



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 51 OF 2019**

**MICHAEL OBARE TAGO.....APPELLANT**

**VERSUS**

**FREDRICK AMBROSE ODUOR OTIENO.....RESPONDENT**

*(Appeal against judgment and decree in Ukwala SRM CC No. 24 of 2009 delivered on 30<sup>th</sup> October, 2019 by Hon C.N.Sindani, SRM)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgment and decree in Ukwala Senior Resident Magistrate's Court Civil Suit No. 24 of 2019 delivered on the 30<sup>th</sup> October 2019. The respondent herein FREDRICK AMBROSE ODUOR OTIENO had filed a claim against the appellant MICHAEL OBARE TAGO seeking for specific performance and the refund of Kshs. 30,000 being monies paid to the appellant by the Respondent as down payment for the purchase of land parcel No. LR No. North Ugenya/Doho/778.

2. The trial court in its decision found that the respondent breached the contract for sale of the land in question by failing to cause the process of transferring the title in favour of the appellant and as such specific performance as prayed for could not be granted. The court thus held that the Kshs. 30,000 paid to the appellant by the Respondent be refunded to the Respondent plus interest at court rates from the date the contract was to be completed. The respondent was also granted costs of the suit.

3. Being dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal dated 28<sup>th</sup> November 2019 which set out the following grounds of appeal:

a) *That the learned trial magistrate erred in law and fact in allowing the respondent's claim when the evidence and facts of the case were against the claim, the whole of Kshs. 30,000 having been refunded to the respondent and therefore no known cause of action on the issue of refund.*

b) *That the learned trial magistrate erred in law and in fact in allowing the respondent's claim against the appellant with interest at court rates since time of agreement without any basis for such an order and hence prejudiced the appellant.*

c) *That the learned trial magistrate erred in law and in fact in failing to consider the evidence of the appellant at trial and submissions by the parties hence arrived at an erroneous finding on issues for determination and particularly that the appellant was liable to refund the sum of Kshs. 30,000 which has been settled in full.*

d) *That the learned trial magistrate erred in law and fact in failing to make a finding that once a banker's cheque for sum of Kshs. 10,000 and Kshs. 20,000 were drawn and forwarded to the respondent, the appellant was totally discharged of liability.*

4. The parties were directed to canvass the appeal through written submissions. Only the appellant filed his submissions and despite reminders to the respondent's counsel Mr. Agina to file his submissions, he declined to do so hence this judgment.

**The Appellant's Submissions**

5. It was submitted that once the respondent admitted to having received Kshs. 30,000 from the appellant, the appellant was discharged of any liability, failing to encash the same notwithstanding and as such the trial court erred in ordering a refund of the part payment of purchase price to the respondent.

6. It was further submitted that the ordering of payment of interest on the refund from the time of breach of agreement to the time of

settlement was also erroneous as it had no legal basis in law and was not supported by evidence.

7. No submissions were filed by the Respondent's counsel.

### **Analysis & Determination**

8. This is a first appeal. The duty of a first appellate Court as stipulated in section 78 of the Civil Procedure Act was stated in **Sielle vs Associated Motor Boat Company Limited [1968] EA 123** and restated in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR** that:

*“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.”*

9. This is the standard of review upon which it is incumbent upon the Court to utilize in determining this appeal. The evidence tendered before the trial court is as follows: The respondent testified as PW1 and stated that he had entered into a sale agreement with the appellant for the purchase of LR No. North Ugenya/Doho/778 for Kshs. 330,000 out of which Kshs. 30,000 had been paid to the appellant with the remainder set to be paid within one month. It was his case that according to the agreement for sale, it was the appellant's duty to process the title deed and transfer the land to the respondent. He further testified that on 8<sup>th</sup> September 2008, he carried out a search over the suit land and found that it was encumbered leading him to seek specific performance or refund of the paid out sums.

10. In cross-examination, the respondent admitted that two cheques for Kshs. 30,000 had been received but not cashed. He denied ever seeing the cheque for Kshs. 20,000 purportedly sent to his advocate.

11. The appellant testified as DW1 admitting the existence of a sale agreement between himself and the respondent but that stated that the same was for a portion of the suit land. He stated that he was only paid Kshs. 30,000 for the land with the balance remaining. The appellant further testified that he had through his own advocate forwarded two cheques amounting to Kshs. 30,000 to the respondent.

12. The appellant in cross-examination stated that he never received any acknowledgement or receipt for the cheques he had sent to the respondent or any notice of the said cheques having been encashed. He further denied having filed or signed any witness statement presented before court terming the same as a forgery.

### **DETERMINATION**

13. I have considered the pleadings by the parties in the trial court and in this appeal. I have also considered the grounds of appeal, evidence adduced before the trial court and submissions by the appellant's counsel in support of this appeal. It is not disputed that there existed a sale agreement between the appellant and the respondent for disposal of LR No. North Ugenya/Doho/778 for Kshs. 330,000 from which Kshs. 30,000 had been paid to the appellant with the remainder set to be paid within one month. It is also not disputed that the respondent subsequently discovered that the suit land was encumbered and sought to get his refund of Kshs. 30,000 from the appellant. The appellant testified that he drew a bankers cheque for Kshs. 10,000 and another of Kshs. 20,000 to the respondent's advocate being refund of the part payment of purchase price.

14. In view of the above evidence, in my humble view, the main issues for determination is:

- a) **Whether the bankers cheques as drawn were evidence of payment or refund and if in the answer is in the negative,**
- b) **Whether the order on interest by the trial court was erroneous.**

15. A cheque is a bill of exchange drawn on a bank payable on demand. Liability of a drawer of a bill is provided under Section 55 of the Bills of Exchange Act, (Cap 27 of Laws of Kenya ), in the following terms:

**“(1) The drawer of a bill by drawing it—**

**(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken;**

**(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.**

**(2) The endorser of a bill by endorsing it—**

**(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken;**

**(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements;**

***(c) is precluded from denying to his immediate or a subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill, and that he had then a good title thereto.***

16. Accordingly, from section 55 above, it is clear that cheques drawn by the appellant would have only been payable upon being presented by the respondent to his bank. For the above reason, I find and hold that the cheques drawn by the appellant in favour of the respondent, which cheques were never encashed did not constitute a payment.

17. It is worth noting that the respondent disputed seeing the cheque for Kshs. 20,000 in his re-examination. The respondent had earlier admitted to having received cheques amounting to Kshs. 30,000 but not encashing them. However, the respondent did not give any reasons why he did not encash the two cheques yet they were for refund of his part payment of purchase price paid to the appellant.

18. Having determined that the refund payment of the refund via cheques by the appellant did not materialise, I turn to the second issue for determination, whether the trial court erred in awarding interest on the refund of Kshs. 30,000 from the date the contract was to be determined that is the 27/8/2008. In the case of **Kenya Human Rights Commission & another v Attorney General & 6 others [2019] eKLR** it was held:

***“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”***

19. In the instant case, I have already found that the appellant did forward the cheques to the respondent’s advocates only that the respondent did not present the said cheques to the bank for payment. The respondent can therefore, in my humble view, not turn and feign ignorance that he was not paid and seek to enrich himself from the interest accumulated from 27/8/2008. Equity aids the vigilant and not the indolent. What motive did the respondent have in failing to bank the cheques for refund and waited until time had run for him to seek for specific performance and refund plus interest accrued for such a long period of time? In my humble view, the respondent was not entitled to interest on the Kshs 30,000 as he deliberately withheld the cheques issued to him through his counsel being refund and failed to encash them in good time.

20. Accordingly, I find and hold that the trial court erred in awarding the respondent interest on the refund of Kshs. 30,000 which the respondent ought to have encashed by the cheques issued to his advocate, and which cheques his advocate refused to present to the bank for reasons well known to himself.

21. Finally regarding costs of the suit before the trial court, it is trite that costs follow the event as provided under section 27 of the Civil Procedure Act. However, albeit costs follow the event, they are awarded in the discretion of the court. In the case of **Supermarine Handling Services Ltd vs Kenya Revenue Authority, Civil Appeal No. 85 of 2006**, the Court of Appeal explained the circumstances that would lead an appellate court to interfere with the trial court’s exercise of discretion thus:

***“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...”***

22. In the instant case, it is my humble view that the trial court was wrong to award the costs of the suit to the respondent as his suit was not fully successful, and as the respondent kept the cheque for refund of what he had paid to the appellant purposely to engage the appellant in unnecessary litigation. Accordingly, it is the view of this court that the parties ought to have borne their own costs in the trial court as well as in this court.

23. The upshot of all the above is that the instant appeal is partially successful with the judgment of the trial court being set aside and substituted with an order that the appellant do refund the respondent Kshs. 30,000 only with interest at court rates from the date of filing suit in the lower court until payment in full.

24. Each party to bear their own costs of the suit in the lower court and in this appeal.

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 16<sup>th</sup> Day of February 2021 via email to both parties’ advocates**

**R.E. ABURILI**

**JUDGE**