Mukishoe v Muko (Environment and Land Appeal E015 of 2022)
[2024] KEELC 5633 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5633 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E015 OF 2022

LC KOMINGOI, J

JULY 18, 2024

BETWEEN

STANLEY KISHIL MUKISHOE ..... APPELLANT

AND

WILLIAM MUKO ..... RESPONDENT

(Being an Appeal against the Judgement of Hon. B. Cheloti, SRM in Kajiado CM ELC No. 2 of 2020 delivered on 15th February 2022)

JUDGMENT

1. In her Judgment dated 15th February 2022, Honourable B. Cheloti SRM observed thus;

> " The Plaintiff averred that he had rescinded the sale agreement dated 17th December 1995 and had offered to refund the Defendant the money already paid being Kshs.186,000/=. The Plaintiff did not state how he rescinded the sale agreement, whether the same was done orally or in writing. There was no proof of the sale agreement being rescinded. From the foregoing, the court will be guided by the sale agreement dated 17th December 1995 and the minutes of the meeting held on 22nd December 2019 in which the Plaintiff agreed to grant the Defendant possession of 31 acres. The suit herein is dismissed for lack of merit. There are no orders as to costs."

2. Aggrieved, the appellant has appealed against the said judgement on the grounds that:

    1. The trial Magistrate erred in law and in fact by adjudicating over issues that were not before her and acting outside the scope of her key duties as a neutral arbiter and also relying on extraneous matters in dismissing the Appellant's suit which dismissal was an indication of judicial bias.

2. The trial Magistrate erred in law in allowing specific performance of an agreement entered in 1995 and in considering minutes of a meeting held on 22nd December 2019 as part of the said agreement.

3. The trial Magistrate misdirected herself by failing to consider the Appellant's written submissions dated 7th December 2021 and the evidence on record and granting judgement against the Appellant which failure occasioned a miscarriage of justice.

4. The trial Magistrate erred in law and in fact by holding that the Appellant was to blame for breach of the sale agreement entered on 17th December 1995 against the law and weight of evidence.

3. This Appeal was canvassed by way of written submissions.

The Appellant's Submissions.

4. Counsel for the Appellant submitted that the dispute emanated from an oral sale agreement entered into between the Appellant and the Respondent on 17th December 1995 for the sale of 50 acres of Kajiado/Kaputiei-Central/1302 for a consideration of Kshs. 300,000. The payment was to be made within 5 months from the date of the agreement but the contract was rescinded because the Respondent only paid Kshs. 186,000. The Respondent had thus failed to adhere to the contract for over 26 years but wanted to gain entry to the suit property thus necessitating the filing of the suit. The trial court in relying on the minutes of a meeting held on 26th December 2019 ordered that the Respondent was entitled to 31 acres of the property which was equivalent to the amount of money paid and dismissed the suit.

5. On whether this was beyond the trial Magistrate's scope, counsel submitted that the trial court in awarding the Respondent 31 acres based on the minutes of the meeting held on 22nd December 2019 was beyond her scope because she gave the minutes same weight as a contract. Adding that, the Respondent neither filed a counterclaim seeking for the 31 acres nor did the Respondent mention the 31 acres in his Statement of Defence.

6. Counsel went on to submit that by this decision, the trial court re-wrote the parties agreement instead of interpreting it citing Rufale vs Umon Manufacturing Co. (Ramsboltom) (1918) LR 1KB 592, Attorney General of Belize et al vs Belize Telcom Ltd & another (2009) 1WLR 1980. Counsel submitted that the contract entered in 1995 was for sale of 50 acres of land for a consideration of Kshs. 300,000. Therefore, the Respondent could not purport that he was entitled to 31 acres which was equivalent to the Kshs. 186,000 paid because that was not the contractual agreement. The contract was thus terminated for non-performance and the minutes relied on could not vary a valid contract citing Kenya Breweries Ltd v Kiambu general Transport Agency Ltd [2000] E 398 where the Court of Appeal held that the agreement for variation of a contract must itself possess characteristics of a valid contract.

7. Counsel went on to add that the trial Magistrate had in a previous ruling stated that the Respondent's claim lacked merit since he had defaulted on his contractual obligation. It was thus strange how the same court would then turn round and hold that the Respondent was entitled to the land. The judgement should thus be set aside.

The Respondent's Submissions.

8. Counsel for the Respondent submitted that it was not in contention that in 1995 the Respondent entered into an agreement with the Appellant for the purchase of 51 acres of land Kajiado/Kaputiei Central/1302. However, the Appellant failed to obtain title to the property and the Respondent could

thus not pay the full purchase price. It was then agreed that the Respondent retains 31 acres being equivalent to the price paid. Counsel went on to state that a constructive trust was created in 1995 and the Respondent was entitled to 31 acres as held by the trial court and the Appeal should be dismissed.

Analysis and Determination

9. I have considered the grounds of appeal, the record of appeal, the rival submissions and the authorities cited. I find that the issues for determination are:

    i. Whether the Learned trial magistrate erred in her Judgement dated 15th February 2022 by granting the order of Specific Performance.

    ii. Whether the Appellant is entitled to the orders sought.

    iii. Who should bear costs of the appeal?

10. This being a first Appeal, the court ought to reconsider the evidence of the trial court, re-evaluate it and make its own conclusion as was stated by the Court of Appeal in Ratilal Gova Sumaria & Another Vs. Allied Industries Limited (2007) eKLR that;

> "…….This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions but as we do so it must be remembered that we have neither seen nor heard the witnesses….."

11. Similarly, the Court of Appeal in Peter M. Kariuki v Attorney General [2014] eKLR held:

> "… We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence…"

12. It is the Appellant's case that the learned trial Magistrate considered factors outside her scope in adjudicating the dispute and granting orders that were not sought for.

13. I have gone through the record of appeal to determine whether the learned trial magistrate erred in her decision.

14. In his Plaint, the Appellant prayed for a permanent injunction restraining the Respondent from trespassing over the Appellant's land Kajiado/Kaputiei Central/1302; general damages for trespass; interest and any other reliefs.

15. The dispute revolves around sale of a portion of Land parcel known as Kajiado/Kaputiei Central/1302. The Appellant claimed that in 1995 he entered into an oral sale agreement with the Respondent for the purchase of 50 acres of the suit property for a consideration of Kshs. 300,000. However, the Respondent only paid Kshs. 186,000 leaving a balance of Kshs. 114,000 leading to breach of contract. This notwithstanding the Respondent without authority had trespassed on the Appellant's suit property with his cattle and had refused to remove them. The Respondent sought that the suit be dismissed although he agreed that he partly performed the contract.

16. In her judgement, the learned Magistrate held:

> "8. … I find that the issue for determination is whether or not the remedies sought are merited. Both parties have relied on the sale agreement dated 17th November 1995 and the meeting held on 22nd December 2019. It is trite law

that courts cannot re-write contracts. To this end, the parties herein are bound by the terms of the sale agreement dated 17th December 1995..."

17. On this issue of parties being bound by their agreements, I find that the learned trial Magistrate properly pronounced herself on this. However, instead of delving onto what this meant regarding the 1995 contract, its validity, the available remedies and whether or not the Respondent was trespassing on to the Appellant's land, the learned Magistrate went on to hold:

> "... and the minutes of the meeting held on 22nd December 2019. During the meeting held on 22nd December 2019, the Plaintiff agreed to give the Defendant possession of the 31 acres already paid for. The minutes of the meeting ... revolved around the 31 acres already paid for by the Defendant. The Plaintiff cannot now turn around and deny the Defendant possession yet he had already agreed to give the same to the Defendant as per the minutes for the meeting held on 22nd December 2019. Parties are bound by terms of their agreements.
>
> 9. The Plaintiff averred he had rescinded the sale agreement dated 17th December 1995 and had offered to refund the Defendant the money already paid being Kshs. 186,000. The plaintiff did not state how he rescinded the sale agreement, whether the same was done orally or in writing... From the foregoing, the court will be guided by the sale agreement dated 17th December 1995 and the minutes for the meeting held on 22nd December 2019 in which the Plaintiff agreed to grant the Defendant possession of 31 acres. The suit is dismissed for lack of merit..."

18. Whereas the courts are being commended for taking up Alternative Dispute Resolution methods as recognised by our Constitution under Article 159(2) (c), I find that the learned trial Magistrate erred in prematurely issuing orders not sought for without comprehensively analysing the issues before her. These were validity and/or otherwise of the oral agreement entered in 1995, the available remedies to whichever party was aggrieved; and whether or not the Respondent was trespassing on the Appellant's land.

19. I am satisfied that the learned trial Magistrate indeed erred in her determination. However, this being an appeal this court cannot making an independent finding on issues not addressed by the trial court. That would be usurping original jurisdiction which would be legally improper. The proper recourse would be to re-submit this suit to the Lower Court for a fresh hearing in the interest of justice so that the issues raised and prayers sought can be conclusively canvassed.

20. I thus make the following orders:

    i. That the Judgment in CM ELC Case No. 2 of 2020 Kajiado delivered on 15thFebruary 2022 by Hononourable B.M. Cheloti is hereby set aside.

    ii. That this matter shall proceed for a fresh hearing before a different Magistrate other than Honourable B.M. Cheloti.

    iii. That the costs of the Appeal be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

In the presence of:

N/A for the Appellant.

N/A for the Respondent.

Court Assistant – Mutisya.