



Jeneby v Awadh (Civil Appeal 150 of 2021) [2024] KEHC 7860 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 150 OF 2021
DAS MAJANJA, J
JUNE 27, 2024**

BETWEEN

SAID ALI JENEBY APPELLANT

AND

MOHAMED AHMED AWADH RESPONDENT

(Being an appeal from the judgment and decree of Hon. F. Kyambia (CM) dated 17th September 2021 in Mombasa CMCC No 2846 of 2007 (Previously Mombasa HCC No 184 of 2005))

JUDGMENT

1. This appeal relates to the judgment of the Subordinate Court dismissing the Appellant’s suit which was predicated on an agreement of sale of land dated 05.10.2004 between the Respondent as the vendor and the Appellant as the purchaser. The Appellant faulted the Respondent for his failure to adhere to the terms of the agreement on the ground that he failed to give him vacant possession and also failed to give him the full size of 0.0830 Ha indicated in the sale agreement. The Appellant sought specific performance noting that the terms of the agreement for sale were specific yet the Respondent had ignored them.
2. In his statement of defence, the Respondent stated that prior to the agreement for sale, the Appellant had been shown the location of the parcel of land that would be excised and sold to him and he was satisfied with it. Any encroachment to the said portion, the Respondent stated, was known or ought to have been known to the Appellant. He stated further that the Appellant took possession of the property upon execution of the agreement for sale and the actual size of the suit property was indicated in the deed plan and the transfer all of which were in the Appellant’s possession before the transfer was effected. The Respondent maintained that granting the Appellant vacant possession was never a term of the agreement and put the Appellant to strict proof thereof.
3. The trial court rendered judgment on 17.01.2022. The Appeal is based on the Memorandum of Appeal dated 29.09.2021 which sets out the following grounds:



- a. The learned trial magistrate erred in law and in fact in holding that the plaintiff had not proved the case on a balance of probabilities;
 - b. The learned trial magistrate failed to analyse the evidence as a whole and apply the principle that extraneous evidence is not to be imputed into an agreement and/or contract where it is clear and unambiguous;
 - c. The learned trial magistrate erred in law and in fact in applying the 'buyer beware' principle when the terms of the contract were clear and unequivocal;
 - d. The learned trial magistrate erred in law and in fact in allowing parol/extrinsic evidence to contradict, vary and alter the terms of the agreement between the parties.
4. As this is a first appeal, I am under a duty as to review the evidence afresh and reach my own conclusion; bearing in mind that the court of first instance had the chance to interact with witnesses first hand and thus had the benefit of observing their demeanor (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
 5. The gravamen of the Appellant's case is that he was allocated a plot that was different from that which he was shown by the Respondent before subdivision and transfer; that the size of the portion of land allocated to him is smaller than that indicated in the agreement for sale; and that the Respondent never granted him vacant possession.
 6. It is apparent from the record that the parties approached the advocate, Mr. Mohamed Faki Khatib, after they had already visited the property and agreed on the terms which were reduced into writing by the advocate. The advocate gave evidence as DW2 and stated that the size contained in the agreement for sale was an approximation and not the actual size. The actual size was contained in the Deed Plan and was also indicated in the transfer. The issue of the size of the land was a matter known to the Appellant and his advocate, Mr. Khatib. I do not find the discrepancy in size to be a sufficient reason to give the orders sought given that the Appellant was aware of the actual size and his advocate having confirmed that what was included in the agreement was only an approximation.
 7. Regarding the issue of vacant possession, the clause relied on by the parties is clause iv) of the Agreement for sale which states:
 - iv) The Vendor to hand over possession of the property on execution of this agreement. (Emphasis provided)Both parties confirmed that the Appellant took possession of the property upon execution of the agreement. Having admitted he took possession, I do not agree with the Subordinate Court that the Respondent was to hand over vacant possession.
 8. My finding on the issue of vacant possession does not affect the finding of the Subordinate Court on the other issues. It only buttresses the conclusion that an order of specific performance cannot issue on a term that was not specifically provided in the agreement for sale. I thus dismiss the appeal with no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JUNE 2024.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

OLGA SEWE



JUDGE

