REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 108 OF 2014

ISAAC KIPKORIR..APPELLANT

-VERSUS-

SILAS S. KOROS...1ST RESPONDENT

FRANCIS CHERUIYOT.................................2ND RESPONDENT

(BOTH TRADING AS 64 PRIME PROPERTIES)

(Being an Appeal from the Judgment and Decree of Hon. S. Mokua, Senior Principal Magistrate, delivered on 2 September 2014 in EldoretCMCC No. 129 of 2013)

JUDGMENT

[1] Before the Court for determination is the appeal by **Isaac Kipkorir,** the Appellant herein, filed on **9 September 2014,** through the law firm of **M/s Limo R.K. & Company Advocates.** The appeal arises from the Judgment and Decree of **Hon. S. Mokua, SPM,** rendered and issued in **Eldoret CMCC No. 129 of 2013** in which the Appellant had sued the Defendants for the recovery of **Kshs. 550,000/=** which he had paid to the Defendants in respect of a botched land sale agreement. The Appellant had alleged before the lower court that he had been defrauded by the Respondents into making payments for a non-existent piece of land; and that in spite of several promises to pay, the Respondents failed to honour those promises.

[2] The Record of Appeal shows that the parties were heard and that in his considered Judgment, delivered on **2 September 2014**, the Learned Trial Magistrate came to the conclusion that the Appellant had failed to prove his case against the Respondents, granted the variance between the pleadings and the Sale Agreement as to the date of the transaction. Being aggrieved by that the decision, the Appellant lodged this appeal on the following grounds:

> **[a]** That the Learned Magistrate erred in fact and law by applying wrong principles in dismissing the suit with costs to the Respondents;
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> **[b]** That the Trial Magistrate erred in law and fact in concentrating on minor procedural technicalities as opposed to the merits of the evidence adduced before it;
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> **[c]** That the Learned Magistrate erred in law and fact in failing to appreciate the evidence of the Appellant thereby leading to a miscarriage of justice;
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> **[d]** That the Learned Magistrate erred in law and in fact in dismissing the Appellant's case without any factual or legal basis even after overwhelming evidence was tendered by the Appellant;
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> **[e]** That the Learned Magistrate erred both in fact and law by failing to put into consideration the receipt and sale agreement produced by the Appellant;
>
> **[f]** That the Learned Magistrate erred both in fact and law in failing to put into consideration submissions rendered on behalf of the Appellant;
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> **[g]** That the Judgment of the Learned Magistrate is in the circumstances unfair and unjust;

[3] Accordingly, it was the Appellant's prayer that the Judgment and Decree of the lower court be set aside and be substituted with a proper

finding by this Court; that the Court be pleased to make any further orders as may deem just and expedient in the circumstances; and that the costs of this appeal be awarded to the Appellant.

[4] The appeal was handled by **Hon. D.O. Ogembo, J.,** who issued directions on **28 March 2017** that the appeal be canvassed by way of written submissions. Compliance was thereafter confirmed and the appeal fixed for Judgment on **6 December 2017.** Owing to the transfer of the Learned Judge away from this station, this file has since been allocated to me for purposes of preparing the Judgment. To that end, I have carefully perused and considered the Record of Appeal and the written submissions filed herein with a view of ascertaining where the justice of the case lies.

[5] The contention of Counsel for the Appellant was that the Learned Trial Magistrate erred in ignoring the applicable principles of law at play in this matter; granted that the Respondents had confirmed not only that he entered into a written agreement with the Appellant as alleged; but also that he received the amount claimed before the lower court. According to Counsel, such evidence could only be challenged by way of expert evidence in the form of a forensic analysis by a document examiner; which evidence was not presented before the lower court. Counsel relied on **Nairobi Civil Appeal No. 100 of 2011: Dick Omondi T/A Ditech Engineering Services vs. Cell Care Electronics [2015] eKLR** for the holding that the evidence of an expert can only be challenged by evidence of another expert.

[6] It was further the submission of Counsel for the Appellant that the Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's suit on a mere technicality, premised on the fact that the Plaint referred to an agreement dated **21 July 2010** instead of **21 July 2009.** Citing **Articles 47, 50 and 159** of the **Constitution** as well as **Section 1A and 1B** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, it was the Appellant's contention that, having proved beyond reasonable doubt the existence of the agreement with the Respondents; and the Respondents having admitted the same in their respective testimonies, it was a misdirection for the Learned Trial Magistrate to determine the suit to his detriment on a technicality. To buttress this argument, reliance was placed by Counsel on **Karim Jamal vs. Shaffique Alibhai [2007] eKLR** and **Omar Mohamed Bawaly vs. Joshua Gitahi Rodrot [2017] eKLR.**

[7] On behalf of the Respondents, written submissions were filed herein on **18 September 2017** whereby the Court was urged to look at the entire record of the subordinate court to review and re-evaluate the evidence adduced by the parties so as to come to its own conclusion, in line with **Selle vs. Associated Motor Boat Company Limited [1968] EA 123.** Counsel expressed confidence that such a reconsideration would confirm that, at paragraph 3 of the Plaint, it was averred by the Appellant that the Agreement in question was entered into on **21 July 2010**; while the Agreement itself, which was produced as **the Plaintiff's Exhibit 1** bears the date of **21 July 2009.** According to him, the evidence of the Appellant before the lower court, was at variance with his pleadings and therefore the Learned Trial Magistrate rightly concluded that the Appellant had not proved his case against the Respondents. Counsel relied on **Nairobi HCCA No. 520 of 2002: Del Monte Kenya Limited vs. David Nyaga Gerald;Nairobi HCCC No. 2371 of 1990 Meshack Allah Olang vs. Erick Gowi**, and **Nairobi Civil Appeal No 95 of 1999: National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Limited** in urging the Court to dismiss the appeal with costs.

[8] This being a first appeal, I am mindful that it is the duty of the Court to review and re-evaluate the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while bearing in mind that I did not have the advantage of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was expressed thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."**

[9] The record of the lower court shows that the Appellant testified on **29 August 2013** as **PW1** and told the lower court that he was desirous of purchasing land; for which purpose he was introduced to the 1st Respondent, **Silas Koros** who was in that field of business. That after discussions with the 1st Respondent, an agreement was reached between them for the sale of a piece of land known as **LR 12448/83 Plot No. S** for **Kshs. 550,000/=;** and that after the sale agreement was reduced to writing, he made a down payment of **Kshs. 300,000/=;** and that they agreed that the balance would be paid by instalments. It was further the evidence of the Appellant that he proceeded to pay the balance as agreed and finalized his part of the bargain on **3 May 2013**. However, when he asked to be given vacant possession of the land, the Respondents failed so to do; or to refund his money when he asked for it. It finally dawned on him that the Respondents were out to defraud him; and so he sought legal advice and opted to sue for refund. The Appellant produced as exhibits before the lower court their Sale Agreement, the payment receipts and acknowledgement of the last payment. They were marked the **Plaintiff's Exhibits 1-4** before the lower court.

[10] The Appellant called, as his witness, **Justus Kipchumba Lagat (PW2). PW2,** a neighbour of the Appellant's, told the lower court that, having bought land from the two Respondents, he introduced the Appellant to them when the Appellant made it known to him he was desirous of purchasing some land. He confirmed, therefore, that it was within his knowledge that, after negotiations, the parties agreed to buy the subject piece of land for **Kshs. 550,000/=;** and that the Appellant made a down payment of **Kshs. 300,000/=.** The balance was to be paid by instalments. **PW2** further stated that, on the request of the Appellant, he paid the 1st Respondent **Kshs. 100,000/=,** being the sum for one of the instalment payments; and that the money was refunded to him by the Appellant. **PW2** further testified that the Appellant was never given possession of the land by the Respondents.

[11] On behalf of the Respondents, evidence was adduced by the 1st Respondent, **Silas Kirwa Koros (DW1)**, on **3 June 2014** confirming that he was one of the directors of **Six Four (64) Prime Properties**, a real estate entity based in **Eldoret Town**. He confirmed that the Appellant, who was desirous of buying land, approached him on **21 July 2009**; and that they negotiated and agreed on the purchase price at **Kshs. 550,000/= for L.R. No.12338/67/83;** whereupon the Appellant deposited **Kshs. 300,000/=.** The balance was to be paid in instalments and cleared by **31 July 2009**. It was further the evidence of **DW1** that the Appellant never paid the full purchase price within the agreed timelines. According to him, he received only **Kshs. 400,000/=** which he was ready to refund, less the agreed penalty of 5% for late payment.

[12] In his consideration of the matter, the Learned Trial Magistrate framed two issues for determination, namely: the question as to when

the agreement between the parties was entered into and whether the suit met the requirements of the law. He then proceeded to determine the issues as hereunder:

> **"The pleadings herein are to the effect that the agreement between the parties was entered into on 21.7.2009. This is as per paragraph 3 of the plaint dated 6.2.2013.. That allegation was contested by the defendant at paragraph 4 of their defence. In demonstration as to when the parties herein entered into a land sale agreement, the plaintiff testified that the agreement between them was entered into on 21.7.2009. He tendered the agreement entered into on 21.7.2009 as P.Exh. 1. In the entire evidence the plaintiff and his witness did not tender evidence oral or documentary in confirmation that there was an agreement entered into on 21.7.2009.**
>
> **The law requires a party to prove his pleadings on a balance of probabilities. It was upon the plaintiff to demonstrate that he entered into the agreement herein on 21.7.2009 as pleaded. Parties are bound by their pleadings. The plaint as earlier indicated shows that the agreement was entered into on 21.7.2010 and not as per the evidence tendered herein.**
>
> **Therefore this suit fails due to the contrast between the pleadings and the evidence. It is hereby dismissed with costs to the Defendant."**

[13] Having re-evaluated the evidence adduced before the lower court in the light of the parties' pleadings and the written submissions filed, it is manifest to me that the parties were essentially in agreement that the Appellant was indeed desirous of purchasing land sometime around **July of 2009**; and that to that end, he was introduced to the 1st Respondent by **PW2.** The parties were further in agreement that on **21 July 2009**, an agreement was made between the Appellant on the one hand and the two Respondents, trading as **Six Four (64) Prime Properties,** on the other hand, for the sale of a portion of land more particularly known as **L.R No. 12448/61/83**, measuring 0.0912 Ha. The agreed purchase price was **Kshs. 550,000/=** of which the Appellant made a down payment of **Kshs. 300,000/=** on **21 July 2009**.

[14] Accordingly, although at paragraph 3 of his Plaint the Appellant stated the date of the Agreement to be **21 July 2010**, by their subsequent pleadings and the evidence adduced by the parties, there was no dispute that the date in question was **21 July 2009**. Here is what the Plaintiff had to say at page 53 of the Record of Appeal, which is, in essence, a reiteration of Paragraph 3 of his witness statement dated **27 February 2013:**

> **"...The arrangement was reduced into writing. I paid Kshs. 300,000/=. This was on 21.7.2009. I have a sale agreement. I wish to produce it herein as P.Exh. 1. I had remained with a balance of Kshs. 250,000/=..."**

[15] In like manner, the 1st Defendant explicitly stated, in his Witness Statement dated **2 April 2013** and filed on **4 April 2013** that:

> **"I am the Director of Sixty Four Prime Holdings Limited hence duly authorized to make this statement. On 21st July 2009, the Plaintiff and the Company entered into a sale agreement in relation to a portion of 0.912 hectares of the parcel of land L.R. No. 12448/61/83 at a consideration of Kshs. 550,000. The Plaintiff paid a sum of Kshs 300,000 upon the execution of the agreement..."**

[16] And, in his testimony before the lower court, the 1st Defendant admitted and reiterated that:

> **"...We agreed at Kshs. 550,000/= on 21.7.2009 he deposited Kshs. 300,000/=. He promised to pay the balance on 31.7.2009...I accepted a further Kshs. 100,000/=. I received a total of 400,000/=..."**

[17] It is manifest therefore that the payment by the Appellant of **Kshs. 400,000/=** to the Respondents was expressly admitted; in which case, the provisions of **Section 61** of the **Evidence Act, Chapter 80** of the **Laws of Kenya,** would be applicable. It stipulates that:

> **"No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted..."**

[18] Accordingly, one of the objectives of **Order 3 Rule 2 and Order 11** of the **Civil Procedure Rules** and, in particular, the requirement for the advance exchange of Witness Statements and documents by parties, is to aid the Court and the parties in identifying contested and uncontested issues with a view of narrowing and resolving outstanding issues in an expeditious fashion. Hence, in the light of the express admissions contained in the Witness Statements, the evidence presented before the lower court and submissions made by Learned Counsel, the date of the subject Agreement was no longer an issue for determination. It is plain, therefore, that had the Learned Trial Magistrate appreciated the aforementioned procedural edict and properly directed himself in the light thereof, he would have avoided the absurd outcome of dismissing the suit with costs, yet the 1st Respondent had unequivocally admitted the claim and offered to refund the monies paid, subject the agreed penalty.

[19] A more or less similar situation arose in <u>**Omar Mohamed Bawaly vs. Joshua Gitahi Rodrot**</u> (supra), but unlike the situation herein, the parties were **"... not clear on the correct date of the Sale Agreement..."** Notwithstanding the variance as to the date of the Sale Agreement, it was held that:

> **"While both parties before me are not clear on the correct date of the Sale Agreement ..., it is not contested that the balance of the purchase price, being Kshs. 2,221,482 was to be paid to the Plaintiff on or before 1st November 2015...In my view, the defendant has clearly admitted owing the Plaintiff the sum of Kshs. 2,221,482/=. The admission is contained both in the Defence and the Replying Affidavit sworn herein...As a result, I enter partial Judgment for the Plaintiff/Applicant in the amount of Kshs. 2,221,482/= only..."**

[20] Indeed, it is a constitutional imperative that justice be administered without undue regard to procedural technicalities; and therefore, the issues that ought to have formed the subject of the lower court's consideration and determination, and which I now proceed to consider, are:

> **[a]** Whether the Appellant paid the full purchase price of **Kshs. 550,000/=;** and
>
> **[b]** How much is the Appellant entitled to by way of refund, if any.

[a] <u>On the Purchase Price:</u>

[21] As has been pointed out hereinabove, it was the evidence of the Appellant before the lower court that, after discussions with the 1st Respondent, an agreement was reached between them for the sale of the Suit Property at **Kshs. 550,000/=;** and that after a the sale agreement was reduced to writing, he made a down payment of **Kshs. 300,000/=.** This payment was not only confirmed by **PW2** but was also duly acknowledged in the Agreement itself **(Plaintiff's Exhibit 1).** Indeed, the payment was similarly conceded to by the 1st Respondent in his evidence before the lower court.

[22] Regarding the balance of **Kshs. 250,000/=,** it was the evidence of the Appellant and **PW1** that the same was to be paid in instalments and was cleared by **31 July 2009.** According to the Appellant, the entire balance was duly paid to the Respondents; albeit belatedly. He relied on the acknowledgments marked the **Plaintiff's Exhibit 2, 3 and 4** in proof of such payment. It is noted however that the acknowledgements and receipt aforementioned account for only **Kshs. 200,000/=;** and although it was the evidence of **PW2** that he paid the 1st Respondent some **Kshs. 100,000/=** on behalf of the Appellant, there was no proof of such payment before the lower court. **PW2** did not state exactly when the payment was made; and while he contended that he withdrew the money from Co-operative Bank and gave it to the 1st Respondent in cash, he did not produce the withdrawal slip or any such document in proof of his allegations. Indeed, he conceded in cross-examination that the 1st Respondent **"...did not record anywhere..."** that he had received **Kshs. 100,000/=** from him.

[23] It is trite that the burden of proof is on the person who alleges. Hence, **Section 107** of the **Evidence Act, Chapter 80 of the Laws of Kenya**, is explicit that:

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."**

[24] Accordingly, it is my finding that the evidence availed before the trial court proved payment of only **Kshs. 500,000/=** in total. I note the allegations by the 1st Respondent that the acknowledgments are forgeries; again no rebuttal evidence was placed before the lower court to controvert the Appellant's testimony; and therefore no basis was laid for the rejection of the said documents. I accept them as genuine and as valid proof of payment by the Appellant.

[b] <u>On the Refund:</u>

[25] The Appellant was interested in buying land. The parties agreed that if he paid **Kshs. 550,000/=** by **31 July 2009** he would be given vacant possession of the Suit Property. The Respondents did not meet their part of the bargain. Similarly, the Appellant did not pay the balance of the purchase price by **31 July 2009.** And, as has been pointed out hereinabove, receipts and acknowledgements were presented before the lower court to prove that the Appellant paid **Kshs. 100,000/=** on **19 August 2009;** a further **Kshs. 50,000/=** on **12 January 2010,** and a final sum of **Kshs. 50,000/=** on **3 May 2010.** It cannot be gainsaid therefore that the Appellant is entitled to a refund, there being no dispute that he was not given vacant possession of the Suit Property. However, it is also manifest that it was one of the terms of the parties' Agreement that:

> **"...in the event of a default in the payment of the balance of the purchase consideration, the vendor shall be refunded the purchase consideration paid as at the time of the default less 5% thereof being penal interest for the breach."**

[26] In the premises, it is manifest that, although the Appellant was entitled to a refund, he was under obligation to pay the penalty charge. Indeed, the 1st Respondent conceded as much. Thus, what is due to the Appellant from the Respondents by way of refund is only **Kshs. 475,000/=,** worked out as hereunder:

> **Amount paid Kshs. 500,000/=**
>
> **Less 5% thereof Kshs. 25,000/=**
>
> **Balance Due Kshs. 475,000/=**

[27] The foregoing being my view of the matter, I would allow the appeal, set aside the Judgment and Decree of the lower court and in place thereof, I would enter Judgment for the Appellant in the aforementioned sum of **Kshs. 475,000/=** with interest thereon from **May 2010** until full payment; as well as costs of the appeal and the lower court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL 2019

OLGA SEWE

JUDGE