**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 55 OF 2012**

**BENEDETTA KOKI WAMBUA *alias***

**KOKI WAMBUA MBINDA.....APPELLANT**

**VERSUS**

**BENJAMIN MUSEMBI MUTHOKA..... RESPONDENT**

**JUDGMENT**

**1.** By a plaint dated 12th April 2011, the respondent (then the plaintiff) filed suit in the lower court against the appellant (then the defendant) seeking a refund of KShs.398,000 being the full purchase price paid to the appellant pursuant to a sale of land transaction which was not completed as contemplated by the parties in their original agreement for sale of two parcels of land.

**2.** In paragraphs 3, 4, 5 and 6 of the plaint, the respondent averred that on or before 3rd September 2007, both parties entered into an agreement in which the appellant agreed to sell to the respondent four acres of land excised from Plot No. Muka Mukuu 1459 (19-054) at a consideration of KShs.238,000. The respondent paid the appellant the full purchase price which was acknowledged by the appellant.

**3.** On or about 8th February 2008, the parties executed a further agreement for the sale of an additional two acres of land at a purchase price of KShs.160,000 which amount was paid and acknowledged by the appellant. It was the respondent's case that despite having received and acknowledged receipt of payment of the full purchase price for a total of 6 acres of land, the appellant failed to transfer the parcels of land to the respondent as agreed.

**4.** In her statement of defence dated 17th June 2011, the appellant admitted paragraphs 3, 4, 5 and 6 of the plaint. She also admitted that she had not transferred the parcels of land to the respondent as documents of ownership of the land to facilitate transfer of the same to the respondent were not available and that in any event, the respondent had rescinded the two agreements and both parties had agreed that the appellant should refund the purchase price in monthly instalments of KShs.30,000; that on the basis of the latter agreement, the appellant had deposited a total of KShs.100,000 into the respondent's bank account being instalments for January, February and March 2011. She contended that the respondent was bound to honour the verbal agreement for refund of the purchase price; that the suit had been filed in bad faith and ought to be dismissed with costs.

**5.** After being served with the appellant's statement of defence, the respondent presented a Notice of Motion dated 27th July 2011 in which she sought summary judgment against the appellant for a sum of KShs.398,000 together with interest thereon at 16% per annum from 3rd September 2007 until payment in full.

**6.** The record of the trial court reveals that by consent of the parties, the application was prosecuted by way of written submissions which both parties duly filed. The learned trial magistrate after considering the parties submissions delivered his ruling on 31st January 2012 and entered summary judgment in favour of the respondent as prayed. The respondent was also awarded costs of the suit and interest at court rates.

**7.** The appellant was aggrieved by the trial court's decision hence this appeal. In her memorandum of appeal dated 20th January 2012, the appellant raised ten grounds of appeal which I reproduce verbatim hereunder:

> ***i. That the learned trial magistrate erred in law and in by holding that there are no triable issues raised in the defence whereas the defence filed had raised several triable issues.***
>
> ***ii. That the learned trial magistrate erred in law and in fact by holding that the defendant had admitted the respondent's claim whereas the defence denied the plaintiff's claim in full.***

***iii. That the learned trial magistrate erred in law and in fact by proceeding to enter judgment for the respondent whereas the respondent never produced any documents to support his claim.***

***iv. That the learned trial magistrate erred in law and in fact by failing to appreciate the issues raised in the appellant's defence.***

***v. That the learned trial magistrate erred in law and in fact by failing to appreciate the principles applicable for granting summary judgment.***

***vi. That the learned trial magistrate erred in law and in fact by failing to take into consideration the appellant's submissions before arriving at his ruling.***

***vii. That the learned trial magistrate erred in law and in fact by hurriedly proceeding to strike out the appellant's defence without due regard to all surrounding facts of the matter before him.***

***viii. That the learned trial magistrate erred in law and in fact by denying the appellant the right to be heard in oral audience.***

***ix. That the learned trial magistrate erred in law and in fact by granting summary judgment without allowing this matter to proceed to formal proof.***

***x. That the learned trial magistrate erred in law and in fact by failing to evaluate the evidence tendered in this matter judiciously before entering judgment.***

**8.** When the appeal came up for hearing, the parties agreed to have it disposed of by way of written submissions. The appellant filed her submissions on 21st January 2019 while those of the respondent were filed on 31st January 2019.

**9.** This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court which will guide me in the determination of this appeal is now well settled. It is to re-examine and re-evaluate all the evidence and material placed before the trial court to draw its own independent conclusions regarding the validity or otherwise of the decision challenged on appeal. **See**: ***Selle & Another V Associated Motor Boat Company Limited & Others, [1968] EA 123***; ***Williamson Diamonds Limited V Brown, [1970] EA 1***.

**10.** I have carefully considered the grounds of appeal, the trial court's record as well as the written submissions filed by learned counsel on record on behalf of the parties. I have also read the ruling of the learned trial magistrate. Having done so, I find that only two key issues arise for my determination in this appeal. These are:

i) Whether the learned trial magistrate erred in entering summary judgment for the respondent against the appellant for the sum claimed in the plaint.

ii) Whether the learned trial magistrate erred in his finding that the appellant's statement of defence did not raise any triable issues that would warrant a full trial.

**11.** On the first issue, it is not contested that the prayer in the Notice of Motion that led to the entry of judgment against the appellant was for summary judgment under *Order 36 Rule 1 (1)* and *(2)* of the *Civil Procedure Rules*. *Order 36 Rule 1 (1)* provides as follows:

***"(1) In all suits where a plaintiff seeks judgment for—***

***a) a liquidated demand with or without interest; or***

***b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."***

**12.** From the above provision, it is clear that summary judgment can only be entered in suits where the defendant has entered appearance but has not filed a defence. That is why *Order 36 Rule 2 (2)* provides that a defendant who has been served with an application for summary judgment can choose to oppose the application by either filing an affidavit or demonstrating by oral evidence that he should be given leave to defend the suit.

**13.** The trial court's record shows that the learned trial magistrate did not address his mind to this position of the law before he entered summary judgment against the appellant as sought in the application. I am therefore in full agreement with the appellant's submissions that the learned trial magistrate erred in law by failing to appreciate that the appellant had already filed her statement of defence by the time the Notice of Motion was filed and that therefore, summary judgement was not an appropriate remedy for the respondent.

**14.** But even if the trial court should not have entered summary judgment as prayed because a defence had already been filed, did the defence raise triable issues that would have justified a full trial? My answer to this question is in the negative for the following reasons:

The statement of defence shows clearly that the appellant admitted that she had sold to the respondent a total of six acres of land at a cost of

KShs.398,000 which sum she had received from the respondent; that she had not transferred the parcels of land to the respondent and that in a subsequent verbal agreement, she had agreed to refund the purchase price in instalments of KShs.30,000 per month. In her response to the application for summary judgment, the respondent chose to file grounds of opposition. She did not file a replying affidavit to dispute the respondent's claim that she was entitled to a refund of the full purchase price and to substantiate her claim that she had made part payment of the amount claimed by allegedly depositing KShs.100,000 into the respondent's bank account.

**15.** In view of the foregoing, it is my finding that the learned trial magistrate was correct in his finding that the defence filed by the appellant did not raise any triable issues as the appellant had already admitted the respondent's claim. And having made that finding, the lower court was duty bound to observe the tenents of substantive justice by allowing the application as there was nothing left to take to trial.

**16.** Given the facts disclosed in this matter, I find that the respondent was entitled to judgment only that he had approached the court using the wrong provisions of the law. He ought to have applied for judgment on admission under *Order 13 Rule 2* of the *Civil Procedure Rules*. In my opinion, applying for summary judgement instead of judgement on admission was a procedural technicality which the court could have disregarded under *Article 159 (2) (d)* of the Constitution.

**17.** Having made the above findings, it is my view that even if I have found that the learned trial magistrate erred in allowing the Notice of Motion seeking summary judgment in a suit where a defence had been filed, it will not serve the ends of justice to set aside the ruling of the trial court and to remit the case to the trial court for trial because there is nothing worth trying in the suit given that the plaintiff's claim is already admitted. If the court were to take that route, it would only protract litigation between the parties and escalate unnecessary costs which would not be in the interest of both parties.

**18.** Under *Sections 1A* and *1B* of the *Civil Procedure Rules*, the court is enjoined to give effect to the overriding objective of the *Civil Procedure Act* (the Act) which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. Guided by the foregoing overriding objective and bearing in mind the principles of administration of justice as encapsulated in *Article 159 (2)* of the Constitution particularly the principles that justice should not be delayed and that substantive justice should not be sacrificed at the altar of procedural technicalities, I am persuaded to uphold the ruling of the learned magistrate which I hereby do. I do not consequently find merit in this appeal and it is hereby dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **NAIROBI this 29th day of April, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Malanga for the appellant

Mr. Nyawara holding brief for Ms Njoroge for the respondents

Mr. Salach: Court Assistant