



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Ruiru (Environment and Land Appeal 4 of 2023)
[2024] KEELC 3739 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 4 OF 2023**

YM ANGIMA, J

MAY 9, 2024

BETWEEN

SAMUEL MWANGI KIMANI APPELLANT

AND

MIRIAM NJOKI RUIRU RESPONDENT

*(Being an appeal against the judgment and decree of Hon. H.O. Barasa
(SPM) dated 28.02.2022 in Engineer SPM ELC No. E013 of 2021)*

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. H.O. Barasa (SPM) dated 28.02.2022 in Engineer SPM ELC No. E013 of 2021 – Miriam Njoki Ruiru v Samwel Mwangi Kimani. By the said judgment, the trial court ordered the Appellant to refund the Respondent the deposit of the purpose price in the sum of Kshs.1,835,000/= paid in respect of the abortive sale of Title No. Nyandarua/Muruaki/6624 (the suit property) together with interest thereon at court rates from the date of the sale agreement until payment in full. The Respondent was also awarded costs of the suit.

B. Background

2. The record shows that vide a plaint dated 28.04.2021 the Respondent sued the Appellant before the trial court seeking the following reliefs:
 - a. A declaration that the Plaintiff is the lawful purchaser for value of all the property known as Nyandarua/Muruaki/6624.



- b. An order of specific performance against the Defendant to successfully transfer land parcel no. Nyandarua/Muruaki/6624 in favour of the Plaintiff by signing and obtaining the relevant completion documents necessary to effect the transfer.
 - c. An order do issue for the Defendant to refund the paid purchase price of Kshs.1,835,000/= paid out to him for land parcel No. Nyandarua/Muruaki/6624 plus interests at commercial rates from the year 2018 up to full payment in the event that (a) and (b) are not granted.
 - d. In addition to (c) above, an order do issue for the Defendant to pay the Plaintiff general and exemplary damages at current market rate with interest on account of the breach of contract.
 - e. Costs of this suit and interest thereon at court rates.
 - f. Such other or alternative remedy that this honourable court may deem apt to grant.
3. The Respondent pleaded that vide a sale agreement dated 28.07.2018 the Appellant sold the suit property to her at an agreed consideration of Kshs.2,300,000/=. She pleaded that she paid a deposit of Kshs.1,835,000/= whereas the balance was to be paid upon transfer of the suit property to her.
 4. The Respondent further pleaded that in breach of the said agreement the Appellant had refused or failed to transfer the suit property or proceed with the sale transaction. It was her case that despite issuance of a demand and notice of intention to sue, the Appellant had failed to oblige thus rendering the suit necessary.
 5. The record shows that the Appellant filed a defence dated 18.05.2021 denying the Respondent's claim in toto. Apart from admitting entering into the sale agreement dated 28.07.2018 he made a general denial of all the allegations contained in the plaint and put the Respondent to strict proof thereof.

C. Trial Court's Decision

6. The material on record shows that upon a full hearing of the suit at which the parties testified on their behalf, the trial court believed the evidence of the Respondent and held that the Appellant was in breach of the sale agreement. The trial court rejected the Appellant's defence that it was the Respondent who had frustrated completion of the sale agreement by failing to pay the deposit of Kshs.1,835,000/= as per the terms of the sale agreement.
7. The trial court, however, declined to order specific performance of the sale agreement but directed the Appellant to refund the deposit of Kshs.1,835,000/= paid together with interest at court rates from the date of the sale agreement. The court also declined to award the Respondent general and exemplary damages for breach of contract on the basis that no sufficient basis had been laid for such damages.

D. Grounds of Appeal

8. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 28.03.2022 raising the following 6 grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact by failing to adequately consider the requirements of a valid contract.
 - b. That the learned trial magistrate erred in law and fact by finding that the Respondent/Plaintiff did indeed provide consideration for the contract.
 - c. That the learned trial magistrate erred in law and fact by failing to consider the issue of attestation of signatures that formed part of the Defendant/Appellant's submissions.



- d. That the learned trial magistrate erred in law and fact in finding that the Plaintiff/Respondent was a bona fide purchaser of value.
 - e. That the learned trial magistrate erred in law and fact by relying on the reply to the Plaintiff's/ Respondent demand letter despite the same having been erroneously written.
 - f. That the learned trial magistrate erred in law and fact by misapprehending the applicable principles, law, considerations, reasons and or circumstances that apply in agreements/ contracts generally.
9. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the appeal be allowed.
 - b. That the judgment and decree of the trial court dated 28.02.2022 be reviewed, reversed or set aside.
 - c. That the court do revisit the judgment and give an independent determination of its own.
 - d. That the court do grant any other remedy it may deem fit in the circumstances.

E. Directions on Submissions

10. When the appeal was listed for directions it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed written submissions dated 02.02.2024 whereas the Respondent's submissions were dated 20.02.2024.

F. Issues for Determination

11. Although the Appellant raised 6 grounds in his memorandum of appeal, the court is of the view that the key issues may be summarized as follows:
- a. Whether the trial court erred in law and fact in ordering the Appellant to refund the deposit of the purchase price.
 - b. Who shall bear costs of the appeal.

G. Applicable Legal Principles

1. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at page 126 as follows:

“...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”



13. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

14. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

15. In the case of *Kapsiran Clan v Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

- a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.



H. Analysis and Determination

a. Whether the trial court erred in law and fact in ordering the Appellant to refund the deposit of the purchase price

16. The court has considered the material and submissions on record on this issue. The Appellant submitted that the trial court failed to consider whether or not there was a valid contract between the parties in the first place. The Appellant contended that there was no valid contract between the parties because the sale agreement dated 28.07.2018 was attested by one witness only instead of two as required under Section 3(3) of the *Law of Contract Act*.
17. The court has noted that the validity of the sale agreement dated 28.07.2018 was neither raised in the Appellant's defence nor his witness statement. It could not, therefore, be a legitimate issue for determination in the trial. It is trite law that issues for determination can only flow from the pleadings of the parties, answers to interrogatories, sworn statements made by or on behalf of the parties, or the documents produced by the parties at the trial. See Order 15 rule 2 of the Civil Procedure Rules, 2010.
18. The court is thus of the view that the issue of the validity of the sale agreement was raised as a mere afterthought in the Appellant's submissions before the trial court. The court is further of the opinion that the validity or otherwise of the sale agreement is really of no legal consequence since the trial court declined to order specific performance of the sale agreement. A party to an invalid sale agreement is entitled to a refund of whatever money he may have paid pursuant thereto.
19. The court has also considered the Appellant's submissions that the trial court erred in law and fact in failing to hold that the Respondent had failed to pay the deposit of Kshs.1,835,000/= thereby frustrating due performance of the sale agreement dated 28.07.2018. The Appellant faulted the trial court for relying upon his advocate's reply to a demand letter as evidence of payment of the deposit of Kshs.1,835,000/=.
20. The court finds absolutely no merit in the Appellant's contention that it was the Respondent who had failed to pay the deposit of the purchase price for at least 5 reasons. First, the Appellant did not produce a single letter or short message service text (sms) demanding payment of the deposit from the Respondent. Second, there was no letter or message to the Respondent seeking to rescind the sale agreement on account of the alleged default. Third, the issue of alleged non-payment of the deposit was not specifically pleaded in the defence as required under the provisions of Order 2 rule 4 of the Civil Procedure Rules. Fourth, the Appellant's reply dated 30.03.2021 to the Respondent's demand letter was so detailed that it could not have been drafted by an advocate without the Appellant's instructions. Fifth, there was no letter from the Appellant's advocates informing the Respondent's then advocates M/S David K. Gichuki Advocates that the letter of 30.03.2021 was written by mistake and without the Appellant's instructions.
21. The court's own evaluation of the evidence on record leads to the inevitable conclusion that the Appellant was paid the deposit of Kshs.1,835,000/= on account of the sale agreement for the sale of suit property. That explains why he offered to refund the sum of Kshs.1,575,000/= he considered to be owing the Respondent by monthly instalments of Kshs.20,000/= until payment in full. As a result, the court finds no error either of law or fact on the part of the trial court in finding and holding that the Appellant had acknowledged receipt of the deposit and was obligated to refund the same. The court agrees with the trial court that it would be unjust and inequitable to allow the Appellant to keep both the money and the suit property.



d. Who shall bear costs of the appeal

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a consequence, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

- 23. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. As a result, the court makes the following orders for disposal thereof:
 - a. The appeal be and is hereby dismissed.
 - b. The judgment of the trial court in Engineer SPM ELC No. E013/2021 is hereby affirmed.
 - c. The Respondent is hereby awarded costs of the appeal.

It is so decided.

Judgment dated **and** signed at Nyandarua **and** delivered **via Microsoft Teams platform this 9th day of May, 2024**.**

In the presence of:

N/A for the Appellant

Mr. Wainaina for the Respondent

C/A - Carol

.....

Y. M. ANGIMA

JUDGE

