Githinji v Gitero & another (Environment and Land Appeal E008 of 2023) [2024] KEELC 5049 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELC 5049 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT AND LAND APPEAL E008 OF 2023

AK BOR, J

JUNE 28, 2024

BETWEEN

ELIJAH MAKANGA GITHINJI ..... APPELLANT

AND

FRANCIS MAINA GITERO ..... 1ST RESPONDENT

FLORENCE WANGUI MAINA ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant lodged this appeal against the judgment delivered by the Senior Resident Magistrate, Hon E. Ngigi on 10/8/2018 vide which the court directed the Appellant to refund to the Respondents the sum of Kshs. 4,500,000/= being the value of the land at that time. The Respondents filed the suit before the trial court seeking to have the Appellant compelled to surrender the original ownership documents for the land known as Unsurveyed Residential A No. 2 Plot No. 61 Nanyuki Municipality, or in the alternative, the Appellant was to be ordered to pay to the Respondents Kshs. 4,5000,000/ = being the market value of the land. The Respondents also sought to restrain the Appellant from dealing with the suit land.

2. The background to the case is that on 6/6/2009, parties entered into an agreement for the sale of suit land at the agreed consideration of Kshs. 1,000,000/=. On execution of the agreement, the Respondents paid Kshs. 500,000 to the Appellant and the parties agreed that the balance would be paid once the Appellant transferred the land. The Appellant was to pursue a lease with the Commissioner of Lands and pay the land rent. The Appellant purported to revoke the transaction vide his advocates' letter dated 27/8/2014 which forwarded a cheque to the Respondents for Kshs. 700,000/= being a refund of the purchase price plus damages.

3. The Appellant did not dispute the sale agreement and receipt of Kshs. 500,000/= but he contended that the sale agreement was frustrated by the failure to procure the lease from the Commissioner of

Lands. He averred that he had pursued the lease for 5 years without success and that he no longer desired to transfer the land to the Respondents.

4. After hearing the parties, the trial court summarised two issues for determination, being who was to blame for breach of the agreement and what remedies were available to the parties. The trial court found that the Appellant did not wish to obtain the leasehold and noted from the evidence of the Respondents' witness that he offered to assist the Appellant to pursue the lease from the National Land Commission (NLC) but the Appellant declined to hand over the requisite documents.

5. The court adverted to clause 6 of the agreement dated 6/6/2009 and noted that a refund of the purchase price and Kshs. 100,000 as liquidated damages in the event of breach was lenient to the Appellant. Additionally, that the clause put the purchaser at a great disadvantage taking into account the fact that more than 6 years had lapsed for the purchaser to receive an additional sum of Kshs. 100,000 yet the value of the suit land had appreciated more than four times. The court therefore found it fair for the purchaser to be compensated at the value of the land then. The Learned Magistrate faulted the Appellant for not offering an alternative valuation report and went by the report supplied by the Respondents.

6. Being aggrieved by those findings, the Appellant lodged this appeal. The court directed parties to file written submissions, which it has read and considered. The Appellant submitted that under the agreement dated 6/6/2009, parties agreed that the land would be sold at a consideration of Kshs. 1,000,000/= of which the Respondents paid 500,000/= and the balance was payable on execution of the transfer of lease in favour of the purchasers. He relied on clause 12 of the agreement which stipulated that the Appellant would pay liquidated damages of 100,000/= in the event of breach by him alongside refunding the consideration paid. The Appellant pointed out that clause 5 provided that the vendor would within 60 days of the date of the agreement process the certificate of lease and the lease documents.

7. The Appellant submitted that by the letter dated 22/8/2014 he wrote to the Respondents and repudiated the agreement because he was unable to procure the completion documents referred to in the agreement and he therefore forwarded the cheque for Kshs. 700,000/= comprising the refund of the consideration paid of Kshs. 500,000/=, liquidated damages of Kshs. 100,00/= and an ex gratia payment of Kshs. 100,000/=. The Respondents rejected the repudiation while returning the cheque through their advocates' letter of 28/8/2014.

8. The Appellant faulted the Learned Magistrate for awarding the Respondents Kshs. 4,500,000/= instead of the remedies which the parties agreed upon, which is a refund of the purchase price together with liquidated damages of Kshs. 100,000/=. The Appellant maintained that parties were bound by the terms of contract they entered into. He argued that the courts must give effect to the intention of the parties and that the court must not rewrite the terms clearly expressed by parties who manifest a clear intention to be bound by those terms.

9. Further, he submitted that by finding that clause 12 of the agreement was too lenient to the Appellant and placed the Respondent at a great disadvantage, the Learned Magistrate set out to rewrite the agreement between the parties to provide for what he perceived to be a fair deal. The Appellant also faulted the Learned Magistrate for relying on *National Bank of Kenya Limited v Pipe Plastic Sanko Lit (K) Limited* and distinguished that case as not being applicable to the circumstances of this case. The Appellant submitted that there was nothing unconscionable in clause 12 of the agreement while urging that in opting out of the contract, he was only taking an opportunity afforded to him by the contract and even if the Respondents were in the process disadvantaged so be it.

10. The Appellant faulted the Magistrate for granting the alternative prayer without giving reasons in the judgment. Further, that he did not suggest that specific performance was not feasible. The Appellant contended that the order of Kshs. 4,500,000/= to the Respondent was whimsical and not based on sound reasoning. The Appellant emphasised that it was not open to the Magistrate to grope beyond the conditions of the contract and base the award on pleadings.

11. The Appellant abandoned the fourth ground noting it was he who signaled the revocation or breach of the contract and urged the court to set aside the judgment of the Learned Magistrate and replace it with an order dismissing the suit with costs to him.

12. The Respondents submitted that through the agreement signed on 6/6/2009, the Appellant received 50% payment of the purchase price of Kshs. 500,000/= on condition that within 60 days he would process the certificate of lease and cause the transfer of the lease following which the balance of the purchase price would be paid with time being of essence. They added that the agreement was not performed within the 60 days and parties acquiesced to the indefinite continuity of the sale agreement on the expectation that the Appellant was working on the completion documents. The Appellant sent the letter dated 27/8/2014 purporting to withdraw from the sale agreement and offered to refund the purchase price with a further sum of Kshs. 100,000/= being damages and a similar sum termed as incidentals. The Respondent rejected the payment.

13. The Respondents submitted that by 7/11/2016 the value of land had risen to Kshs. 4, 500,000/=. The Respondent urged that there was no evidence to show that the Appellant applied for the certificate of lease over the suit property or caused the transfer to the Respondents in terms of the agreement which leads to the conclusion that the Appellant did not intend to perform his part of the agreement and simply bought time to utilise and benefit from the money the Respondents had paid him. The Respondents added that during the engagement they had taken possession of the land and built structures on it.

14. The Respondents supported the findings by the Learned Magistrate and added that when entering into the sale agreement which was to be performed in 60 days, the parties did not even imagine that the sum of Kshs. 100,000/= would suffice as liquidated damages for a breach of the agreement occurring six years and two months later. The Respondents faulted the Appellant for not tendering any evidence to show the efforts he made in following up on the processing of the lease and pointed out that there was no provision in the agreement for payment of incidental cost or an ex gratia payment. Further, that the agreement did not provide for withdrawal and that this together with other factors drew the trial court to make a finding that it would be inequitable to reward a party who had gone out of his way to frustrate and repudiate his own contract and then seek to throw some money at the party who had been wronged.

15. The Respondents submitted that having failed to perform the contract terms within the 60 days and having continued to make commitments of processing the lease, the Appellant was estopped from reverting to the same terms of the agreement which were operative within 60 days. The Respondents maintained that the Appellant had walked out of the contract terms and the trial court only made a finding which would achieve justice in the circumstances. They pointed out that had they utilised the sum of Kshs. 500,000/= to buy another piece of land in 2009, by 2014 the value of the land would have grown in value fivefold to Kshs. 2,500,000/=. They urged that it would be unconscionable and would amount to unjustly enriching the Appellant if the Appellant were allowed to refund them the sum of Kshs. 600,000/= as compensation for the Appellant's breach which occurred six years after the agreed completion date.

16. The Respondents relied on *Mrao Limited v First American Bank of Kenya Limited and 2 Others* [2003] eKLR in urging that on a first appeal the court is required to re-analyse the evidence and the law and can only overturn the trial court's finding if the trial judge misdirected himself or misapprehended the facts or took into account considerations he should not have taken or he failed to take into account considerations which he should have taken into account or if his decision was plainly wrong. They maintained that no materiel had been placed before this court by the Appellant to show that the Magistrate's decision was plainly wrong or that the Learned Magistrate took into account considerations that he ought not to have.

17. They added that the superior courts had held that where no consideration was proved in breach of contract, the aggrieved party must be returned to its just position and where the breach is found to have been oppressive, high handed, outrageous and vindictive as in this case general damages are to be awarded. They submitted that the trial court exercised its discretion properly. They urged that the Court of Appeal in *Delilah Kerubo Otiso v Ramesh Chander Ndingra* [2018] eKLR held that general damages are awardable where the conduct of the person in breach was found to be high handed outrageous, insolent or vindictive.

18. The issue for determination is whether the court should allow the appeal by setting aside the judgment and decree of the Learned Magistrate and instead dismiss the Plaintiff's suit and award the Defendant the costs of the suit and the appeal. The appeal arose from the judgment of the Learned Magistrate who directed the Appellant to refund to the Respondents the sum of Kshs. 4,500,000/= which was the market value of the land at that time. The court also awarded the Respondents costs and interest.

19. The background to this case is that the parties in the suit entered into a sale agreement on 6/6/2009 vide which the Appellant sold the suit plot to the Respondents at the agreed sum of Kshs. 1,000,000/= out of which Kshs. 500,000/= was paid on execution of the agreement and the balance was to be paid immediately upon execution of the transfer of lease in favour of the Respondents. The sale transaction aborted and the Appellant's advocate wrote to the Respondents on 27/8/2014 claiming that he was unable to procure the completion documents and as such had no desire of completing or finalising the transaction. His advocates forwarded a cheque for Kshs. 700,000/= made up of the deposit of Kshs. 500,000/=, liquidated damages of Kshs. 100,000/= and a further sum of Kshs. 100,000/= termed as other incidentals incurred by the purchasers.

20. The Respondents' advocates objected to the unilateral termination while maintaining in their advocates' letter of 28/08/2014 returning the cheque that the agreement was still valid and could only be terminated by mutual understanding of the parties. Their advocates pointed out that they had been in possession of the suit land while warning the Appellant not to interfere with their possession and user of the land.

21. The Respondents sought three main prayers in the Amended Plaint, an order to compel the Appellant to transfer the land to the Respondents or in the alternative, that he pays Kshs. 4,500,000/= being the market value of the land. The third prayer was for a permanent injunction to restrain the Appellant from disposing of the land or interfering with the Respondents' possession of the suit land. The Learned Magistrate directed the Appellant to pay the Respondents the sum of Kshs. 4,500,000/=.

22. In this appeal, the Appellant contends that the court erred by granting the Respondents a relief that was not provided for in the contract thereby rewriting the contact on behalf of the parties. It is helpful to look at the terms of the sale agreement. Under clause 5, the Appellant was to process the certificate of lease and lease within 60 days from the date of the agreement, with time being of essence. In the event of breach of any clause by the vendor, he was to refund the purchaser all the consideration paid

plus a further sum of Kshs. 100,000/= being the agreed liquidated damages pursuant to clause 12 of the agreement.

23. It is not in dispute that the Appellant purported to terminate the agreement over six years after its execution citing the reason that he was unable to procure the completion documents set out in the sale agreement and that he no longer desired to complete the sale transaction. No evidence was led to show the efforts the Appellant had made towards procuring the requisite completion documents. What emerges from the evidence tendered by the Appellant is that the Appellant continued paying land rates and rent for the suit land even after the completion date and that he simply changed his mind and did not wish to finalise the sale transaction by meeting his obligations under the agreement.

24. Despite the agreement making time of essence for the completion of the transaction and setting the completion as 60 days of the date of the agreement, there is nothing to show that the efforts the Appellant took to fulfil its obligations under the contract. The Respondents who had been put in possession of the land contended that they were led to believe that the contract would be performed years after the completion date had passed.

25. There was no basis for the additional sum of Kshs. 100,000/= which the Appellant purported to send to the Respondents that it termed as other incidentals incurred by the Respondents.

26. The decisions which the Appellant relied on only deal with the legal position that parties are bound by the terms of the contracts that they have voluntarily entered into and it is not the place of the court to rewrite contracts for the parties. The facts of the decisions which the Appellant relied on are distinguishable. In *Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) and Another* [2020] eKLR the issue was whether the appellant was entitled to damages for eviction from the suit premises which was also pegged on whether there was a tenancy in force between the parties. *Jane Elizabeth Gitiri Waroga v John Dryden Kimotho* [2019] eKLR related to interest payable on a loan borrowed where interest was to be paid and the appellate court found that parties were bound by the interest terms agreed upon.

27. This case is about an agreement for the sale of land which was not completed due to breach by the Appellant and the damages payable to the aggrieved party under the contract. In its analysis on the assessment of damages in the Omar Gorhan case, the court quoted Viscount Haidane L.C as having stated that one of the broad principles in making decisions on assessment of damages was that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. Had the Appellant performed his part of the contract and effected the transfer to the Respondents within the 60 days as agreed, there would have been no dispute. The Respondents ought to be placed as far as money can do it, in a good situation as if the contract had been performed by the Appellant.

28. This court agrees with the Learned Magistrate's finding that it was the Appellant who breached the agreement by failing to fulfil his obligations within the timelines under the contract or a reasonable period after that. The Learned Magistrate did not err by awarding the Respondents the value of the land as compensation for the breach of the contract of sale by the Appellant. It is evident that an order for specific performance would not have been practical and an order for injunction would not have been available in the circumstances of the case.

29. Owing to the fact that the Respondent had not paid purchase price for the suit land in full and the sum of Kshs. 500,000/= was outstanding, the sum awarded by the Learned Magistrate is reduced to Kshs. 4,000,000/=.

30. The appeal lacks merit and is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JUNE 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Mwangi Kariuki for the Appellant

Court Assistant- Stella Gakii

No appearance for the Respondent