that the orders I am being asked to grant in paragraph 7 of the plaint are orders to be granted in darkness. Ordering the defendants to specifically perform the agreement when they may not be having the capacity to so perform the agreement. A person who is not a registered proprietor cannot transfer registered land. If the allegation of breach of contract is founded, as in this case, on that person’s failure to transfer registered land, the plaintiff has to do more than the plaintiffs did in this case in order to prove that the person committed breach. Otherwise, how did the plaintiffs fail to expect such a failure when they themselves did not care to ascertain that the person they expect to do the transfer was the registered proprietor of the plot they were buying”.

13. What the learned judge was saying in short is that the appellants knew that the respondents were not the registered proprietors of Plot No. 14. They also knew that the respondents could not transfer the plot to them without the clearance of the City Council of Nairobi and the Commissioner of Lands. The respondents did what they could to obtain the clearance but they were not successful. The respondents' failure to transfer title was not deliberate.
14. At the time the appellants filed the suit alleging breach of contract, they had all the information they needed to understand why the transaction had failed. They knew that there was nothing the respondents could do without the co-operation of the City Council of Nairobi and the Commissioner of Lands. They decided to take only the respondents to court and left out the City Council of Nairobi and the Commissioner of Lands. They should have known that an order made against the respondents was incapable of enforcement against the City Council of Nairobi and the Commissioner of Lands who were not parties to the suit. It is for this reason that an order of specific performance would not have been an appropriate remedy.
15. There is no evidence that the respondents misled the appellants or failed to disclose any material fact to them. They did not pocket the deposit paid by the appellants which is still lying with the advocates. Neither did they try to gazump (sell to someone else at a higher price) after agreeing to sell to the appellants. An order of damages would therefore not have been appropriate, as the appellants never indicated what loss they had undergone in order to justify an award of damages.
16. Considering all the 15 grounds of appeal in the light of what we have said, it is plainly obvious that there is no substance in any of them. For the reasons we have given, we are satisfied that the learned judge made the correct decision on the evidence before him. There is no merit in this

appeal. Accordingly, it is dismissed with no order as to costs.

Dated and delivered at Nairobi this 10th day of July, 2015.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR