



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 56 OF 2014

BETWEEN

BILLEY OLUOCH OKUN ORINDA.....APPELLANT

AND

AYUB MUTHEE M'IGWETA.....1ST RESPONDENT

FREDRICK MWITI M'IGWETA.....2ND RESPONDENT

JAPHET MURITHI M'IGWETA.....3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru

(Kasango, J.) dated 30th October, 2009 in H. C. C. No. 72 of 1995)

JUDGMENT OF THE COURT

1. This land dispute has had a chequered history since its debut in the courts 20 years ago in March 1995. The original plaintiff, **Samson Okun Orinda** (Samson) who gave his testimony in the suit in 2006 has since died in the year 2010 and was replaced by his son **Billey Oluoch Okun Orinda** (Billey), who is now the appellant before us. Samson had testified that he and his wife were attacked on the disputed land by armed robbers who killed his wife and critically injured him in 1997. The immediate suspects for that dastardly attack were the three respondents before us : **Ayub, Fredrick and Japhet**(the respondents), who are brothers and they were arrested, tried but acquitted of the crime. Several Judges of the High Court have handled the case in turns until it was finalized by Kasango J. in her judgment delivered on 30th October 2009. All those intervening events may explain the delay in concluding the matter.

2. The dispute relates to a parcel of land known as **NTIMA/IGOKI/4218** (plot 4218). It was part of a larger plot No. 1137 measuring approx. 3 Acres, jointly owned by the respondents, which they subdivided into three sub-plots: 4216, 4217 and 4218 in 1989 and sold to different people. Samson entered into a written agreement with the respondents for purchase of plot 4218 on 20th November 1990. The size of the plot as indicated in the sale agreement and the Title deed was 0.6228 Hectares or approx. 1.5 Acres. The price was agreed at Sh. 350,000 and payment terms were set. In addition the agreement provided for purchase of some 10 temporary structures on the plot at Sh. 30,000.

3. There is no dispute that the respondents accepted payments made towards the purchase price totaling Sh. 261,000 by the year 1993. The only assertion by the respondents is that the payments were not made in terms of the agreement. It is also not in dispute that the requisite Land Control Board's consent was obtained to validate the sale agreement. It was thus enforceable in law by either side. Finally it is not in dispute that Samson took possession of the plot in 1992 and commenced developments thereon including the construction of a substantial stone house at a stated cost of Sh. 1.5 million, (valued in 2009 at Sh. 5.5 million). The only dispute is whether he took possession with the consent of the respondents as he contended or he did so forcefully as contended by the respondents. What is clear is that the substantial developments on the land did not occur overnight, but there is no pleading or evidence that the respondents made demands or filed suit for eviction. On the contrary, their primary demand was for payment of the balance of the purchase price with interest and their right to collect monthly rentals from the temporary structures at sh. 1000 per month until the balance of the purchase price was paid.

4. The kernel of the dispute was the balance of the purchase price. According to Samson, the payment was interrupted by a court case between the respondents and the purchaser of the adjacent plot 4217 who demanded a right of way and he won the right. The plots were resurveyed after the court case and plot 4218 was reduced by half Acre which also took seven of the temporary structures which were supposed to be part of the plot. The Meru District Land Registrar (PW2) and the Meru Central District Land Surveyor (PW3) testified on the reduction of the sizes of the plots. In those circumstances, Samson thought the remaining portion was worth less and he offered to pay Sh. 89,000 balance for the plot and Sh. 12,000 for the remaining temporary structures, total Sh. 101,000. He sought execution of the transfer upon that payment. The respondents refused to do so and demanded the full balance of Sh.119,000 with interest at the bank rate of 24%, as well as general damages for breach of contract. The die was cast.

5. On 24th March 1995, Samson filed suit seeking an order that the respondents do sign the transfer forms failing which the Executive Officer of the court would do so. In the alternative he sought a refund of the money he had paid to the respondents at bank overdraft rates as well as payment of the value of the developments made on the plot, plus special and general damages. The respondents shot back in their defence dated 2nd May 1995 insisting that they would only sign the forms when the balance of Sh. 119,000 was paid but Samson had refused to do so. They contended that Samson had built his mansion without their consent and therefore they were not responsible for the building cost. They pleaded a counterclaim in which they averred that they had allowed Samson to take possession and construct his building on the strength of his promise that he would pay the balance of the purchase price but he did not pay despite requests. They sought judgment on the sum of Sh. 119,000 plus interest at 24% p.a, payment of rent for the temporary structures, special and general damages.

6. After considering the evidence tendered by Samson and his witnesses, the Land Registrar and the Land Surveyor, as well as the evidence of Ayub who was the sole witness for the respondents, the trial court decided the matter on the sole finding that the agreement for sale was incapable of enforcement as the doctrine of frustration applied to void it. The court delivered itself thus:-

“Evidence was led by the plaintiff and through PWII and III that the suit property following a court order was reduced in size to 0.48Ha. A party in law can be excused from performing a term of the contract because of the (sic) impossibility. Like in this case, the parties contracted for a specific measurement of land to be transferred to the plaintiff. However due to factors which cannot be blamed either on the plaintiff or the defendant, that acreage was reduced. It was reduced following an order of the court. That reduction was done after the parties had contracted to sell and buy the suit property. The reduction of the measurement of the suit property makes the performance of the contract as per the agreement of the parties impossible. There is no way the defendants can be able (sic) to transfer the acreage they agreed with the plaintiff. Indeed the act of reducing the suit property measurements frustrated the party's contract. Frustration is discussed in the book of Treitel: The Law of Contract, eleventh Edition Pg 909:-

Frustration terminates a contract automatically at the time of the frustration event, though the parties for some time after the event went on behaving as if the contract existed.

The plaintiff's prayer therefore for orders of specific performance of the contract cannot be entertained because of that frustration of the contract.”

7. The Court proceeded to make an order for refund of Sh 261,000 to Samson without any interest thereon, and rejected his claim for compensation for the developments he made thereon because, in its finding, he made them without the authority of the respondents. An order for removal of a caution registered on the plot was made and a 90-day period was given for Samson to deliver vacant possession of the plot at the pain of eviction in default. Nothing was said about the counterclaim of the respondents. Samson subsequently obtained an order for stay of execution pending hearing and determination of the appeal and has remained in occupation of the plot throughout.

8. It is the orders of the trial court that Billey, on behalf of Samson, challenges before us. In five grounds laid out in his memorandum of appeal, which may be summarized, he contends that the learned Judge erred in fact and in law in:

- ***Holding that the contract of sale was frustrated;***
- ***Holding that the appellant was only entitled to be refunded Sh. 261,000;***
- ***Failing to consider the developments made on the plot over a period of 15 years;***
- ***Deciding the case against the weight of evidence;***
- ***Failing to find that the contract was partly performed and was enforceable.***

9. Learned counsel for the appellant, **Mr. Charles Kanyangi**, submitted on the first ground, that the trial court invented and applied on its own motion, the doctrine of frustration when there was no pleading, evidence or submissions from any of the parties. The parties, he submitted, never envisaged any frustration in their dealings and in their respective pleadings did not seek rescission on the ground of frustration or any other ground. Indeed, submitted counsel, the respondents in their pleadings and evidence were ready to transfer the plot once the balance was paid.

10. On the issue of the developments made on the plot, Mr. Kanyangi submitted that it was ignored and bluntly dismissed on the basis that it was made without the respondents' authority. The trial court found, wrongly in counsel's view, that the appellant entered in the plot without the knowledge or consent of the respondents. Fair compensation should therefore have been ordered even if the contract had been frustrated, which it was not. At all events, he submitted, under English law which applies in Kenya by dint of **Section 2 of the Law of Contract Act, Cap. 23**, contracts are severable when part is frustrated and the other remains enforceable.

11. Finally, Mr. Kanyangi contended that it was the act of the respondents who had sold an adjacent plot without a road of access which resulted in the appellant's plot being reduced by half acre and they cannot be heard to benefit from their own acts. The trial court, in his view, did not examine the circumstances that led to the intention by the appellant to deduct some money to compensate for the reduced acreage. The respondents held the plot in trust for the appellant after the agreement was signed and it was unjust, unlawful and unconstitutional to enrich them by giving them the plot back together with the house and other developments for free. The alternative prayer by the appellant should have been considered in that light.

12. In response, the respondents who were not represented by counsel, asserted through Ayub, that the appellant was in breach of the sale agreement since he did not pay the balance of the purchase price, chased away tenants, and forcefully took possession of the property. He contended that the building of the house and other developments were made after Samson caused their arrest after the robbery incident where his wife was killed and he was injured. He even failed to comply with a demand letter they served him on 14th January 1995 for payment of the balance of the purchase price and therefore, all he was entitled to was a refund of his payment of Sh. 261,000 and nothing more. The agreement did not provide for any other payments after breach of the contract and the trial court was right to make the findings it did, he concluded.

13. We have anxiously given a fresh re-evaluation and re-assessment of the pleadings and the evidence on

record as we must on a first appeal in order to draw our own independent conclusions. We shall nevertheless confer some deference to the findings of the trial court where those findings are properly based on the evidence on record, but will not be shy to depart from them if they are based on no evidence at all or are based on a perversion of the evidence or in all the circumstances, they are plainly wrong in principle. We shall also bear in mind that we did not, unlike the trial court, see and hear the witnesses and therefore give allowance for it, that the trial court was better placed to judge the credibility of the witnesses. See *Selle v. Associated Motor Boat Company [1968] E.A. 123* at p.126.

14. The issues that fall for our decision, as we see them, are four:-

- ***Was the doctrine of frustration applicable in the circumstances of this case?***
- ***Was the appellant entitled to specific performance?***
- ***Did the respondents prove their counterclaim?***
- ***What are the appropriate orders?***

15. On the first issue, we have already observed that the case in the High Court was solely decided on the issue of frustration. Mr Kanyangi submits that the issue was never raised by the parties at any stage and therefore the court made an error of law to base its judgment on an unpleaded issue. We have carefully re-examined the record and it bears out that submission.

16. Samson did not plead frustration of the contract. On the contrary he relied on it to show that he had made payments which were acknowledged by the sellers; he had taken possession and made developments with the consent and “assistance of the defendants”; he had obtained the consent of the Land Control Board; and all that remained was the signature of the respondents on the transfer forms to conclude the contract, which is the prayer he made to the Court. In sum, according to him, he had performed his part of the contract. On the other hand, the respondents too did not plead frustration but relied on the contract to allege breach of it in their defence, and in their counterclaim for the balance of the purchase price before they could execute the transfer forms.

17. It is trite law that in civil proceedings, issues are raised by way of pleadings and the court can only lawfully determine issues that are specifically pleaded and proved before it. The court cannot base its decision on an un-pleaded issue. This was better explained in *Gandy v. Caspair Air Charters Ltd. (1956) 23 EACA 139* where Sir Sinclair, V-P, said:

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

18. For the rationale of that approach in our common law system, we may borrow from the Malawi Supreme Court of Appeal in *Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3*, where the learned judges quoted with approval from an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings*” published in [1960] *Current Legal Problems*, at P174 where the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of

justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice."

19. As to whether it is necessary to specifically plead "frustration", we cite Owour, J.A in Kenya Commercial Finance Co. Ltd –vs- Kipng'eno Arap Ngeny & Another- Civil Appeal No. 100 of 2001 where it was held:

"A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the Amended Complaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same. This not having been done, the learned Judge was clearly wrong."

20. There is, nevertheless, an exception to the rule which the predecessor of this Court expressed in the case of, Odd Jobs –vs- Mubia [1970] EA 476 and has since been faithfully applied by the courts. In the case of Vyas Industries –vs- Diocese of Meru [1982] KLR 114, the exception was summarized as follows:

"a) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to court for decision;

b) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."

21. Does the Odd Jobs case exception apply in this case? We think not. That is because the issue of frustration was neither raised in the evidence of the parties nor raised by counsel in their submissions. In his evidence Samson was simply explaining why he could not complete the payment as the respondents battled in court with another buyer of the adjacent plot for a road of access and they lost. They are the ones who had sold the plot to the neighbor without the road of access and he blamed them for the reduced acreage of his plot, hence his contention that he should pay less for the remaining acreage. It was not a question of mutual mistake, as he took no blame for the impasse. The written submissions filed by his advocate expounded the same theme.

22. Similarly, the evidence of the respondents and the written submissions of counsel made no reference to frustration. They relied on the agreement to plead that it was Samson who was in breach by failing to pay the balance of the agreed price and blamed him for taking possession of the plot before he had paid fully for it. According to them the size of the plot had no problem and they blamed the surveyors called by Samson for giving the wrong measurements. He ought to have satisfied himself on the size before the agreement was signed and not afterwards. As stated earlier, all they were interested in was payment of the balance of the agreed purchase price, regardless of the plot size, and damages.

23. In those circumstances, it is our finding that the trial court was in error in treating the contract as having been nullified on account of frustration and making an order for refund of the purchase price only. As we understand it, frustration, even where one is pleaded and proved, does not render a contract null and void. The supervening event simply makes the further performance of a valid contract impossible and releases the parties from further obligations under the contract. We may cite some persuasive statements from the House of Lords in Fibrosa Spolka Akcyjna –vs- Fairbairn Lawson Combe Barbour Ltd. (1942) 2 ALL ER 122 where Lord Macmillan expressed himself as follows:-

"My Lords, every system of law has had to face the problem of defining the consequences of a contract becoming impossible of fulfillment owing to some external supervening event for which neither of the parties is responsible. That such an eventuality releases both parties from further

performance of any of the stipulations of the contract is agreed on all hands. Each must fulfill his contractual obligations up to the moment when impossibility supervenes, for the contract is not avoided by becoming impossible of fulfillment, but the duty of further performance ceases. Having so declared, must the law stop there? What if money has been paid, work has been done, or liabilities have been incurred by one or other or both of the parties in pursuance of or in reliance on the fulfillment of the contract which now can never be completed?

The law may say that the event which has rendered fulfillment of the contract impossible is, so far as the parties are concerned, a mere accident; of mere accident the law takes no cognizance and for its consequences affords no redress; loss or gain must lie where it happens to fall and the parties must be left where they stood when their contract was frustrated. On the other hand, the law may endeavour to effect an equitable adjustment between the parties, so as to restore each as far as may be to the position which he occupied before he entered into the contract, and by a process of give and take to mitigate the consequences of the contract having proved abortive. I find this doctrine of restitution stated in its broadest terms in Pufendorf's celebrated treatise on the Law of Nature and Nations, first published in 1672, as follows:

'When the thing at the time of making the promise or pact appeared possible and afterwards becomes impossible we must inquire whether this happened by mere chance or by default and deceit. In the former case the pact is disannulled if nothing has yet been performed on either side. If anything have been already done towards it by one of the parties, the other shall give it back, or pay to the value of it; if neither of these can be done he is to use his best endeavours that the man be not a loser by him. For in contracts the first regard is had to the thing expressly mentioned in the agreement; when this cannot be obtained it is sufficient to give an equivalent; but whatever happens all imaginable care is to be used that the other party suffer no prejudice.'...

It is obvious that neither of these attempted solutions of the difficulty can be productive of complete justice. To leave matters as they stood when the contract became impossible of fulfillment may result in great gain to one of the parties and great loss to the other and to a grave infringement of the maxim nemo debet locupletari aliena jactura. It is no consolation to the individual sufferer to be told that on the whole such a rule works less injustice than any other. It is in truth a confession of impotence in the face of a problem deemed to be inextricable. On the other hand, to attempt to restore matters in their entirety is to attempt the impossible. The hands of the clock cannot be turned back; things cannot be as if they had not been. At best some sort of equitable accommodation can be achieved which must inevitably fall short of complete justice. The process is sought to be rationalized on a theory of quasi-contract. The parties have made no provision in their contract for the event which has frustrated it, so the law implies for them what it assumes they would have agreed upon if they had had the unforeseen contingency in contemplation when they entered into their contract. On another view, restitution is regarded as a separate principle of the law independent of contract.

Presented with this choice of methods of dealing with the situation, the law of England has adopted as its general principle the first of the two alternatives, namely, that each party shall be left as he stood, despairing of the practicability of conjecturing and enforcing what the parties might be assumed to have agreed upon if they had contemplated and provided for the unforeseen contingency."

24. It follows therefore, that even if there was frustration in this case, which there was not, the facts relating to payments made by the purchaser and the developments made pursuant to the contract ought to have been considered and enforced as part performance. Which leads us to the second issue.

25. Did the appellant make a case for conveyance of the plot in his name, or specific performance? In our view, all the ingredients of an enforceable contract were present and were largely admitted. The fact that a disagreement subsequently arose on the size of the plot was a matter of evidence which the court could resolve without affecting the validity of the contract. The consent of the Land Control Board was granted

and part of the agreed purchase price was made. The trial court made a finding, in our view against the weight of the evidence, that possession of the plot was forcefully taken by Samson.

26. The pleading on possession by the appellant was as follows:

***“At or immediately after the agreement was entered by all parties, the Defendant orally persuaded the plaintiff to take possession, the plaintiff developed the land by planting orange trees, used concrete posts to fence with barbed wires, spent Kshs 50,000/- to put terraces on the hilly part of the land, installed tap water and constructed a permanent house valued over 1.5 million shillings in which the plaintiff has planted nappier grass on the lower part of the land, all these developments were carried out with the assistance of the defendants.*”**

27. The response in defence was as follows:

“The defendants wonder why he claims that the defendants persuaded him to take possession and what advantage did the defendants gain from the plaintiff's act or taking possession? The fact is that the plaintiff forcefully and unlawfully and without consent and the plaintiff's, (sic) took possession of this land and built a mansion house therein thus evicting the defendants' tenants who lived in the temporary houses there.”

28. The pleading by the respondents, if valid, would surely have attracted immediate civil action or criminal prosecution. But nothing happened to dissuade the appellant from carrying out the huge developments he did until completion. The lie was given away in the counter claim where it is pleaded thus:

“That during the year 1991 the plaintiff forcefully entered into the said land and started constructing houses on that land. The defendants acquiesced to the said building because the plaintiff had promised to pay the balance soonest possible. The defendants have on several occasions requested the plaintiff to pay so that they could effect the transfer but without any response.” (Emphasis added)

29. So that, if there was acquiescence as pleaded, it explains why the respondents took no action to file suit or otherwise evict Samson until he filed suit four years later in 1995. In all probability, he took possession of the plot with the knowledge and consent of the respondents and the developments he carried out cannot be wished away. The finding by the trial court that there was forceful entry is therefore not borne out by the pleadings and evidence. It is set aside with the consequence that the developments made on the plot were legitimately made. From the date of the agreement and entry into possession, the respondents held the title to the plot in constructive trust for the appellant.

30. Specific performance is, of course, an equitable and discretionary remedy. That being so, it will not be ordered where there is an adequate alternative remedy and even where damages are not an adequate remedy, specific performance may still be refused where it will cause severe hardship to the defendant. See Reliable Electrical Engineers (K) Ltd vs. Mantrac Kenya Limited (2006) eKLR. As stated in Halsbury's Law of England Volume 44 (1), 4th Edition (Re-issue) at paragraph 840 :

“Where it is sought to enforce specific performance of a contract, the court must be satisfied (1) that there is a concluded contract which would be binding at law if all proper formalities had been observed and in particular that the parties have agreed, expressly or impliedly, on all the essential terms of the contract, and (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract.”

31. There was a valid, binding and enforceable agreement between the parties in this matter. The disagreement came at the tail end when Samson tendered a reduced balance of the purchase price explaining that part of the plot was reduced in size which was a proved fact. The amount offered was rejected by the respondents. The appellant should have repudiated the contract at that point and claimed his money back but did not. Instead he sued for specific performance as the main prayer or refund of the

money paid plus value of developments as an alternative. The alternative prayer would have been appropriate if specific performance was impossible, but in our view, it is not.

32. The appellant has been in possession of the plot for the last 20 years. All that remains is execution and registration of the transfer. The appellant never repudiated the agreement and cannot be heard to say that he should pay a reduced price for it. Any adjustments to the acreage is a matter of survey for him to rectify at his expense. We think in the circumstances of this case that specific performance is a more appropriate remedy, and we grant it in terms of prayer (a) of the plaint.

33. On the issue of counterclaim, we uphold the respondents as it is clear that the full balance of purchase price in the sum of sh. 119,000 was not paid. We give judgment for that sum with interest thereon at court rates of 12% from the date of filing the counterclaim on 2nd May 1995 until payment in full.

34. The upshot is that the appeal succeeds to the extent stated above. As each party had its share of blame in this standoff, the order for costs shall be that each party shall bear its own costs both here and in the court below.

Dated and delivered at Nyeri this 28th day of October, 2015.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR