



Mosata Enterprises Limited v Ngunjiri & another (Environment and Land Case 1387 of 2014) [2023] KEELC 16559 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 1387 OF 2014**

**JO MBOYA, J
MARCH 23, 2023**

BETWEEN

MOSATA ENTERPRISES LIMITED PLAINTIFF

AND

HON. ONESMUS KIMANI NGUNJIRI 1ST DEFENDANT

KANJU TRADING COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

1. The suit herein was commenced vide Plaint dated the 28th October 2014 as against the two (2) named Defendants. However, on the 23rd March 2023, the Plaintiff and the 2nd Defendant duly entered into a consent where the Plaintiff's claim as against the 2nd Defendant was duly compromised. Furthermore, the Plaintiff also forfeited and withdrew her claims to and in respect of the suit property.
2. Having withdrawn, her claim as against the suit property and as against the 2nd Defendant herein, the Plaintiff sought to pursue the recovery of the monies that were paid to and in favour of the 1st Defendant herein towards and on account of the purchase price/consideration of the botched and/or aborted sale of the suit property, which property was also found to have been sold to and in favour of the 2nd Defendant herein.
3. In respect of the claim for refund of the monies, the Plaintiff's witness duly relied upon and adopted the witness statement dated the 28th October 2014. For clarity, the averments at the foot of the witness statement by the witness herein, have neither been controverted nor challenged.
4. To the extent, that the evidence by the Plaintiff's witness have not been challenged and/or controverted, it is my considered view that same have proved and established the Plaintiff's claim as against the 1st Defendant.



5. In addition, the contents of the documents produced by the witness are also clear and explicit to the extent that same confirm and underscore that the 1st Defendant duly received the monies at the foot of the impugned sale agreement herein.
6. Premised on the foregoing, I do find and hold that the Plaintiff has duly discharged the burden of proof to the requisite standard, namely, on a balance of probabilities; and hence the same is entitled to Judgement.
7. As pertains to the burden of proof, it is imperative to take cognizance of the holding of the Supreme Court in the case of Raila Amollo Odinga & Another Versus Independent electoral and Boundaries Commission(I.E.B.C.) and others [2017] eKLR,

“(131) He joined Ole Kina in deposing that declaration of election results could only be done when the Commission was in possession of all Forms 34A and B, which was not the case during this election because at the time of declaration. He emphasized that the results could only be called or declared when the Commission was in possession of all the Form 34A and 34B and at the time of declaration; the Commission had only 29,000 Forms 34A. He asserted that the results transmitted from the 11,000 polling stations out of 3G and 4G network coverage could not be ascertained and compromised up to 7 million votes. In his evidence, vote transmission could only be manual, not both manual and electronic.

(132) I must however point out that his evidence cannot be considered as that of an expert witness because he describes himself as part of the Petitioners’ party and in my view, supporting the averments in the Petition as opposed to advancing expert opinion to the Court. This evidence must therefore be examined with that caution in mind. Ngaah J, in Peter Kariuki Njenga v Gabriel P. Muchira & Another [2017] eKLR Civil Appeal, No. 188 of 2010, referred to the following passage on expert evidence:

In Cross on Evidence 5th Edition at page 446, the following passage from the judgment of President Cooper in Davie versus Edinburgh Magistrates (1933) SC 34,40, is set out as stating the functions of expert witnesses:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence.”

So an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.
2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.



3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness. [Emphasis supplied]

In response

(133) The 1st and 2nd Respondents' averred that:

- (i) Transmission was completed in accordance with the electoral law and Regulations thereunder and in terms of the decision of the Court of Appeal in the Maina Kiai case
- (ii) The completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage and where this was unavailable, alternative mechanisms to ensure completion in transmission of the image of the Form 34A in areas that lacked 3G or 4G network coverage, was established.

8. In a nutshell, I find and hold that the Plaintiff is entitled to refund of the sum of Kshs.4,928,020/= only being the amount claimed at the foot of the Plaint dated the 28th October 2014.
9. Additionally, I also find and hold that the Plaintiff is entitled to Interest from the 28th January, 2009, being the date when the Plaintiff was duly informed and established that the certificate of title, which was allegedly sold to the Plaintiff herein was irregular and invalid.
10. In this regard, I am mindful of the provisions of Section 26 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, which provides that the court can grant Interest for the period prior to and before the filing of the suit, if circumstances of the case warrants and necessitates.
11. For the avoidance of doubt, the circumstances of the suit herein are such that Interests are necessary from the named date/duration so as to provide indemnity/atonement for the loss suffered by the Plaintiff.
12. To this extent the court is alive to and do apply and invoke the holding of the Court of Appeal in the case of Highway Furniture Mart Limited versus the Permanent Secretary, Office of the President and Others [2006], eKLR, where the court discussed the circumstances for award of the interest prior to and before the filing of the suit.
13. Besides, the Court of Appeal in the said decision [supra] also spoke to and confirmed the prevailing rate of interest. In short, I also award, interests at court rates [14%] per annum from the 28th January, 2009 and the same shall run from the said date and for a maximum of six (6) years from the date of the Judgment.
14. For clarity, the Plaintiff is awarded interest at court rates [14%] per annum from the date of 28th January, 2009.
15. Finally, the Plaintiff shall also have costs of the suit and the same to be taxed and certified by the Deputy Registrar of the Honourable court.
16. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2023.



OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant.

Mr. Jackson Omwenga for the Plaintiff.

Mrs. S.K. Muendo for the 2nd defendant.

No appearance for the 1st Defendant.

