Gokhale Investment Limited v Gichuhi (Civil Appeal E584 of 2022)
[2024] KEHC 8300 (KLR) (Civ) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E584 OF 2022

REA OUGO, J

JUNE 27, 2024

BETWEEN

GOKHALE INVESTMENT LIMITED ..... APPELLANT

AND

CYRUS KINYANJUI GICHUHI ..... RESPONDENT

(Being an appeal from the entire Judgment and Decree of the Small Claims Court at Nairobi of the Hon. V.M Mochache (R.M) delivered on 8th July 2022 in SCCCOMM/E2296 of 2022)

JUDGMENT

1. The appellant at the lower court filed a claim against the respondent claiming a Kshs 880,000/- which it paid to the respondent. The appellant and respondent entered into an agreement which required the respondent to obtain all approvals to facilitate the subdivision and registration of titles for parcels KJD/Purko/663 and KJD/Olchoro Onyore/7212. The appellant claimed that the respondent failed to carry out the subdivision of parcel KJD/Purko/663 and demanded a refund of Kshs 880,000/-.

2. The respondent's response to the statement of claim was that he had completed the sub-division of KJD/Olchoro Onyore/7212. He averred that the amount claimed by the appellant was payment for the work that had been undertaken by the respondent.

3. The trial magistrate in her judgment held that the respondent deserved payment for the work already done and found that clause 4.2 of the contract was unconscionable and the appellant failed to prove that the term was fair, just, and reasonable. The court therefore declined to enforce the said term of the contract.

4. The appellant dissatisfied with the judgment of the trial court has filed a memorandum of appeal dated 28/7/2022. The appeal is premised on the following grounds:

1. That the learned Magistrate erred in law and in fact when she dismissed the claimant's case in its entirety without considering the merits of the claimant's case.

2. That the learned Magistrate erred in law and in fact when she failed to consider that the respondent freely and voluntarily executed the contract between the parties herein and which agreement expressly provided that the respondent would be liable to refund all monies paid to him by the claimant in the event that the agreement was terminated.

3. That the learned magistrate misdirected herself in holding the claimant failed to prove that the term of the contract it was relying upon was fair, just and reasonable whereas the respondent did not adduce any evidence to support a finding of illegality, fraud or unconscionability of the contract.

4. That the learned Magistrate erred in law and in fact in failing to appreciate that the contract between the appellant and the respondent was valid and enforceable for it met all the legal requirements.

5. That the learned Magistrate erred in law and in fact in not finding that the contract being valid and enforceable, the parties herein are bound by the terms of the contract.

6. That the learned magistrate erred in law in purporting to rewrite a contract between the parties herein.

7. That the learned magistrate misdirected herself in relying on case law and/or precedent whose facts and circumstances were materially different from the case at hand thus arriving at an erroneous decision.

8. That the learned Magistrate erred in law and in fact by subjecting the appellant's case to a standard of proof of beyond reasonable doubt and dismissing the appellant's suit with costs on the basis that the appellant had not proved its case against the respondent on a balance of probabilities.

9. That the learned Magistrate erred in law and in fact in failing to consider or ever adequately adopt and appreciate the pleadings and the written submissions of the appellant on record.

10. That the learned Magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before her.

5. The appellant seeks that the appeal be allowed and this court grants an order allowing the appellant's claim in the lower court.

6. The appellant submits that the agreement between the parties was not in dispute in the trial court. The parties were desirous of having the properties sub-divided and new titles processed. There was no evidence that the agreement was unfair, unjust or unreasonable. There was no evidence of fraud, duress, coercion or undue influence. The magistrate therefore erred in finding that clause 4.2 was unconscionable and unfair. They relied on the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020)* [2021] KEH 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) where the court held that:

> " 13. When a person signed a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document.
>
> ....

> 29... A court would decline to use the power where a party relied on abstract values of fairness and reasonableness to escape the consequences of a contract. The party who attacked the contract or its enforcement bore the onus to establish the facts. The principle that public policy demanded that contracts freely and consciously entered into had to be honoured."

7. The appellant argues that the trial court's refusal to enforce the agreement between the parties was unwarranted and in so doing the court purported to re-write the agreement between the parties.

8. The respondent opposed the appeal. The respondent submits that all the issues and the defence were raised in the trial court and the Honourable Magistrate was well-guided in making her ruling and did not in any way try to rewrite the pleadings as alleged by the Appellants in their submissions. It is a trite law that courts should not rewrite a contract for the parties. However, courts have never been shy to interfere with or refuse to enforce contracts that are unconscionable, unfair, or oppressive due to the procedural abuse during the formation of the agreement, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party.

9. An unconscionable contract was described in the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR as one that is extremely unfair. Substantive unconscionability was described as that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See Black's Law Dictionary, 9th Edition, Gardner, Ed.).

10. It was further submitted that the Respondent undertook some work and was paid the Kshs. 880,000/= which defence was duly raised in the trial court both in the response to the statement of claim. The court in arriving at its decision was guided by the case of Kenya Commercial Finance Company Ltd vs. Ngeny & Another [2002] 1KLR as quoted in the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR where the Court stated:

> "The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."

11. That it was rationally unreasonable for the Appellant to demand compensation for monies where they failed to pay the full agreed amount for the works and claiming an amount for the portion of the work already undertaken, which works that has already been done by the Respondent has not been denied by the Appellants. He urged the court to dismiss the Appeal with costs.

Analysis and Determination

12. I have carefully considered the evidence on record, the grounds of appeal, and the submissions by the parties. Although the trial magistrate in her judgment found that the contract was unconscionable, the issue of whether clause 4.2 of the contract is unconscionable was not raised by the respondent in his pleadings, evidence or submissions. The respondent's defence was that the monies paid by the appellant were for work done. Therefore, the only issue for the court's determination is whether the appellant proved its case to the required standard.

13. It was not in dispute that the parties entered into a contract where the respondent was to subdivide, get the requisite approvals, and process titles in respect of parcels KJD/PURKO/663 and KJD/Olchoro

Onyore/7212. The appellant does not deny that the respondent subdivided parcel KJD/Olchoro Onyore/7212, obtained the land control board consent, obtained approvals for physical planning, ground survey, and obtained title documents. In this regard, the respondent was discharged from the performance of the agreement concerning KJD/Olchoro Onyore/7212. Therefore, the appellant could not terminate the contract with respect to KJD/Olchoro Onyore/7212 as the respondent had discharged all its obligations.

14. The appellant was obligated to substantiate the net amount included within the Kshs 880,000/-, intended to cover the respondent's fee for services with respect to KJD/Purko/663. It is trite law that he who alleges must prove. The appellant did not provide any evidence to show how much was paid to the respondent for services concerning KJD/Purko/663. Therefore,the court cannot rely on conjecture to grant an award to the appellant without sufficient evidence of the money paid solely towards services concerning KJD/Purko/663.

15. Consequently, I find that the appellant did not prove its case to the required standard and hereby dismiss the appeal. The respondent is awarded the costs of the appeal.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT BUNGOMA ON THIS 27TH DAY OF JUNE 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr Mwai Muthoni h/b Miss Kariuki For the Appellant

Miss Wangusi For the Respondent

Wilkister/ Diana -C/A