Ngethe v Komo (Environment and Land Appeal E035 of 2022)
[2023] KEELC 16234 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEELC 16234 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E035 OF 2022

BM EBOSO, J

FEBRUARY 14, 2023

BETWEEN

ALLAN MUNGAI NGETHE ..... APPELLANT

AND

PETER NDICHU KOMO ..... RESPONDENT

(Being an Appeal against the Ruling of Hon. E. Ominde, (Chief Magistrate) delivered in Kiambu Chief Magistrate Court on 5/4/2022 in Kiambu CMCL & E Case No E010 of 2021)

JUDGMENT

Background

1. This appeal challenges the ruling rendered on 5/4/2022 by Hon E. Ominde, Chief Magistrate, in Kiambu Chief Magistrate Court Environment and Land Case No E10 of 2021. Through the ruling, the Chief Magistrate Court allowed the respondent's application dated 6/12/2021 in which the respondent sought an order striking out the appellant's defence dated 29/11/2021. The respondent was the plaintiff while the appellant was the defendant in the said suit. Before I dispose the key issues that fall for determination in the appeal, I will briefly outline the background to the appeal.

2. The respondent sued the appellant in the Chief Magistrate Court at Kiambu, seeking a sum of Kshs 12,199,999 together with interest at commercial rates. He did not specify the "commercial rate" which he had in mind. His case was that he entered into a sale agreement with the appellant, dated 29/11/2018, pursuant to which he agreed to purchase from the appellant, Villa Number 9, erected on Land Reference Number 21103/1. The agreed purchase price was Kshs 25,500,000. He paid the appellant a total of Kshs 14,749,999. He subsequently ran into financial problems. Consequently, the appellant invoked Clause 16.2 of the sale agreement, rescinded the sale agreement, and took 10% of the purchase price as liquidated damages. The amount refundable to him after reckoning the 10%

liquidated damages forfeited to the appellant was Kshs 12,199,999. The appellant failed to refund the said amount to him, triggering the suit.

3. The appellant filed a defence dated 29/11/2021. Upon receiving the appellant's defence, the respondent filed an application for an order striking out the defence on the ground that the defence was a sham. The appellant did not file a response to the application, despite securing an adjournment to enable him file a response. The Chief Magistrate Court considered the application and rendered a ruling dated 5/4/2022, in which it granted the application by striking out the appellant's defence and entering judgment in favour of the respondent in the following terms:

> "Judgment is accordingly entered for the plaintiff and against the defendant for the sum of Kshs 12,199,999 plus interest thereon at commercial rates from the date of the agreement, costs of the suit and interest at court rates."

Appeal

4. Aggrieved by the ruling and the orders of the Chief Magistrate Court, the appellant bought this appeal advancing the following seven verbatim grounds:

    1. That the Learned Trial Magistrate erred in law in striking out the appellant's statement of defence and summarily allowing the plaintiff's claim effectively denying the appellant his constitutional right of access to justice and the right to a fair hearing as guaranteed in the *Constitution* resulting into a miscarriage of justice.

    2. That the Learned Trial Magistrate erred in law and in fact in striking out the appellant's statement of defence and allowing the plaintiff's claim summarily despite the appellant's defence raising triable issues that could only be determined in a full trial, a decision that was highly prejudicial to the appellant, legally untenable and amounted to a miscarriage of justice.

    3. That the Learned Trial Magistrate erred in law and in fact in allowing the respondent's case summarily without the respondent discharging the burden of proof as by law required hence arriving at a decision that was egregiously erroneous and legally untenable and amounted to a miscarriage of justice.

    4. That the Learned Trial Magistrate erred in law and in fact in awarding the respondent interest contrary to the terms of the contract subject matter of the suit hence misconstruing the said contract and rewriting the terms thereon a decision that was in contrast and violation of the rules of interpretation of contracts and manifestly unjust in the circumstances.

    5. That the Learned Trial Magistrate erred in law and in fact in awarding the respondent's prayer for interest as prayed without any evidence adduced to substantiate the said prayer and in contrast with the glaring evidence that the contract was rescinded on account of the respondent's default hence arriving at a decision that was manifestly unjust and legally untenable.

    6. That the Learned Trial Magistrate erred in law in relying on privileged information to summarily determine the respondent's suit in contrast with the rules of evidence resulting into a miscarriage of justice.

7. That the Learned Trial Magistrate erred in law and in fact in denying the appellant an opportunity to oppose the respondent's application to strike out his defence contrary to the rules of natural justice a decision that was manifestly unjust and in violation of the appellant's constitutional right to a fair hearing.

5. The appellant prayed for the following verbatim reliefs in this appeal:

   a. That the ruling by the trial magistrate made on the 5th of April 2022 be and is hereby set aside.

   b. The appellate court be pleased to determine whether the appellant's defence raises triable issues and if so resubmit the matter for hearing before a different trial magistrate.

   c. The appellant be granted costs of the appeal.

Submissions

6. The appeal was canvassed through written submissions dated 10/11/2022, filed by M/s Mogaka Nyantika & Co Advocates. The respondent filed written submissions dated 14/9/2022 through M/s Ochicho TLO & Associates Advocates. I have perused and considered the submissions. I will not rehash the submissions. I will only address the key issues raised in the submissions in my brief analysis of the issues that fall for determination in this appeal.

Analysis and Determination

7. I have perused and considered the record of appeal together with the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellant advanced seven (7) grounds of appeal but submitted on six grounds. The respondent's submissions only focused on the issue of interest.

8. Taking into account the grounds of appeal and the parties' submissions, the following are the four key issues that fall for determination in this appeal: (i) Whether the subordinate court breached the rules of natural justice in disposing the application leading to the impugned ruling without the appellant's formal response to the application; (ii) Whether the subordinate court erred in granting the respondent summary judgment in terms of the principal claim of Kshs 12,199,999; (iii) Whether the subordinate court erred in granting the respondent an award for interest in the terms set out in the impugned ruling; and (iv) What order should be made in relation to costs of this appeal. The four issues will be disposed sequentially in the above order. Before I dispose them, I will briefly outline the principle that governs this court when exercising appellate jurisdiction.

9. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* [2013] eKLR as follows:-

> "As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

10. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

11. The first issue is whether the subordinate court breached the rules of natural justice in disposing the application, leading to the impugned ruling, without the appellant's formal response to the application. There is no gainsaying that the *Constitution* of Kenya 2010, the *Civil Procedure Act*, the *Civil Procedure Rules* and, indeed, Kenya's Civil Legal System in its entirety, place key emphasis on one's right to be heard before any adverse order or decree is pronounced against him. Article 50(1) of the *Constitution* safeguards this right in the following terms:

> " 50(1) Every person has the right to have any dispute that can be resolved by the application of land decided in a fair and public hearing before a court of if appropriate, another independent and impartial tribunal or body."

The Court of Appeal emphasized the centrality of the right to be heard in the case of *Mbaki & others v Macharia & another* [2005] 2 E.A 206 at page 210 in the following words:

> " The right to be heard is a valued right, it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard".

12. In the proceedings relating to the impugned ruling, it does emerge from the record of appeal that the appellant was at all material times represented in the proceedings by Mr Nyantika. When the application came up for hearing on 22/2/2022, Mr Nyantika was present and made the following presentation before the trial court:

> " There is nothing urgent from the applicant's application dated 6th December, 2021 when application was served upon us last week. Nothing is burning at all. In fact we are yet to file our replying affidavit."

13. On the above day [22/2/2022], hearing of the application was adjourned to 15/3/2022 to enable the appellant file and serve a response. Come 15/3/2022, the respondent had not responded to the application. On that day, Mr Nyantika confirmed that the respondent had been served on 15/2/2022. The trial court considered the rival parties' positions on the question of adjournment and made a finding to the effect that the application for adjournment was unmerited. The finding and order was made on 15/3/2022. The said finding and order dated 15/3/2022 did not attract an appeal by the appellant. Indeed, this appeal does not challenge the order of 15/3/2022. This appeal only challenges the ruling and orders made on 5/4/2022.

14. It is clear from the record of the trial court that the appellant was served with the application and was afforded ample opportunity to contest the application. He took the view that there was "nothing burning" in the application and elected not to respond to the application timeously.

15. In the circumstances, the subordinate court cannot be faulted for disposing the application in the manner it did. Put differently, in the above circumstances, it cannot be said that the subordinate court

breached the rules of natural justice by disposing the application as an uncontested motion. That is my finding on the first issue.

16. The second issue is whether the magistrate court erred in granting the respondent summary judgment on the principal sum. The principle upon which our courts exercise jurisdiction to enter summary judgment are well settled. The Court of Appeal in the case of *Harit Sheth t/a Harit Sheth Advocates v Sharma Charania* [2014] eKLR summarized the principle as follows:

> "This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subjected to cross-examination."

17. The magistrate court awarded summary judgment in terms of the principal claim of Kshs 12,199,999. The respondent's principal claim was for a refund of Kshs 12,199,999 being part of the purchase price that he had paid to the appellant. This amount was the net balance after reckoning the agreed liquidated damages equivalent to 10% of the purchase price. Based on the purchase price of Kshs 22,500,000, the liquidated damages was Kshs 2,250,000.

18. Did the respondent satisfy the criteria for summary judgment in terms of the principal claim? First, the appellant admitted that he entered into the material sale agreement. Second, the respondent placed before court documentary evidence in form of exhibits annexed to the affidavit he swore in support of the application. Among the exhibits were bank funds transfer slips showing the payments made to the appellant. Also exhibited was a letter dated 11/6/2021 from the appellant's advocates, Soita & Associates Advocates, advising the respondent that the appellant had invoked Clause 16.2.1 of the sale agreement and had rescinded the agreement. The letter, further advised the respondent that the equivalent of 10% of the purchase price was to be forfeited to the appellant.

19. Also exhibited was a letter dated 12/8/2021 through which the appellant's advocates, Soita & Associates Advocates, confirmed to the respondent's advocates that the sum refundable to the respondent after reckoning the 10% liquidated damages was Kshs 12,199,999. The appellant's advocates requested for the respondent's bank details to enable the appellant refund the said sum of Kshs 12,199,999.

20. From the foregoing, it is clear that there was no triable issue in relation to the question as to whether or not the principal sum of Kshs 12,199,999 was payable to the respondent. I cannot, in the circumstances, fault the subordinate court for granting summary judgment for Kshs 12,199,999. That is my finding on the second issue.

21. I now turn to the question as to whether the subordinate court erred in awarding interest in the manner it did. The jurisdiction of a trial court to award interest is guided by the framework in Section 26 of the *Civil Procedure Act* which provides as follows:

> "(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as

the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

22. I have perused the sale agreement. The clause relating to refund of the purchase price is silent on the issue of interest. The respondent did concede in paragraph 6 of his amended plaint that he was "faced with financial and economic constraints" leading to his inability to pay the balance of the purchase price. As a consequence of the respondent's inability to complete the purchase, the appellant legitimately elected to rescind the contract through the letter dated 11/6/2021. Against the above factual background, the subordinate court awarded the respondent interest from the date of the agreement in the following terms:

> " Judgment is accordingly entered for the plaintiff and against the defendant for the sum of Kshs 12,199,999 plus interest thereon at commercial rates from the date of the agreement, costs of the suit and interest at court rates (sic)".

23. First the above disposal order is incoherent in terms of the interest rate applicable. It is not clear whether the interest rate awarded was "commercial rates" or "court rates". Secondly, commercial rates are normally defined by the parties themselves in the contract. It is clear from the agreement that the parties to the agreement did not contemplate interest on the refund at commercial rates. There was therefore no basis for the award of interest at commercial rates.

24. That is not all. The disposal order awarded interest from the date of the agreement. This was certainly an error. The respondent had admitted in paragraph 6 of the amended plaint that he was the one who was unable to complete the purchase due to financial difficulties. Put differently, he was the one who caused the rescission. In the above circumstances, he would only be entitled to interest from the date the refund became payable. That date is the date when the appellant rescinded the agreement. That is 11/6/2021. It cannot be the date of the agreement for sale because the appellant was not the cause of the rescission.

25. For the above reasons, it is my finding that there was an error in the order awarding interest to the respondent. The proper award in relation to interest should have been interest at court rate from the date of rescission, that is, 11/6/2021.

26. On costs, this appeal has partially succeeded and partially failed. In the circumstances, parties will bear their respective costs of the appeal.

Disposal Orders

27. In the end, this appeal partially succeeds and is disposed in the following terms:

a. The disposal order in the ruling of the Chief Magistrate Court in Kiambu CMC Environment & Land Case No E10 of 2021 dated 5/4/2022 is varied to read as follows:

"Judgment is accordingly entered for the plaintiff and against the defendant for the sum of Kshs 12,199,99 plus interest thereon at court rate from 11/6/2021 to the date of remittance of the sum of Kshs 12,199,999 to the plaintiff".

b. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 14TH DAY OF FEBRUARY 2023

B M EBOSO

JUDGE

In the Presence of:

Mr Nyantika for the Appellant

Mr Ochich for the Respondent

Court Assistant: Hinga