



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 57 OF 2015

STEPHEN OBABU SIBWORI.....APPELLANT

VERSUS

VERONICAH SIKABU KAMEMBA.....RESPONDENT

{Being an appeal against the Judgement of Hon. J. Wanjala – SPM – Nyamira dated and delivered on the 31st day of January 2013 in the original Nyamira Chief Magistrate’s Court Civil Case No. 84 of 2010}

JUDGEMENT

The respondent sued the appellant for an alleged admitted debt of Kshs. 16,000/= and costs of the suit and was by a judgement delivered on 30th January 2013 granted orders as prayed. The debt is alleged to have arisen from an agreement for lease of two parcels of land to the respondent by the appellant. In the lease agreement dated 2nd July 2009 which was in writing and duly executed by the parties and attested by their witnesses the respondent was to lease two portions each measuring half an acre for two years at Kshs. 1,200/= per portion hence a total of Kshs. 4,800/=. At the execution of the agreement the respondent paid a sum of Kshs. 3,000/= and according to her she later paid the balance in form of maize. Upon paying a sum of Kshs. 3,000/= she took possession of the land, cultivated it and planted maize. It was her evidence however that the appellant kicked her out of the land and prevented her from harvesting her crop. Her demand for him to refund her money fell on deaf ears and so she sought help from the local administration who summoned the respondent and when he failed to heed the summons he was arrested. This culminated in an agreement dated 19th January 2010 wherein the respondent admitted he owed the appellant a sum of Kshs. 3,000/= and agreed to refund it. He did not pay and so on 8th April 2010 he was, according to him put into custody whereupon he admitted owing the appellant a sum of Kshs. 16,000/= which he agreed to pay as follows:-

“(i) 12.4.2010 – Kshs. 10,000/=

The remaining balance shall be paid in three instalments of Kshs. 2,000/= every month by 5th of every month starting May 2010.”

The appellant did not honour the agreement and hence the suit. The respondent vehemently opposed the claim but after hearing and considering evidence from both parties the court reached the decision which is the subject of this appeal. The grounds of appeal are: -

“1. THAT the learned trial magistrate erred in Law and in fact by failing to appreciate and consider the evidence tendered before her.

2. THAT the learned trial magistrate erred in Law and in fact by failing to appreciate the issues before her and misapprehended the facts and the law leading to an erroneous finding.

3. THAT the learned trial magistrate failed to appreciate the Law by awarding a liquidated sum that was not proved.

4. THAT the learned trial magistrate failed to consider the submissions tendered by the appellant and more so the decision relied.

5. THAT the learned trial magistrate erred in Law and in fact by failing to consider that no agreement was tendered in court.

6. THAT the learned trial magistrate erred in Law and in fact by relying on extraneous issues and imported her own propositions and arrived at a wrong conclusion.

7. THAT the learned trial magistrate erred in law and in fact by failing to allocate any reasons for her finding.”

The appeal was canvassed by way of written submissions. It is the appellant's submission that the alleged agreement was made under duress as he had slept in the police cell for 2 days. Counsel for the appellant faulted the trial Magistrate for not taking that into account. Counsel contended that had the trial Magistrate taken that into consideration she would have come to the conclusion that the respondent had not proved her case on a balance of probabilities. For the respondent it is argued that the claim was proved to the standard required and that this appeal has no merit and it should be dismissed with costs.

I have considered the rival submissions carefully but being the first appellate court I have a duty to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion albeit bearing in mind that I did not see or hear the witnesses testifying (see *Selle v Associated Motor Boat Company Limited* [1968] EA 123).

There is no doubt that on 2nd July 2009 the parties herein entered into an agreement for lease of 2 portions of land at a consideration of Kshs. 4,800/=. There is also no doubt that at the time of execution of the agreement the respondent paid to the appellant a sum of Kshs. 3,000/= being part payment. It is not very clear whether the balance of 1800/= was paid. What is clear is that the agreement did not materialize because after the respondent took possession of the land and planted her crop the appellant kicked her out of the land and despite her persistent demands for a refund of the consideration the appellant refused to pay. It is my finding that the appellant having breached the agreement he was under a duty to refund the consideration. What I do not agree with is that the sum refundable was Kshs. 16,000/=. I say so because of the following reasons: -

1. **The consideration was Kshs. 4,800/= and the sum paid was Kshs. 3,000/=.**
2. **If the respondent expended any sums on the land upon taking possession she was entitled to a refund of those sums too as she was not to blame for the collapse of the agreement. However, such sums needed to be specified and proved on a balance of probabilities but this was not done in the instant case and it was not proved how the sum of Kshs. 3,000/= rose to Kshs. 16,000/=.**
3. **On 19th January 2010 the parties had entered into another agreement arising from the same issue before their Assistant Chief but for Kshs. 3,000/= only. It is not clear therefore how the amount of Kshs. 3,000/= rose to Kshs. 16,000/=. In her testimony the respondent seemed to suggest that it was because of the sums she expended in purchasing the seeds she sowed, for labour and also money paid to the Chief (2,000/=). This however was not proved and any sums paid by her to the elders and administrators who arbitrated the dispute should have been tabulated and proved by way of receipts for it to become payable which was not done.**
4. **The appellant executed the agreement dated 8th April 2010 while in the custody of their Chief. It is evident from the appellant's testimony that he was arrested after the respondent reported him to the Chief for failing to pay the Kshs. 3,000/= in the agreement dated 19th January 2010. The appellant's evidence that he had spent two nights in custody was not controverted and the respondent in fact conceded that they left with him after executing the agreement. Clearly this was an agreement under duress and for that reason it was voidable and unenforceable and the appellant was not bound by it.**
5. **Had the trial Magistrate correctly applied her mind to the law she would not have come to the conclusion that the agreement was enforceable.**

Be the above be as it may and as I have already stated, the appellant having fallen short on his part of the agreement he was under a duty to refund the consideration to the respondent. My finding is that the respondent did not adduce cogent evidence that the said consideration was fully refunded and indeed his agreeing to the refund of only Kshs. 3,000/= on 19th January 2010 corroborates that. This in my finding is the sum which is due and owing to the respondent by the appellant. I accordingly allow the appeal, set aside the judgement of the lower court for a sum of Kshs. 16,000/= and substitute it with judgement in favour of the respondent for a sum of Kshs. 3,000/= together with interest from the date of filing suit until payment in full.

Costs follow the cause but in this case the order that commends itself to me is that each party shall bear their own costs of this appeal. The respondent shall however get the costs of the case in the court below. It is so ordered.

Signed, dated and delivered in Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE

This judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines in view of the Covid-19 pandemic, the Advocates for the parties having consented.