IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appeal 286 of 2002

EDWARD MUGAMBI ……...……..…… APPELLANT

AND

JASON MATHIU …….. RESPONDENT

***(Appeal from Judgment and Decree of the High Court at Meru (Kasanga, J) dated 1st August, 2002* In H.C. Civil Appeal No. 39 of 1998)**

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JUDGMENT OF THE COURT:

The conflict between Edward Mugambi, the appellant herein, and Jason Mathiu, the respondent, appears to have arisen from two documents, one headed "AGREEMENT" and the other one headed "RECEIPT." The "AGREEMENT" is in these terms:-

"***I Mr. JASON MATHIU accept that I have received Kshs. Five Thousand (5000.00) from Mr. Edward K. Mugambi being the first payment of a piece of land of total value Kshs.70,000/- (seventy thousand) Balance of Kshs.65,000/- (sixty five thousand) to be paid by the end of August.***

MR. JASON MATHIU

……

1. ***Witness: Jacob Muthuri***

2. ***Witness: Justus M'Inoti."***

The date on which this document was made does not appear on the copy in the Court's record.

The second document "RECEIPT" was in these terms:-

"***I, JASON MUTHUI, of P.O. Box 636, Meru, do hereby acknowledge receipt of Kshs. seventeen thousand (17,000/-) and a Peugeot 504, valued at Kshs.50,000/- from EDWARD MUGAMBI of P.O. Box 35, Nanyuki, being the part payment of the purchase price of my plot No. 4 Katheri Farmers Company (1) pursuant to an agreement made in the chambers of Gitobu Imanyara & Co. advocates on 5th August, 1981.***

Dated at Nanyuki this 5th day of August, 1981.

Signed

VENDOR

Witness

For and on behalf of GITOBU IMANYARA & Co. Advocates

Signed ….. Partner."

No other agreement appears on the record we have, but thereafter there are various letters dated 16th August, 1982, 27th October, 1982, 6th March, 1986, all written to the appellant by the Advocates for the respondent. The letter of 16th August, 1982 demanded from the appellant the payment of Kshs.53,000/- within fourteen days and that if the appellant did not pay the money or hand over the land, legal proceedings would be taken against him. The one of 27th October, 1982 gave the appellant seven days to pay or leave the land. The one of 6th March, 1986 informed the appellant that he should vacate the land within ninety days from the date of the letter and that if he did not, legal proceedings would be instituted for his eviction.

To all these letters, the appellant appears to have written only one dated 26th August, 1982 and in that letter written and signed on behalf of Gitobu Imanyara, the appellant's advocates told the respondent's advocates that:-

"***Our client denies the allegations of your client in their entirety and that:-***

"***Any action against our client will be strenuously defended at your client's risk as to costs."***

It is not clear if the apepllant was denying that there had ever been any agreement between them or that if there had been an agreement, he had paid the full consideration and things like that.

It is not therefore, surprising that by a plaint dated 23rd September, 1992, the respondent filed suit against the appellant in the court of the Senior Resident Magistrate at Nanyuki pleading that:-

"5. The plaintiff sold to the defendant the plaintiff's land situated at Katheri Farmers Co. Ltd. (Hook's Farm) measuring 13 acres at a consideration of K.shs.70,000/- and the plaintiff paid to the defendant a sum of K.shs.17,000/- leaving an outstanding balance of Kshs.53,000/- which the defendant has completely refused to pay to the plaintiff despite the fact that the defendant was put into possession of the land.

3. The plaintiff claims that once the defendant failed to pay the balance of the purchase price he became a trespasser on the plaintiff's piece of land and now the plaintiff claims that the defendant should be evicted from the land in question."

The prayers asked for in the plaint were:-

"***(a) An order to evict the defendant from the plaintiff's piece of land situated at Katheri Farmers Co. (Hook's Farm);***

(b) Mesne profits.

(c) Costs of and incidental to the suit.

(d) Interest at court rates."

To this plaint the respondent's answer in his defence dated 24th November, 1992 was that:-

"***3. The defendant denies the contents of paragraph 3 of the plaint and puts the plaintiff to strict proof***

thereof.

4. The defendant states that he paid the whole of the purchase price as agreed and therefore denies the contents of paragraph 4 of the plaint and puts the plaintiff into strict proof thereof.

5. The defendant states that the suit is time-barred by limitation of action act (sic) and will apply for the same to be struck off (sic).”

The plaint and the defence were tried before the Magistrate at Nanyuki and the respondent testified and called three witnesses. The burden of the respondent’s evidence was that they entered into an agreement with the appellant for the sale of his shares in Katheri Farmers Co. Ltd. and it was known by both parties that the shares represented land of some 13 acres and to the respondent and the appellant all they knew was that the sale concerned 13 acres of land not shares. The documents whose contents we set out at the beginning only talked of land not shares and the document headed “RECEIPT” specifically mention PLOT No. 4 at Katheri Farmers Co. Ltd. Two other witnesses (PW2 and PW3) knew about the agreement and as far as we are able to understand the evidence, the appellant agreed that the respondent was selling land to him at the price of Khs.70,000/-. The respondent was paid Kshs.17,000/- in cash and the apepllant handed over to him motor vehicle Reg. No. KVN 260 Peugeot 504. That vehicle was valued at Kshs. 50,000/- The respondent and his witnesses said the respondent subsequently returned the vehicle to the appellant, either because it was not registered in the appellant’s name (i.e. according to the respondent) or because it had an automatic gear-system which the respondent was not familiar with (i.e. according to PW2 and PW3). But the important thing which the Magistrate accepted and which was confirmed by the superior court was that the respondent, for one reason or the other, returned the vehicle to the apepllant. The appellant did not reject the vehicle; instead he accepted it back and subsequently sold it to Robert Myall (PW4) for Kshs.35,000/-. PW4 told the Magistrate he still had the vehicle at the time he was testifying and that he had bought it from the appellant. There was not only reasonable and credible evidence, but, in our view, overwhelming evidence, that the appellant paid to the respondent only Kshs.17,000/- leaving a balance of Kshs.53,000/- still outstanding. Despite numerous demand notices from the respondent the appellant adamantly refused to pay.

In those circumstances, the two courts below were perfectly entitled to hold as they did, that the appellant had committed a fundamental breach of the contract of sale and that that breach entitled the respondent to either rescind the contract as he in fact did or to ignore the breach and seek the enforcement of the terms of the contract. Mr. Kariuki, learned counsel for the appellant, referred us to the Book “*Law of Contract in East Africa*” by R.W. Hodgin, Kenya Literature Bureau, and the learned author deals with “FUNDAMENTAL BREACH” in this way:-

“***In deciding whether there has been a fundamental breach of the contract, it is necessary to ask whether it is a condition or a warranty that has been broken. As we saw earlier it is not an easy task to differentiate between the two. We can say that a condition is a major term of the contract and a breach of such a term allows discharge of the contract, and that a warranty is a minor term that attracts only an award of damages. If the breach goes to the root of the contract and affects its commercial viability , it is said to discharge the contract.***

It is possible for a breach of condition to be treated merely as a breach of a warranty in that the injured party elects to affirm the contract, or is compelled because he has already derived substantial benefits from it. In such a case the condition becomes a ‘warranty’ ex post facto”

Surely, failure to pay a substantial portion of the purchase price, i.e. the consideration for the deal, must of necessity amount to a breach of a condition, and must entitle the innocent party to a discharge of the contract. Of course, the innocent party can choose to affirm the contract, but with the greatest respect to Mr. Kariuki, it is not for the party in default to prescribe for the innocent party the remedy to seek.

By his letter of 6th March, 1986, the respondent gave to the appellant a notice to leave the land in ninety

days or proceedings for his eviction would be taken. When the appellant failed to leave, the suit was filed on 23rd September, 1992 and the only remedy sought was the eviction of the appellant and mesne profits. Like the two courts below, we are satisfied the appellant was in fundamental breach of their bargain and the respondent was entitled to treat the contract as discharged and to seek the eviction of the appellant. We can find no basis in law for interfering with the decision of the two courts below on this aspect of the case. Accordingly grounds one and two in the memorandum of appeal which complain that:-

"***1. The learned Judge erred in Law in arriving at a decision which is contrary to Law".***

and

"***2. The learned Judge erred in Law in not finding that under the Law of Contract, if there was unpaid balance, the Respondent could only claim the same not repudiate or recede (sic) the contract".***

have no basis either in Law or on the facts and must accordingly fail.

Was the suit time – barred? Once again like the two courts below, we are certain that the suit was not time barred.

It is true there was a contract between the apepllant and the respondent and that in ordinary contracts the limitation period under *section 4* of the Limitation of Actions Act, *Chapter 22* Laws of Kenya

ix years. But as a result of the contract, the appellant gained possession of the respondent's land, i.e. the appellant acquired possession of the land by virtue of the contract whose terms he failed to honour. He was still in possession of the land by the time the suit was filed and if the respondent had allowed his (appellant's) continued possession for twelve years, the appellant might well have claimed that he had acquired the land by way of adverse possession after the contract between them had failed. The respondent was seeking to recover possession of his land from the appellant, and in our view, that is the kind of situation provided for in *section 7* of the Limitation of Actions Act:-

"*An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."*

Whether the respondent's right of action accrued to him on 16th August, 1982, or on 27th October, 1982 or on 6th March, 1986, twelve years had not lapsed by the time the suit was filed on 23rd September, 1992. We agree with Mr. Mwirigi, learned counsel for the respondent, that the defence of limitation was for rejection and was rightly rejected. Ground three of the grounds of appeal to the effect that:-

"***The learned Judge erred in Law in not finding that the claim was time barred."***

must also fail.

The respondent claimed mesne profits but the Magistrate did not award him any. He had received Kshs.17,000/- as part of the purchase price, but the appellant himself said he had been in occupation of the land since 1981 and he was obviously using it and deriving benefit from that user. The Magistrate was obviously right in not ordering the respondent to refund the Kshs.17,000/- and this was particularly just in view of the Magistrate's refusal to award mesne profits to the respondent. We are satisfied that the two courts below reached a just decision on the evidence and the law and that being our view of the matter, we order that the appeal be dismissed with costs thereof to the respondents. Those shall be our orders.

Dated and Delivered at Nyeri this 18th day of May, 2007

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR.