



Blessed Shelters Holdings Limited v Maina (Environment and Land Appeal 68B of 2019) [2023] KEELC 15661 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 68B OF 2019**

JG KEMEI, J

FEBRUARY 16, 2023

BETWEEN

BLESSED SHELTERS HOLDINGS LIMITED APPELLANT

AND

GRACE WARUGURU MAINA RESPONDENT

JUDGMENT

1. In the trial Court the Respondent who was the Plaintiff sued the Appellant for breach of contract (sale agreement) entered into on the 20/4/2018 between the parties herein. It was the case of the Respondent that despite making full payment of the purchase price the Appellant refused to perform its part of the agreement and in particular to transfer the suit land to her and instead sold the suit land to a third party. Consequently, the Respondent sought orders for;
 - a. A declaration that there was a breach of contract by the Defendant
 - b. Special damages amounting to Kshs 3.5 Million.
 - c. Default interest at the rate of 20% of the purchase price amounting to Kshs 700,000/-.
 - d. Nominal damages for breach of contract
 - e. Costs of the suit and interest on costs.
2. In rebuttal, the Appellant contended that the Respondent was in blatant breach of the agreement of sale dated the 20/4/2018 with respect to the suit land by failing to furnish the Appellant with completion documents and fees including execution of the transfer documents, Land Control Board fees, stamp duty among other documents. It was its case that the Respondent failed to respond to the Appellant's notices to furnish the Appellant with the said documents and statutory fees. It denied ever undertaking to make good the Respondents claim as alleged in the Plaintiff.



3. Upon hearing the parties, the trial Court entered Judgement and found for the Respondent.
4. This Judgment has provoked this appeal on the grounds set out as thus;
 - a. The learned Magistrate of the lower Court erred in law and fact in its Judgment of November 26, 2019 by finding that the Appellant was liable to pay the damages for breach of agreement hereof.
 - b. The learned Magistrate of the lower Court erred in law in its Judgment of November 26, 2019 by failing to hold that the Respondent was liable for the alleged breach of the agreement by failing to tender to the Appellant necessary transfer documents and stamp duty charges.
 - c. The learned Magistrate of the lower Court erred in law and fact in failing to refer the matter to arbitration yet the Agreement had clear provisions for arbitration and the Respondent confirmed that there was an arbitration clause in the said agreement.
 - d. The learned Magistrate of the lower Court erred in law and fact in failing to adequately consider the facts herein and the evidence tendered thus leading to a wrong Judgment thus occasioning a miscarriage of justice against the Appellant.
 - e. The learned Magistrate of the lower Court erred in law and fact in failing to apply the applicable principles in the circumstances of the case and was clearly wrong in the exercise of its discretion of the Court and as a result whereof there has been a miscarriage of justice.
 - f. The learned Magistrate of the lower Court erred in law and fact in acting bias against the Appellant and such bias occasioned miscarriage of justice.
5. Consequently, the Appellant sought the following orders on appeal;
 - a. That the ruling and order of the lower court dated November 26, 2019 be set aside.
 - b. That the appellant's suit be referred to arbitration hereof.
 - c. That the damages on penalties awarded by the lower court be set aside.
 - d. That the honourable court be pleased to give appropriate directions relating to hearing and determination of the lower court suit hereof.
 - e. That the costs of this appeal and of the court below be awarded to the appellant hereof.
6. By consent of the parties the documents on pages 24-25 and pages 64 -70 stand expunged from the Record of Appeal.
7. On the October 25, 2022, parties elected to canvass the appeal by way of written submissions. The firm of Kimakia Magara & Partners filed submissions on behalf of the Respondent while the Appellant failed to comply despite the deadline for submissions having been on the 8/11/2022. By the time of writing the Judgement none had been filed on the part of the Appellant.
8. It was submitted on behalf of the Respondent that the legal effect of the Appellant not calling witnesses in the trial Court in support of its case is that there is no evidence in support of its case and that the Plaintiffs case remains uncontroverted. The case of *DT Dobie Company Limited Vs Wanyonyi Wafula Chebukati* CA No 88 of 2009 was cited in support of the proposition.
9. Whether the learned Magistrate erred in law and fact in its Judgement of the November 26, 2019 by finding that the Appellant was liable to pay the damages for breach of the sale of the land agreement dated the 20/4/2018, the Respondent submitted that the Appellant was in clear breach of the contract



by refusing to transfer the land despite receipt of the full purchase price. That the breach was admitted by the Appellant on the 13/5/2019. Further that the Appellant failed to demonstrate that it notified the Respondent to produce the documents or fees and she ignored.

10. Relying on the case of *Peter Mwema Kaboro & Anor Vs Benson Maina Gitbethuki* (2006) eKLR the Respondent submitted that the presence of an arbitration clause does not oust the jurisdiction of the Court to entertain and grant the reliefs sought.
11. Having carefully perused the pleadings, the trial Court Judgement, the submissions and all the material placed before me I make the following observations; The parties entered the agreement of sale freely; the Respondent complied fully with the terms of the contract by paying the full purchase price; to that extent the contract was fully performed and what was pending was the formalities of transferring the land to the Respondent; at that point the Appellant held the land in trust for the Respondent having acknowledged the full purchase price; the alleged outstanding payments being stamp duty and registration fees are outside the purchase price as they are payments due to Government agencies and it does not warrant the reselling of the land to a third party, even if the Respondent had failed to pay the same. The sale was complete as far as the agreement for sale was concerned. Even in the worst case scenario that the Respondent failed to pay, it would only delay the registration of the transfer but not give any right to the Appellant to resell the land of the Respondent. I find this action amounted to blatant breach of the contract.
12. Be that as it may, I have not found any evidence notifying the Respondent to pay the stamp duty and registration fees and she refused. In any event the letter dated the 13/5/2019 is a giveaway on the part of the Appellant. It states as follows;

“ May 13, 2019

Subject: Refund to Grace Waruguru Maina

ID No 884xxxx

The above matter refers.

The above named Grace Warugu Maina ID No 884xxxx is our client at our Ruiru Branch Office: we have sold three plots to her in our bypass project, transferred to the three plots and title deeds issued.

However she intended to buy a fourth plot at 3.5 million (Three Million and Five Hundred Thousand Kenya Shillings) in the same project but was mistakenly transferred to another client and she has consequently requested for refund of the same.

The company has no objection to the same and we are making quick arrangements to refund the same, soonest possible within 90 days at interest of 10%.

Blessed Shelter Holdings Limited.”

13. The import of the above letter is that the Appellant acknowledged that it had breached the contract and made amends to refund the purchase price within 90 days with a 10% interest.
14. On the issue of arbitration, I am in total agreement with the Respondent’s submissions that the Courts jurisdiction was not ousted. The Appellant failed to submit itself to the arbitral seat and proceeded with the suit in the trial Court thus acknowledging the jurisdiction of the Court. In any event the suit has been fully heard and there is nothing to refer to arbitration. The issue is being raised too late in the day when the horse has bolted.



15. I have not found any evidence to fault the trial Court either in law or in fact or such evidence that suggests bias on the part of the Hon Learned Magistrate or misapprehension of the facts and the law.
16. In the upshot the appeal is unmerited. It is dismissed with costs to the Respondent.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Kurauka for Appellant

Nadia HB Kimakia for Respondent

Court Assistants – Esther / Kevin

