



REPUBLIC OF KENYA



KENYA LAW
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**Gateri v Munyi (Civil Appeal 22 of 2018)
[2023] KEHC 24225 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 22 OF 2018
FN MUCHEMI, J
OCTOBER 26, 2023**

BETWEEN

DAVID MACHANGA GATERI APPELLANT

AND

PHINEAS NJAGI MUNYI RESPONDENT

*(Being an Appeal from the Ruling of Hon. S. M. Soita (CM) delivered
on 21st September 2017 in Kerugoya CMCC No. 49 of 2017)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling in Kerugoya CMCC No. 49 of 2017 whereby the court entered judgment of Kshs. 500,000/- in favour of the respondent and awarded costs and interests running from the date of the sale agreement until payment in full.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing six (6) grounds summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding that the respondent had proved his case on a balance of probabilities;
 - b. The learned trial magistrate erred in law and in fact in disregarding the appellant's counter claim.
3. Parties put in written submissions to dispose of the appeal.



Appellant's Submissions

4. The appellant submits that parties entered into a sale agreement on 18/4/2011 whereas he was selling LR Nos.Inoi/Kamondo/850 and Inoi/Kamondo/854 to the respondent at a consideration of Kshs. 900,000/-. He further submits that the properties were in the name of his father which the respondent was aware of because he was selling the said properties to collect money to complete the succession cause of his late father. In any event, the appellant argues that the respondent ought to have done his due diligence before purchasing the land.
5. The appellant argues that according to the terms of the agreement, the respondent was to pay the balance of Kshs. 650,000/- in two instalments, Kshs. 450,000/- on or before 31/7/2011 and Kshs. 200,000/- after the land and control board consent. The appellant contends that by the said date, the respondent had only paid Kshs. 500,000/- and therefore breaching the terms of the agreement. In the event of default, the appellant submits that the agreement provided that the defaulting party would pay Kshs. 30,000/-. The appellant argues that the respondent having breached the terms of the agreement made it difficult for him to perform his part of the agreement. He further states that in goodwill he deposited Kshs. 500,000/- in court as the refund of the purchase price paid. He therefore argues that he is aggrieved by the court ordering that he pay costs an interest whereas the respondent is the one who breached the agreement.
6. The appellant relies on the following cases to support his submissions:- Koyumkei Multipurpose Co-operative Society Limited & 17 Others vs Rael Chepneg'etich Koech [2019] eKLR; Zadock N. Danda vs South Nyanza Sugar Co. Ltd (2018) eKLR and Abraham Gina Adams (Suing as the Administrator of the Estate of the late Geoffrey Adams Ogwa) vs James Ouma Vatolio (2015) eKLR.

The Respondent's Submissions

7. The respondent submits that they entered into a sale agreement with the appellant whereby the appellant was to sell him LR Nos.Inoi/Kamondo/850 & 854. However the respondent states that the appellant did not disclose to him that the said parcels of land were the appellant's father's and were under succession. The respondent argues that the appellant intended to defraud him of his monies as he did not disclose that the said parcels were not his and further that they were under succession proceedings. Furthermore, the suit properties were combined and a new number allocated to them being LR No.Inoi/Kamondo/3900.
8. The respondent further submits that the appellant ought to pay interest as he was the defaulting party in the agreement. He argues that interest ought to be calculated from the date of the agreement on 18th April 2011 to when the suit was filed on 18th January 2017.
9. The respondent relies on the following cases to support his submissions:- Daniel Kosgei vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR; Panthion Ltd vs Industrial & Commercial Development Corporation (2008) eKLR and The New Tyres Enterprises Limited vs Kenya Alliance Insurance Company Ltd (1987) KLR 380.

Issue for determination

10. The main issue for determination is whether the appeal has merit.



The Law

11. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

12. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

13. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

14. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appeal has merit.

15. The bone of contention is the issue of interest on the amount of Kshs.500,000/- deposit paid by the respondent. According to the appellant, he should not pay costs and interest of the suit since the respondent was the defaulting party of their agreement dated 18/4/2011. The respondent argues that the appellant fraudulently sold him the suit properties whereas he knew that he did not have the capacity to do so as he was not the registered owner of the properties.

16. Section 26(1) of the *Civil Procedure Act* guides us on what stage interest on damages starts to run. It provides:-

Where and in so far as a decree is for 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.

Where such 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.



17. The authority and discretion of a court to award interest on costs is provided for in Section 27(1) & (2) of the [Civil Procedure Act](#) as follows:-

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

18. In light of the above, a trial court has wide discretion to award and fix the rate of interest provided that the discretion must be exercised judiciously. Given this discretion, an appellate court is therefore enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. *New Tyres Enterprises Ltd vs Kenya Alliance Insurance Company Limited*.
19. Section 26 (1) of the [Civil Procedure Act](#) covers interest in two stages being the period from the date the suit is filed to the date when the court gives judgment and the period from the date of judgment to date of payment of the sum adjudged due. When it comes to the period before filing the suit, Section 26 of the [Civil Procedure Act](#) has no application. Interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. *Jane Wanjiku Wambu vs Anthony Kigamba Hato & 3 Others [2018] eKLR*.
20. In the instant case, parties entered into an agreement for the sale of LR Nos. Inoi/Kamondo/850 & 854 at a consideration of Kshs. 900,000/-. The respondent paid Kshs. 500,000/- in instalments and stopped making further payments because he was suspicious that something was not right. The appellant states that he agreed to sell the suit properties to the respondent which were registered in his father's names and that the respondent was aware of the status. It is noted that LR No. Inoi/Kamondo/854 was registered in the name of Fredrick G. Machanga whereas Inoi/Kamondo/850 was registered in the names of Fredrick G. Machanga, Jamleck N. Kaberenge, Stephen R. G. Munyi and Prisca Wanyiko Kaberenge. In spite of this, the agreement stated that the appellant stated that he was selling the suit properties free from any encumbrances. Thus the appellant was aware that he did not have capacity to sell any of the two properties because he was not the registered owner. The respondent states that he was under honest belief that he was purchasing land parcels that were free from any encumbrances and which belonged to the appellant. He proceeded to enter into an agreement for sale with the appellant and paid a substantial deposit of Kshs. 500,000/- leaving a balance of Kshs. 400,000/-
21. The Court of Appeal in the case of *Prem Lata vs Peter Musa Mbiyu (1965) EA 592* stated:-

In both these cases, the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the



party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.

22. Further in Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited (1970) EA 469 the court held:-

The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment.

23. I have analysed the evidence and the facts of this case. It is my considered view that the respondent was entitled to refund of the deposit of Kshs.500,000/- together with interests which were correctly ordered by the magistrate at the rate of 14% per annum. However, the trial court ordered that the interest was payable from the date of the agreement on 18/04/2011. This was actually erroneous in that Section 26 of the Civil Procedure Rules provides that such interest be payable from the date of filing the suit up to the date of satisfying the decree. In this appeal, the appellant deposited the Kshs.500,000/- in court on 21/02/2018 during the pendency of the suit. As such, the interest ought to be calculated from the date of filing the suit to the date the money was deposited in court as far as the principal sum is concerned.
24. The appellant said that his counterclaim was not considered by the court below. I have perused the record and find that the issue was dealt with in paragraph 5 and 6 of the ruling of the court delivered on 21st September 2017. The court declared the agreement between the parties as null and void since the appellant herein lacked the capacity to sell properties he purported to sell. The clause of payment of Kshs.30,000/- in case of default was therefore not applicable since there was no valid agreement to be breached. Furthermore, the court faulted the appellant for purporting to sell land parcels that did not belong to him and taking deposit of quite a substantial sum which he kept for over six (6) years. The respondent did not benefit from the clause of payment of interest of 40% per annum, due to the fact that he had not paid the full consideration. The court fixed the interest payable following the law and precedents set by the superior courts. In my considered view, the counterclaim was dealt with and although the final order or declaration was not made, the said counterclaim, in my view was not plausible.
25. Consequently, I find no merit in this appeal save for the dates of payment of interest on the principal sum which this court has corrected.
26. The interest of 14% per annum on the sum of Kshs.500,000/- shall be run from the date of filing the suit to the 21st February 2018. The accrued interest owing shall however attract interest at court rates until payment in full.
27. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October , 2023

