



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 1 OF 2015

WILSON SOI.....APPELLANT

VERSUS

WILLIAM BOR.....RESPONDENT

(An Appeal arising from the Judgment of Hon. T. Okello, SRM, delivered on the

10th day of March, 2010 in Bomet Senior Resident Magistrate's Court Civil Suit No. 59 of 2004.)

JUDGMENT

1. Being dissatisfied with the entire judgment, the Appellant filed Memorandum of Appeal on 9th April, 2010 seeking orders that the judgment be set aside and the Plaintiff's suit be dismissed with cost on grounds that:

i. THAT the learned trial magistrate erred in both fact and in law in that he failed to find that there was no agreement between the Defendant and the Plaintiff to the effect that the Plaintiff would pay the Defendant's loan at Agriculture Finance Corporation (AFC) for and on the Defendant.

ii. THAT the learned trial magistrate erred in both fact and in law by not holding that, on the evidence before court, the Plaintiff can only claim for refund of a total sum of Kshs. 30,000/= that he had paid to the Defendant.

iii. THAT the learned trial magistrate erred in both fact and in law in that he failed to take into account the evidence given during the cross-examination of the Respondent and his witnesses.

iv. THAT the learned trial magistrate erred in both fact and in law in ignoring the defence filed and Defendant's oral evidence and that of his witnesses.

v. THAT the learned trial magistrate erred in bot fact and in law in shifting the burden of proof to the Defendant.

vi. THAT the learned trial magistrate erred in both fact and in law in considering extraneous issues that had not been specifically pleaded to by the Plaintiff in the pleadings and/or crystallized in the Plaintiff's oral evidence before court.

vii. THAT the learned trial magistrate erred in both fact and in law by awarding the Plaintiff the sum of Kshs. 49,550/= as being the money paid by the Plaintiff to the Defendant as purchase price and Agriculture Finance Corporation (AFC) on offsetting the Defendant's loan when evidence before court clearly showed that there was no agreement between the Plaintiff and the Defendant to the effect that the Plaintiff was to pay the loan at Agriculture Finance Corporation (AFC) for and on behalf of the Defendant.

BACKGROUND

2. The Respondent/Plaintiff vide an Amended Plaint dated 13th October, 2004 filed a suit against the Appellant/Defendant for a refund of Kshs. 89,550/=, cost of the suit and interest on both at court's rate. Consequently, on 17th November, 2004 the Defendant/ Appellant filed his reply dated 9th November, 2004 denying each and every allegation stated by the Plaintiff and seeking that the suit be dismissed with costs.

3. The matter proceeded for hearing where the Respondent/Plaintiff called 5 witness and the Defendant 1 witness.

4. PW1 gave sworn statement where it was his evidence that he knows the Defendant for a long time. It was his testimony that on

20th January, 2001 the Defendant had agreed to sell to him a 50 by 100 plot from Kericho/Silibwet/1142 for Kshs. 30,000/= as the Defendant was going to offset his loan with A.F.C. It was his evidence that an agreement was made at Kirui's office. The agreement was marked as MF1-1.

5. It was his evidence that him and the Defendant received demand letters dated 20/6/2001 and 7/6/2002 from A.F.C demand payment of the outstanding loan since the Defendant had defaulted in payment.

6. It was his testimony that the Defendant requested him to pay money to A.F.C and in alternative the Defendant would give him a larger portion. The Plaintiff proceeded to pay a total sum of Kshs. 49,550/= to A.F.C in Defendant's account and produced receipts marked as MF1-4,4 and 6.

7. The Plaintiff testified that the Defendant had indicated that he would give him 0.3acres and add another 0.7acres for Kshs. 161,000/= which the Plaintiff paid a total of Kshs. 10,000/=. An agreement dated 10/11/2003 was made to that effect. The Agreement marked as MF1-7. Therefore, outstanding balance was Kshs. 151,000/=

8. It was the Plaintiff's evidence that he was unable to pay the balance and requested the Defendant to give him the land which he had earlier purchased. However, the Defendant refused. It was the Plaintiff's evidence that he reported the matter to the Chief and the elders but the Defendant still remained adamant. The Plaintiff later sought for his refund which the Defendant also refused to give.

9. PW2 Julius Kibet Molyot branch manager at Agriculture Finance Corporation at Bomet gave sworn statement and testified that the Defendant had taken a loan with AFC of Kshs. 30,000/= and gave as security a title deed of parcel of land Kericho/Silibwet/1142 measuring 1.22 hectares.

10. He further testified that the Defendant defaulted in repaying the loan resulting in his account being foreclosed. It was also his evidence that during the foreclosure, there were arrangements that one Mr. William Bor will come forward to make payments.

11. PW2 confirmed that the sum of Kshs. 49,500/= were indeed paid by the Plaintiff into the Defendant's account and there is an agreement to that effect.

12. During cross examination even though it was confirmed that there was no authorization in the file giving William Bor the authority to pay to the Defendant's account, PW2 confirmed that from the body of exhibit 2 AFC was aware of the agreement between the Plaintiff and the Defendant for payment of the loan.

13. PW3 Joel Soi testified that he knows both Plaintiff and the Defendant. He also gave evidence that he witnessed the land transaction between the two parties whereby, the Defendant sold one-point acre to the Plaintiff for Kshs. 30,000/=. He further testified that the money was paid in full and an agreement dated 20/1/2001 was made to that effect where both parties signed and he also signed as a witness.

14. During cross examination, PW3 confirmed that the agreement was not prepared by Kirui Advocate but was done by the Advocate's clerk.

15. PW4 Joseph Kirui an advocate and practicing in the name and style of J.K. Kirui and Company Advocate testified that on 20/1/2001, two clients; Wilson Soi and William Bor came to his office with intention of entering into an agreement of sale of land Kericho/Silibwet/1242 measuring 50ft by 100ft which agreement was made and witnessed in his office.

16. It was his further evidence that on the said date he was not in his office however, he gave instructions to his clerk Paul Maritim and typist Rose to have the agreement prepared and keep for his execution. A consideration of Kshs 30,000/= was paid in full to the seller one Wilson Soi. The agreement was produced as exhibit 1.

17. PW5 Daniel Chemwa Assistant Chief testified that on 10/11/2003 he made an agreement for sale of land between Wilson Arap Soi and Arap Bor. Kshs 8,000/- was given to Wilson and the agreement signed.

18. The matter proceeded for defence hearing, the defence calling in one witness.

19. DW1 Wilson Soi gave sworn statement. He testified that he is the owner of land parcel Kericho/Silibwet/ 1142. It was also his testimony that he knows William Bor and that he had sold him land parcel 0.1acres for kshs 30,000/=. That William had initially paid him 25,000/= and later Kshs. 5,000/=. It was also his evidence that he never agreed to add him land.

20. DW1 further testified that he had a loan of Kshs. 20,000/= with A.F.C and that he was in continuous payment and he never at any time authorized William to do any payments on his behalf. On cross examination, DW1 testified that he did not sign any agreement nor did he go to the chief. In addition, DW1 testified that if Bor gave AFC money, then it is AFC to give back.

21. On 10/3/2010 judgment was entered in favour of the Plaintiff as against the Defendant for Ksh. 79,550/= being the money given to the Defendant and the AFC on offsetting the Defendant's loan. Being dissatisfied with the said judgment, the Appellant/Defendant has lodged this appeal.

22. The appeal was canvassed by way of written submissions.

ISSUES FOR DETERMINATION

23. After perusing the memorandum of appeal, submission filed together with authorities relied upon by both parties. I find that there is only one issue for determination as follows;

whether there existed a contract between the Respondent/Plaintiff and Agriculture Finance Corporation over payment of loan due by the Appellant/Defendant.

24. I find that both parties relied upon the authorities of; **Kenya Ports Authority Vs. Kusthon (Kenya) Limited (2009) 2EA 212** and **Michael Odhiambo V Republic (2005) eKLR** that it is settled law that the High Court being the first appellate court has the responsibility to analyse, evaluate, assess, weigh, interrogate and scrutinize all the evidence produced and arrive at its own independent conclusion, bearing in mind that it had no advantage of seeing or hearing the witnesses as they testified.

25. The Respondent/Plaintiff alleged that he had entered into a sale agreement with the Appellant/Defendant over sale of land 50ft by 100ft in Parcel Land Kericho/Silibwet/1142 and paid a consideration of Kshs. 30,000/=. Sale agreement prepared on 20th January, 2001 and signed by both parties was produced as exhibit. PW3 Joel Soi testified that he was a witness to both the agreement and the sale transaction. PW4 Joseph Kirui an Advocate also testified that the said agreement was prepared under his instructions and confirmed that Kshs. 30,000/= was received by the Appellant/Defendant as the purchase price. In addition, the Appellant/Defendant does not challenge this position. During his testimony, he acknowledges sale agreement and agreed to have received the purchase price of Kshs. 30,000/= from the Respondent/Plaintiff and he was willing to refund the same. I find that the said issue is not in dispute.

26. On issue of the sale agreement dated 10-11-2003 over 0.7acres of land to which the Respondent/Plaintiff alleged to have paid a total of Kshs. 10,000/= which he seeks for a refund, the Appellant/Defendant denied any such agreement. PW5 Daniel Chemwa assistant chief testified to be the maker of the said agreement. There is indeed an agreement produced but it is my opinion that no evidence was adduced to corroborate. The agreement is shown to have been witnessed by one Benard Kirui who did not come to court to give his evidence. There is no evidence to prove authenticity of the said agreement. In this regard, I find that the Respondent/Plaintiff failed to prove his case.

27. This appeal therefore rotates on the issue of the money alleged to have been deposited on the account of the Appellant/Defendant with the Agriculture Finance Corporation by the Respondent/Plaintiff.

28. From the Appellant/Defendant, he does not dispute that he had a loan with Agriculture Finance Corporation. He also does not dispute that the outstanding loan was paid and only Kshs. 10,000/= had remained as balance which he cleared. It was also in his knowledge that the loan had been cleared by the Respondent/Plaintiff.

29. The Respondent/Plaintiff produced receipts drawn on the Appellant/Defendant's account with the Agriculture Finance Corporation totaling to a sum of Kshs. 49,550/=. He also produced letters dated 20th June, 2001 and 7th June, 2002 notifying him of the status of the land Kericho/Silibwet/1142 which was being held as security over the loan given to the Appellant/Defendant in which he had acquired interest on it and; demand letter noting default in repaying of loan and consequences if no action will be taken.

30. PW 2 Julius Kibet Molyot Branch Manager at Agriculture Finance Corporation testified and confirmed the authenticity of both the receipts and the letters. Appellant/Defendant also does not dispute that the Respondent/Plaintiff had deposited Kshs. 49,550/= in his account with the financier and that also the demand letter written to the Respondent/Plaintiff was copied too him. Appellant's only contention is that the Respondent/Plaintiff deposited the amount with no authorized instructions from him thus arguing that there is no existing contract between the Respondent and the Financier or the Respondent and himself over the repayment of the amount with AFC.

31. I agree with the Appellant that rights under a contract are only conferred or imposed by parties to that contract however, this was the position before the law was reformed so as to safeguard the interests of third parties who are not part of the contract but in one way or another has an interest in the contract. The **Afkinson case** relied upon by the Appellant is an old case, we should appreciate evolution of law.

32. Privity of Contract refers to the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. But the requirement of privity of contract has been relaxed under modern law, statutory as well as constitutional law, and doctrines of implied warranty and strict liability which allow a third-party beneficiary or other foreseeable user to sue.

33. A Court of Appeal case **Aineah Liluyani Njirah Vs. Aga Khan Health Service (2013) eKLR** in its entirety resolves the issue of privity of contract. In this case, it is acknowledged and appreciated that this doctrine has provoked much criticism and debate. The three benched judges sitting in this matter namely; Nambuye J, Maraga J(as he was then) and M'noti j recognized that in 2008, a report, "Law Reform Commission of Ireland on "The privity of Contract and Third Party Rights" recommended that, subject to certain limitation, the privity of contract should be reformed so that a third party who the contracting parties clearly intended to benefit from their agreement would be able to rely on and enforce the agreement if it is not carried out properly.

34. It is in the report's central recommendation that the right for third party to enforce contractual obligation is two-folded: one, the contracting parties expressly so provide and secondly, the contracting parties intend to confer a benefit on the third party provided that the contracting parties do not also intend that the third party beneficiary should have the right to enforce the contract.

35. However, it is to be distinguished between an express and implied benefit which are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no right unless the contract expressly gives that third party a right to enforce the contract. These presumptions can be rebutted by the contracting parties if they can show that they did not intend for the third party to have such a right.

36. It should be noted that the demand letter dated 7th June, 2002 copied to the Appellant/Defendant at paragraph I read as follows, "The

above account whose responsibility of repaying you had taken, is in arrears as shown above.”From this statement, it is presumed that the Appellant/Defendant and the Respondent/Plaintiff had an agreement towards settling of the arrears. The Appellant/Defendant did not inform AFC not to accept any payments done by the Respondent/Plaintiff. No such evidence has been given by the Appellant/Defendant to suggest that he did not intend the third party that is; the Respondent/Plaintiff to have such rights.

37. I agree with the Respondent/Plaintiff that even though he is not an immediate party to the contract between the Appellant/Defendant with Agriculture Finance Corporation, his interests were intertwined in the sense that he had bought a portion of the land parcel Kericho/Silibwet/1142 which land was being held as security with AFC and default in paying the arrears would have resulted in foreclosure of the land therefore detrimental to him.

38. I find that the Respondent/Plaintiff can recover what he had paid to AFC from the Appellant/Defendant under the exemption to the privity of contract principle.

39. I find that the Respondent/Plaintiff had proved his case on a balance of probability as required by law in civil matters therefore; it is my final finding that the trial magistrate did not err in fact and law in reaching that conclusion.

40. I find that this appeal has no merit and I accordingly dismissed with costs to the Respondent.

41. The judgment as delivered by Hon. T. Okello SRM on the 10th day of March, 2010 in Bomet Senior Resident Magistrate’s Court Civil Suit No. 59 of 2004 is upheld.

Any party aggrieved by this judgment has a right of Appeal within 28 days of this date.

Delivered and signed at Bomet this 5th day of August 2020.

A. N. ONGERI

JUDGE