



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. 3 OF 2020**

**BENSON OGINA OGALO.....APPELLANT**

**VERSUS**

**SAMSON OMUOMBO ODIDO....RESPONDENT**

**(Appeal from judgment and decree of Hon. E.N.Wasike, SRM in Bondo PM CC No. 24 of 2018 delivered on 20/12/2019)**

**JUDGMENT**

**Introduction**

1. This appeal is from the judgement, decree and order of the learned Resident Magistrate Hon. E.N. Wasike delivered on 20/12/19 at Bondo Principal Magistrate's Court.
2. The respondent herein SAMSON OMUOMBO ODIDO filed suit against the appellant BENSON OGINA OGALO for a refund of Kshs. 103,000 with interest being the agreed payment for the purchase of a stall allegedly owned by the appellant and situate within Bondo on the 26/2/2018. It was the Respondent's case that after purchasing the said stall and parting with the consideration, when he went to the County Government Offices to have the stall transferred to his name, he was told that the appellant did not own the metallic stall.
3. The appellant filed a defence denying the plaintiff's/Respondent's claim but conceded that he received the amount claimed as consideration upon which he handed over the stall to the appellant who in turn sold the said stall to a third party. It was the appellant's case that he acquired the stall from the County Government of Siaya and had been paying rates for the same.
4. After hearing evidence from both parties, the trial court found in favour of the respondent awarding him the refund of the consideration paid to the appellant herein with the chargeable interest as prayed stating that from the evidence adduced, the appellant was not the actual owner of the stall but seemed to have some beneficial interest which did not give him license to acquire money from the respondent without passing him a proper title.
5. Dissatisfied with the decision of the trial court, the appellant filed his Memorandum of Appeal dated 24<sup>th</sup> January 2020 setting out the following 2 grounds of appeal;
  - a. That the learned trial magistrate erred in law and in fact in failing to consider the contract entered between parties.
  - b. That the learned trial magistrate's judgement and decision was against the weight of evidence.
6. The appeal was canvassed by way of oral submissions.

**Appellant's Oral Submissions**

7. It was submitted by Mr. Okello counsel for the appellant that the appellant sold to the respondent a metallic container whose ownership was not disputed as it belonged to the appellant and that the stall was neither a plot nor land. It was Mr. Okello's submission that as the appellant was the owner of the stall and thus paid ground rent, it follows that the trial magistrate erred in finding that the appellant did not own the stall. Counsel for the appellant reiterated that his client sold the stall and not the land or plot.

**Respondent's Oral Submissions**

8. On his part the respondent acting in person submitted that the appellant sold him the stall that was attached to the permanent stalls put up by the Siaya County Government but that when he went to have the same transferred to his name at the county Government offices, the physical planner Mr. Umaya wrote him a letter to the effect that the appellant had no stall to sell and that his particulars were not in the County Government system.

9. The Respondent further submitted that the appellant brought one Otumba who he alleged worked with the Siaya County Government saying that he would help the respondent change the stall to the Respondent's name but that did not work hence the Respondent was intent on getting his money back.

10. It was further submitted by the Respondent that the letter of 17/4/2018 from the sub-county physical planner was clear that the appellant never owned any stall at the place in question hence the appellant could not sell what he never owned.

### **Analysis & Determination**

11. This being a first appellate court, and as required by section 78 of the Civil Procedure Act, its role is to re-evaluate and reassess all the evidence adduced before the trial court and to reach its own conclusions in respect thereof, bearing in mind the fact that it neither heard nor saw the witnesses as they testified hence giving an allowance to that, as was espoused in **Sielle v Associated Motor Boat Company Ltd** [restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR**.

12. I have considered the appeal herein, the evidence adduced before the trial court and submissions for and against the appeal. The main issue arising from the two grounds of appeal and therefore whether the appeal has merit is ***whether the trial magistrate correctly interpreted the contract between the parties.***

13. The evidence adduced by both parties reveal that the appellant and the respondent entered into a written agreement dated the 26<sup>th</sup> February 2018 for ***the sale of a building piece around Siaya Stage*** for a consideration of Kshs. 103,000.

14. The respondent called two witnesses, Evaline Marata and Jane Akinyi Obare who both witnessed the sale agreement between the parties herein. Mrs. Obare the respondent's wife gave evidence to the effect that she and the respondent wanted a stall to set up a butchery. She stated that the respondent approached her inquiring whether she knew anyone who wanted to sell a store and that she introduced him to the appellant who informed the respondent that he had been paying rent yearly and that the respondent was free to move the County Government to transfer the stall to his name upon payment of the agreed consideration.

15. On his part the appellant denied the plaintiff's allegation and stated that he sold the stall to the Respondent as agreed hence the respondent could not seek for refund as there was no contrary evidence that the appellant owned the stall which he sold to the Respondent.

16. I have examined the agreement between the appellant and the respondent and indeed it confirms that the parties entered into an agreement. The appellant must have known that the respondent intended to use the metallic stall for a business which entailed it being located on the current premises. This, in my humble view, shaped the appellant's imploring the respondent that he had paid the yearly land rates. I further note that the contents of the letter by Mr. Umaya the sub-county physical planner states that the appellant did not own any stall within Bondo Bus Park where he purported to sell the same to the respondent.

17. It is worth noting that where parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intentions to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain. The court will not seek to re-write the contract for the parties: see **Mamta Peesh Mahajan [Suing on behalf of the estate of the late Peesh Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] Eklr**

18. In the instant case, albeit the appellant claims that he owned the stall and that there was no contrary evidence, there is no evidence adduced before the trial court demonstrating his ownership of the stall in question, which was situate on the county government land. Furthermore, albeit the appellant claimed that he used to pay annual licences to the County Government of Siaya, there is no credible evidence that he had such licence and therefore his capacity to receive Kshs. 103,000 from the respondent is in serious doubt. If the appellant truly had such licence then it was his duty to demonstrate that indeed his particulars were with the County Government records and he would have produced such licence as evidence. The receipts produced are not evidence of licence or ownership of the stall.

19. In my humble view, the appellant lacked the capacity to pass ownership of the metal stall to the Respondent and therefore as he could not pass title of the stall that he never owned to the Respondent, he was bound to refund to the Respondent the money upon the Respondent discovering that the appellant did not own the stall.

20. The reason why the Respondent could not obtain a licence for the stall is because there was no evidence that the appellant was the owner of the stall and therefore that he was licensed for the said stall to be at the place where it was situated.

21. Regarding the costs awarded by the trial magistrate, it is worth noting that the issue of costs is in the discretion of the court as provided for under Section 27 of the Civil Procedure Act. The basic rule on attribution of costs is that costs follow the event. See **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application No. 6 of 2014**

22. In the instant case, despite finding for the respondent against the appellant, the trial court found that the respondent also failed to conduct due diligence and as such ordered that each party do bear their own costs of the suit. I find no reason to interfere with the trial court's

discretion.

23. The upshot of the above is that the appeal herein is found to be devoid of merit and is hereby dismissed. The judgment of the trial court is upheld. Each party to bear their own costs of the appeal.

24. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 16<sup>th</sup> Day of December, 2020**

**R.E. ABURILI**

**JUDGE**