



**REPUBLIC OF KENYA**

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

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 115 OF 2015**

**BETWEEN**

**CHARLES OKELLO OMBOGA ..... APPELLANT**

**AND**

**BENARD NYANGAU OMBORI ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. I.N. Barasa, RM dated 29th January 2015 at Nyamira Magistrates Court in Civil Case No. 136 of 2013)***

**JUDGMENT**

1. The appellant contests the judgment of the subordinate court in which the respondent was awarded Kshs. 240,000/- and his counterclaim was dismissed. The appellant was the defendant while the respondent was the plaintiff. I shall refer to the parties in their capacities before the trial court unless the context demands otherwise.
2. The plaintiff's case as set out in the plaint is that by an agreement dated 6<sup>th</sup> March 2012, the defendant sold to the plaintiff part of a piece of land being LR No. WEST MUGIRANGO/SIAMANI/4879 measuring 30 by 70 feet ("the suit property"). At the time the sale agreement was signed, the defendant acknowledged receipt of Kshs. 100,000/- from the plaintiff. The plaintiff paid a further Kshs. 140,000/- in two instalments; Kshs. 100,000/- on 14<sup>th</sup> May 2012 and Kshs. 40,000/- on 16<sup>th</sup> August 2012. The sale was not completed and the parties agreed on 1<sup>st</sup> December 2012 that the defendant would refund Kshs. 240,000/- sum by 21<sup>st</sup> December 2012 but he did not do so. The plaintiff prayed for judgment for Kshs. 240,000/- with 14% interest and costs of the suit.
3. In the statement of defence and counterclaim, the defendant admitted that it entered in the sale agreement dated 6<sup>th</sup> March 2012 for the suit property save that it stated that the parcel measured 50 by 100 feet. He stated that he received Kshs 100,000/- on 6<sup>th</sup> March 2012 and stated that it was agreed that the plaintiff would pay Kshs. 100,000/- in May 2012 and another Kshs. 100,000/- in September 2012. He claimed that the plaintiff disappeared and failed to pay the instalments as agreed only for him to resurface on 27<sup>th</sup> December 2012 and accuse him of receiving money by false pretences. He was arrested and charged in *Nyamira Magistrates Court Criminal Case No. 25 of 2013* on 4<sup>th</sup> January 2012. The defendant claimed that he was coerced to enter into another agreement dated 4<sup>th</sup> January 2013 for the purchase of the suit property for Kshs. 240,000/- so that the criminal proceedings may be withdrawn. The criminal proceedings were later withdrawn by the Officer of the Director of Public Prosecutions. The defendant therefore claims general damages for breach of contract and malicious prosecution and cost of the suit.
4. At the hearing, the plaintiff (PW 1) testified and called Dickson Mokaya Nyakondo (PW 2) as his witness. The defendant (DW 1) testified and called his wife Wilkister Kemunto Okelo (DW 2) as his witness. The trial magistrate allowed the plaintiff's claim and dismissed the defendant's defence and counterclaim. It is the judgment that has precipitated this appeal which is based on the grounds set out in the memorandum of appeal dated 20<sup>th</sup> November 2015.
5. The thrust of the appellant's appeal was that the trial magistrate erred in dismissing the defence and counterclaim yet the same had been proved on the balance of probabilities and in so doing disregarded the appellant's evidence and submissions. The appellant also contended that the trial magistrate erred in finding that respondent had proved his case on the balance of probabilities despite the lack of evidence. The respondent supports the decision of the trial magistrate and takes the view that he proved his case on the balance of probabilities while the defendant failed to do so.
6. Both parties filed written submissions in which they rehashed the evidence before the subordinate court. Ultimately the issue for determination is one of fact and in resolving the dispute, the court is guided by the principle governing the jurisdiction of this court exercising appellate jurisdiction. The first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions

making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126).

7. The testimony of PW 1 and DW 1 mirrored what they stated in their respective pleading and what I have outlined in the opening paragraphs above. PW 2 testified that he was the one who successfully located the plot for PW 1 to purchase. He told the court he witnessed the original agreement and confirmed that he witnessed payment of the 2<sup>nd</sup> instalment of Kshs. 100,000/- which was endorsed on the sale agreement and he was the one who forwarded to DW 1 the instalment of Kshs. 40,000/- which DW 1 acknowledged in writing. He also witnessed the agreement of 1<sup>st</sup> October 2012 in which DW 1 agreed to refund Kshs. 240,000/- by 21<sup>st</sup> December 2012. He also stated that he witnessed the agreement dated 4<sup>th</sup> January 2013 in which the DW 1 agreed to give the plaintiff another piece of land.

8. DW 1's wife, DW 2's wife, confirmed that they decided to sell the suit property for Kshs. 300,000/- as they were having difficulties paying school fees. She also stated that they only received Kshs. 100,000/- from PW 1 as he did not pay the balance of the purchase price. She recalled a meeting on 27<sup>th</sup> December 2012 with PW 1 who demanded to be refunded Kshs. 200,000/- plus 40% interest but they could not agree. Thereafter DW 1 was arrested on 31<sup>st</sup> December 2012 and subsequently charged. She also confirmed that they signed another agreement on 4<sup>th</sup> January 2013. She stated that she was not forced to sign the agreement.

9. The main issue in this case is whether the plaintiff proved his case and whether the defendant proved his counterclaim. In other words, did the plaintiff prove that he paid Kshs. 240,000/-. Having reviewed the evidence and documents produced as exhibits, I find that agreement dated 6<sup>th</sup> March 2012 between the parties confirms that the defendant received Kshs. 100,000/- Although the DW 1 denied that he received the balance of the purchase price, there is an acknowledgment of receipt of Kshs. 100,000/- on 14<sup>th</sup> May 2012 which was witnessed by DW 2. The sum of Kshs. 40,000/- is evidenced by a document signed by DW 1 on 16<sup>th</sup> August 2012 in which the sum was paid to him on behalf of PW 1. PW 1 also produced an agreement signed by both PW 2 and DW 1 in which DW 1 acknowledged that he received Kshs. 240,000/- and promised to refund the money in full. PW 2 confirmed that he witnessed that agreement.

10. All these documents were admitted without objection. Although, the appellant suggested that the documents were fraudulent, he did not complain to the police or contest them in his counterclaim on account of fraud. Since he complained that the documents were fraudulent, he bore the burden of proving that allegation. He failed to do so. I also find that the fact of indebtedness was confirmed by the appellant pleading guilty to a charge of obtaining money by false pretences in *Nyamira Magistrates Court Criminal Case No. 25 of 2013*. Although the case was later withdrawn the guilty plea is an admission and the appellant is estopped from alleging that he did not owe the respondent any money.

11. The appellant's defence was that he only received Kshs. 100,000/- and that he was coerced into pleading guilty and signing a subsequent agreement in which he acknowledged receipt of the Kshs. 240,000/- and undertook to give the respondent another piece of land. I reject this defence in light of the clear evidence supported by the documents produced by the respondents. Counsel for the appellant argued that the agreement of 6<sup>th</sup> March 2012 contemplated clear timelines under which the instalments would be paid and therefore and in the circumstances, the respondent was in breach. This argument is undermined by the fact that in the subsequent agreement DW 1 agreed to refund the Kshs. 240,000/-.

12. I now turn to the appellant's counterclaim. He claimed damages for breach of contract. It is trite law that general damages are not awarded for breach of contract and such a claim cannot lie. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited NRB CA Civil Appeal No. 120 of 2017 [2018]*, the Court of Appeal reiterated that general principle as follows:

*[A]s a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR.*

13. As regards the claim for malicious prosecution, I understand the claim was based on the fact that the appellant was the complainant in *Nyamira Magistrates Court Criminal Case No. 25 of 2013*. Even though the claim was ultimately withdrawn, the respondent had already pleaded guilty and the court recorded the plea and admission that, "We have agreed to give the land to the complainant." The counterclaim was properly dismissed.

14. I dismiss the appeal with costs to the respondent which I assess at Kshs. 25,000/-.

**DATED and DELIVERED at KISII this 11<sup>th</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochoki instructed by Ochoki and Company Advocates for the appellant.

Mr Onchwangi instructed by Oguttu-Mboya and Company Advocates for the respondent.