



REPUBLIC OF KENYA



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**Etirikia v Ekandi (Environment and Land Appeal E076 of 2021)
[2023] KEELC 55 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 55 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E076 OF 2021
CK YANO, J
JANUARY 18, 2023**

BETWEEN

STEPHEN NTURIBI ETIRIKIA APPELLANT

AND

CYPRIAN MUTABARI EKANDI RESPONDENT

(Being an appeal against the judgment/decree of the Hon P.M WECHULI, Senior Resident Magistrate (SRM) delivered on 25/05/2021 in Tigania PMC E&L CASE NO. 12 OF 2018)

JUDGMENT

A. Introduction

1. The appellant Stephen Nturibi Etirikia filed this appeal against the judgment/decree of Hon PM Wechuli in Tigania PMC E&L case No 12 of 2018 delivered on May 25, 2021 and set out the following 9 grounds of appeal:-
 - i. That the Honourable Magistrate erred in law and in fact by overlooking the appellant's pleadings as sought in the consolidated case ELC Case No 11 of 2018.
 - ii. That the Honourable magistrate erred in law and in fact by failing to consider the evidence of the appellant herein in its entirety.
 - iii. That the Honourable Magistrate erred in law and in fact in concluding that the appellant herein unlawfully evicted the respondent from the suit land.
 - iv. That the honourable magistrate erred in law and in fact in finding that the appellant herein breached the agreement in question and allegation of fraud misrepresentation.
 - v. That the honourable magistrate erred in law and in fact in finding that the appellant was not the sole owner of the suit property.



- vi. That the honourable magistrate erred in law and in fact in finding that the appellant herein received the purported amount in relation to the agreement as against evidence adduced by the appellant herein.
 - vii. That the honourable magistrate erred in law and in fact in finding that the appellant ought to have filed an affidavit of service to accompany counter claim.
 - viii. That the honourable magistrate erred in law and in fact in finding the mistake of counsel as to amounts remitted vis a vis evidence adduced by the appellant herein.
 - ix. That the honourable magistrate erred in law and in fact in finding that agreement in question was invalid as against the pleadings filed herein by the parties and respective spirit.
2. The appellant urged this Honourable court to allow the appeal and set aside the judgment of the Honourable magistrate in Tigania Senior Resident Magistrate case no 12 of 2018 and in the alternative the Honourable court to order for a retrial and to award the costs of the appeal to the appellant.

Background of the Appeal

3. The gist of the case in a nutshell is that Tigania E&L case No 11 of 2018 was consolidated with E & L Case No 12 of 2018 vide an order of the trial court dated July 18, 2019 pursuant to an application by counsel for the appellant herein and with the agreement of the counsel for the respondent. The consolidation was effected after the respondent herein had already testified in case No 12 of 2018.
4. The appellant commenced E&L case No 11 of 2018 vide a plaint dated January 17, 2018 wherein he stated that by an agreement in writing dated August 25, 2017 made between the appellant and the respondent, the respondent agreed *inter alia*, that he would purchase plot no 8A Ngundune Market measuring 20 Ft by 80 Ft at a consideration of Kshs 2,700,000 in which he would pay up the balance of Kshs 1,700,000 on or before the end of September 2017. It was the appellant's case that in breach of contract, the respondent failed to pay up the said balance and prayed for judgment against the respondent for general damages for breach of contract plus costs and interest.
5. In his statement of defence dated February 7, 2018 the respondent admitted that they entered into the said agreement. The respondent, however, pleaded that the said agreement was poorly drafted and contained ambiguous and unclear terms. The respondent pleaded *inter alia*, that the appellant breached the implied terms of the said agreement because he was not the registered owner of the suit premises and had refused to render vacant possession nor transferred the suit premises because he had no capacity to do so and had not refunded the respondent the deposit paid.
6. Vide the respondent's amended plaint dated February 8, 2019 and a defence to counterclaim in E&L case no 12 of 2018, the respondent averred that the appellant had already breached the terms of the agreement since it turned out that he was not the owner of the suit premises which were in the names of Karuma M'Liria. The respondent averred that the appellant had no capacity to transfer the suit premises and was guilty of illegally breach of agreement, and fraudulent misrepresentation and acquisition of the purchase price. The respondent sought for the refund of the sum of Kshs 2,123,300/ = plus interest which he allegedly gave to the respondent plus costs.
7. The appellant filed a defence and counterclaim dated November 28, 2019 in which he denied the respondent's claim and prayed for general damages for breach of contract from the respondent plus costs and interest.



8. After hearing evidence from both the appellant and the respondent, the learned trial magistrate allowed the respondent's claim in terms of prayer (a) and (b) of the amended plaint and dismissed the appellant's counterclaim. Being dissatisfied with the said decision, the appellant filed this appeal.
9. The appeal was canvassed by way of written submissions, the appellant filed his submissions dated July 25, 2022 on July 27, 2022 through the firm of Otieno Co & Company advocates while the respondent submissions dated and filed on August 19, 2022 were filed by the firm of Joshua Mwiti Law Advocates.

The Appellant's Submissions.

10. The appellant's appeal is grounded on nine grounds whose cornerstone is that the trial court erred in finding that there was no breach on the part of the respondent of the agreement dated August 25, 2017. It is the appellant's submissions that the decision was against the weight of the evidence and the law placed before the court.
11. It is submitted that the trial magistrate erred in law and fact in finding that clause 4 of the agreement was not breached by the respondent herein. The appellant submitted that it is crystal clear that timelines for payments of the balance to the said agreement was September, 2017, and submitted that the respondent admitted that the entire consideration of Kshs 2.7 million was not paid up by the respondent as at September 30, 2017. The appellant argued that this was a clear breach on the part of the respondent.
12. The appellant further submitted that the respondent took possession of the suit property and utilized the same, an aspect he argued was not considered by the trial court in rendering refund of the deposited monies.
13. The appellant stated that it is imperative that a party is bound by his pleadings and that that burden is on the one alleging on a balance of probability and submitted that time was of essence in the said agreement and that failure to adhere to the same would rightly vitiate the contract. The appellant relied on the case of *Ganuni Construction co Ltd V County Government of Garrisa & anor* (2020) eKLR where the court stated that 'for purposes of payment of general damages, the intention is to restitute the claimant to as much as possible to the position he was before the breach occurred... what the plaintiff ought to have claimed is interest which however he did not claim...'
14. The appellant further submitted that the respondent did not approach court with clean hands having failed to confirm that he honored his part of the bargain. Further that the allegation of different person registered is neither here nor there as per the agreement the appellant did indicate he was the registered owner but "sole owner"
15. It is the appellant's submissions that parties are bound by the terms of their contract or agreement, unless coercion, fraud or undue influence are pleaded and proved. It is submitted that there was no breach on the part of the appellant demonstrated or otherwise. The appellant urged the court to be persuaded by the explanation by the appellant as can be deciphered in the proceedings. The appellant argued that the trial court erred in finding breach on the part of the appellant without coming out clear when this aspect of breach was allegedly discovered vis a vis the deadlines in the agreement. In addition, the appellant submitted that it is further ironical why the respondent could further belatedly pay Kshs 576,700 by banker's cheque No 38xxx on December 7, 2017 when he had believed that the appellant had breached a key clause of the agreement.
16. Counsel for the appellant further submitted that a cause of action founded on a contract accrues when breach takes place and not when the damage is suffered, and that a breach of contract occurs when one or both parties failed to fulfil their obligations under the terms of the contract and relied on the case



of *Mukuru Munge Vs Florence Shingi Mwanana & 2 others* (2016) eKLR. This, they submitted was the case herein whereof the respondent as it is evident did not meet the timelines nor otherwise. That the burden of affirmatively establishing the elements of an assertion rests upon a party alleging them, and that the material if any placed by the respondent herein before the trial court is very scanty and or none, and the appellant urged the court to find that the trial court holding on the issue is erroneous and not based on the evidence.

The Respondent's Submissions

17. The respondent submitted that the appeal emanates from the appellant's memorandum of appeal which contains nine grounds all of which do not raise any cogent legal issue for determination by this Honourable court.
18. The respondent submitted inter alia that the appellant's submission as filed in court has not addressed any ground as contained in the memorandum of appeal but instead chose to focus on other issues not raised in the memorandum of appeal which in itself negates the whole rationale of filing an appeal and is contrary to Order 42 Rule 4 of the Civil Procedure Rules 2010 which constrains the appellant to the grounds set forth in their memorandum of appeal unless with the leave of the court that they can be heard and other grounds not set therein.
19. Regarding ground 1, 2 and 7 of the appeal which is the appellant's position that the Learned Trial Magistrate overlooked the appellant's pleadings and did not consider their evidence in its entirety, the respondent submitted that the trial court thoroughly analyzed the appellant's pleadings before it arrived at its judgment.
20. The respondent submitted that just after the respondent filed his claim, the appellant filed his defense and counterclaim which was incurably defective for offending Order 7 Rule 5 (a) of the *Civil Procedure Rules, 2010* which required the same to be accompanied by a verifying affidavit pursuant to Order 4 rule 1(2). It is the respondent's submission that the above provisions are very clear that any counter claim filed should be supported by a verifying affidavit which the appellant did not file. Further the respondent submitted that the appellant's counterclaim as filed alleged breach of agreement on part of the respondent but did not contain any particulars for the alleged breach and thus offended the provisions of Order 2 Rule 10 (1) of the *Civil Procedure Rules* which stipulates that every pleadings shall contain the necessary particulars of claim or other matter pleaded and that that was the trial court's finding.
21. The respondent submitted that the appellant's contention that the trial court overlooked his pleadings is without any basis and urged the Honourable court to disregard the same. Further, it is the respondent's submission that the appellant's contention that the trial court did not consider its evidence in entirety is without any basis and that a close look at the trial court's judgment reveals that in fact the judgment was entirely based on a close scrutiny on the evidence provided by the appellant. It is the respondent's submission that the appellant is just on a fishing expedition and that if anything they ought to have pointed out which particular evidence the trial court disregarded. The respondent submitted that that ground is ambiguous and urged the Honourable court to disregard the same.
22. With respect to ground 3 of the appeal, the respondent submitted that the appellant cannot fault the trial court for finding that the appellant unlawfully evicted the respondent as this finding was made on account of the appellant's own testimony which stated inter alia, that one Georgina was in possession as a tenant.
23. Regarding ground 4 of the appeal, the respondent argued that the appellant presented himself as the registered proprietor of the suit land at the time of executing the sale agreement only for the respondent



to later learn that the suit land was registered in the name of one Karuma M'liria. The respondent submitted that this in itself was fraudulent misrepresentation on part of the appellant which amounts to breach of contract on his part. The respondent submitted that the agreement between the parties did not contain any clause that made time of essence, and that it left it to be inferred on when the final payment was to be made, adding that the said agreement was a result of poor draftsmanship and ambiguity and that the trial court condemned it to its fate and made its pronouncement on such. That the appellant's contention that the trial court erred in holding that they breached their agreement is therefore without any basis.

24. The respondent submitted that in Tigania CMCC Civil Suit No 12 of 2018, the respondent's main contention was that the appellant had breached the sale agreement between them for fraudulently passing himself as the registered proprietor of the suit land when the same was registered in the name of Karuma M'Lilia and that he produced a certificate of search for the said parcel which in fact showed that the same was registered in the name of Karuma M'Liria. The respondent's submission is that the appellant's contention thus under ground five is baseless and misplaced and urged the Honourable court to find as such.
25. With regard to ground six of the appeal, the respondent submitted that it is not clear what amount the appellant alluded to but presumed that he is contesting the payment of kshs 2,123,300/= which the trial court found him to have received and which was supported by cogent evidence. The respondent submitted that in defense, the appellant averred that he received Kshs 1,000,000/= from the respondent and disputed the receipt of the other Kshs 1,000,000/=. That vide the appellant's letter dated December 1, 2017 he acknowledged that he had received from the respondent "at the moment you have only managed to pay partly two million..." Out of the agreed upon 2.7 million shillings. That the letter was adopted by the appellant during hearing as P exhi 2. The respondent further submitted that vide the appellant's reply dated December 6, 2017 which was listed under his list of documents and adopted during hearing as P exhibit 3, he confirmed that the respondent had indeed paid kshs 2,000,000/=. That the payment of Kshs 123,300/= that was paid vide M-pesa is not disputed and certified copies of M-pesa statements were produced in court. It is the respondent's submissions that the appellant's contention herein is unsubstantiated.
26. It is the respondent's submission that the appellant's appeal is baseless and lacks merit and urged the Honourable court to strike out the same with costs to the respondent.

Analysis and Determination

27. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned magistrate were justified on the basis of the evidence presented and the law. From the grounds of appeal and submissions herein, the issues for consideration, in my view are;
 - i. Whether the trial court was justified in finding that there was no breach of the agreement dated August 25, 2017 on the part of the respondent.
 - ii. Whether the decision of the trial magistrate was against the weight of the evidence and the law.

Whether the trial court was justified in finding that there was no breach of the agreement dated 25th August on the part of the respondent.

28. From the pleadings, the respondent's claim before the subordinate court was that the parties entered into a sale agreement for the purchase of plot No 8A at Ngundune market measuring 80 ft by 20 ft at



a total consideration of Kshs 2,700,000/=. The respondent pleaded that when he visited the Tigania West Land Registry, he found out that the suit premises are in the name of one Karuma M'Liria and not the appellant. The respondent therefore accused the appellant of being guilty of breach of the said agreement for inter alia, purporting to be the sole registered owner of the property when he knew or ought to have known that he was not. The respondent's claim was for an order compelling the appellant to refund the deposit paid plus interest.

29. I have perused the said agreement dated August 25, 2017 between the parties. The subject matter of the sale agreement was plot No 8A Ngundune market measuring 20 ft by 80 ft. Clause 1 of the said agreement expressly stipulated that the appellant herein is the sole owner of the said plot and was selling the same to the respondent for an agreed consideration of kshs 2,700,000/=. Clause 3 of the said agreement stated that the appellant acknowledged receipt of Kshs 1,000,000 from the respondent while clause 4 provided that the balance of kshs 1,700,000/= was to be paid on or before the end of September. According to clause 6, the appellant was to put the respondent into actual possession immediately upon the execution of the said agreement while clause 7 thereof states that the appellant vows that the plot was free from any encumbrances.
30. From the evidence adduced in the lower court, and has found by the trial magistrate, the appellant had already breached the terms of the agreement since it turned out that he was not the owner of the suit premises which in fact was in the name of one Karuma M'Liria.
31. In this case, both parties claim breach of agreement by the other. As rightly found by the learned magistrate, a plain reading of clause 1 of the said agreement leaves no doubt that the appellant represented himself as the sole owner of the suit property. From the latter disclosure by the copy of search from the lands office that infact the plot was in the names of one Karuma M'Liria, it was a clear breach of the agreement by the appellant who represented himself as the owner of the plot when he was not. Therefore, it is my finding that the trial magistrate was right in concluding that the appellant was in breach of the agreement and acted fraudulently in receiving money from the respondent yet he did not own the plot being sold. Additionally, the respondent could not have been found to be in breach when it is clear from the material on record that he paid part of the consideration based on the appellant's misrepresentations.

Whether the decision of the learned trial magistrate was against the weight of the evidence and the law.

32. The court has carefully perused the proceedings in the record of appeal. I have further considered the submissions made. From the evidence adduced, it is quite clear that the learned magistrate correctly addressed himself to the pleadings and the relevant law. To start with, it's apparent that the appellant's counterclaim offended the provisions of Order 7 Rule 5 of the *Civil Procedure Rules* and Order 2 Rule 10(1) of the *Civil Procedure Rules*. Order 7 Rule 5 (a) is clear that where a party has filed a counterclaim, the same ought to be accompanied by an affidavit verifying the correctness of the averments in that counterclaim. In the instant case, there was no verifying affidavit filed by the appellant accompanying his counterclaim. Therefore, and as correctly found by the learned magistrate, the counterclaim by the appellant was in breach of the mandatory provisions of Order 7 Rule 5 (a) and Order 4 Rule (1) and (2) and the same was rightly struck out for that omission. Further, the said counterclaim that alleged that the respondent breached the contract, had not set out any particulars thereof contrary to the clear provision of Order 2 Rule 10 of the *Civil Procedure Rules*.
33. As already stated, the learned trial magistrate correctly analyzed the claim before the subordinate court and rightly found that it was the appellant who was in breach of the agreement for having represented himself as the sole owner of the suit premises when he was not. Further, the evidence on record shows



that the respondent paid the sum of Kshs 2,123,300/= to the appellant. The appellant was therefore liable to refund the respondent the amount paid as rightly found by the trial magistrate.

34. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned magistrate were well founded and I find no basis to interfere with the same.
35. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the respondent.
36. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF JANUARY, 2023

In the presence of

C.A Kibagendi

Otieno C for the appellant

No appearance for Mwititi for respondent

C.K YANO

ELC JUDGE

