



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.112 OF 2017

JULIUS KIMAIYO KIBET.....APPELLANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

(Being an appeal from Judgment and Decree delivered by Hon.W.K.Kitur, Resident Magistrate on 27th July 2017 in Nakuru CMCC No.265 of 2012)

JUDGMENT

INTRODUCTION

1. This appeal arise from a suit filed in the lower court by the appellant against the respondent seeking **refund of kshs.125,000** in respect of a **contract** the appellant entered into with the defendant for **purchase of eucalyptus mature trees** from the defendant's premises in Rongai area Nakuru County.
2. The plaintiff never received the said eucalyptus trees despite the payment of the agreed purchase price as individuals who claimed ownership of the premises turned him away from the premises.
3. Appellant averred that despite demand for refund of the said amount paid to the defendant, he has ignored, neglected and or failed to refund.
4. In defence filed by the respondent in the lower court, he denied the claim and stated that the appellant/plaintiff harvested all the trees he had purchased from him at kshs.125,000.
5. Respondent contended that the suit is misconceived and that it disclosed no cause of action by virtue of **Section 87 (a) of Kenya Railways Corporation Act, CAP 397**.
6. After hearing, the trial magistrate found that the plaintiff/appellant had not proved his case on a balance of probabilities and dismissed the suit with costs to the defendant.
7. Being aggrieved by the trial magistrate's determination, the appellant filed this appeal on the following grounds:-
 - i. That the trial magistrate erred in fact and law by failing to determine the matter herein on merit having heard all parties**
 - ii. That the trial magistrate erred in fact and law by failing to determine the matter herein on merit having heard all parties**
 - iii. That the trial magistrate erred in fact and law in failing to hold that there was breach of contract that entitled the appellant to an order for damages**
 - iv. That the trial magistrate erred in fact and law by failing to consider evidence and submissions tendered by the appellant hence arriving at a fundamentally flawed wrong decision**
 - v. That the trial magistrate erred in fact and law by misdirecting himself on the issues in dispute**
8. The parties herein agreed to prosecute the appeal by way of filing written submissions.

APPELLANT'S SUBMISSIONS

9. Appellant submitted that there was advertisement in Kenya Gazette that the defendant/respondent was selling trees within its premises in Nakuru; that the appellant entered into a contract with the respondent on 5th June 2009 to purchase 2000 trees at a consideration of kshs.125,000 which he paid on 15th July 2009.

10. Appellant submitted when he went to harvest the trees he was stopped by persons who informed that the trees were for private individual and do not belong to the respondent; that the contract was therefore frustrated as he was unable to harvest the trees.

11. He submitted that the trial magistrate found that there was insufficient evidence that the appellant never harvested the trees and therefore failed to prove his case on a balance proof probabilities.

12. Appellant submitted that in the case of **Re H and others (minors) [1996] AC 563,586 Lord Nicholas of Birkenhead** explained what balance of probabilities as follow:-

“The balance of probabilities standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of an event was more likely than not...”

13. Appellant submitted that the court has a greater flexibility in determining whether one has proved that there is likelihood that a certain event occurred and the discretion must be exercised for ends of justice to be met.

14. Appellant submitted that it was not disputed that there was a contract between appellant and respondent and that **52 eucalyptus trees** were to be harvested and the cost was kshs.125,000 which appellant established by producing receipts marked 4 a, b and c.

15. Appellant submitted that the unanswered question is who harvested the trees and the appellant maintain that he never harvested the trees.

16. Appellant submitted that he produced a letter proving that the trees he was shown belonged to **Mutula Limited**. Appellant further submitted that the burden of proof shifted to the respondent to prove that indeed it's the appellant who harvested the trees.

17. Appellant submitted that none of the 3 witnesses availed by the respondent never witnessed the appellant harvest trees. The PW1 said he visited that site and confirmed appellant had harvested trees; that he saw stamps. PW2 said he knew appellant was to harvest trees and he found that he had harvested. PW3 area chief said appellant sought approval to cut trees and that he left his power saw at his house and went to collect it the same day.

18. Appellant further submitted that PW4 testified that he saw appellant harvest trees and that she served him food; that the appellant showed her authorization order. He however submitted that evidence of PW4 was quite scanty; that she failed to state how many people were involved in the tree harvesting and why it took 5 days to harvest and no official of respondent was present to supervise the exercise; further that the trial magistrate failed to consider that PW4 was the respondent's tenant for 24 years and could not have given testimony contrary to respondent's interests.

19. That the appellant having filed the suit in the lower court and this appeal, it is unlikely that he would incur costs of filing suit with intention of fleecing the respondent; that he is an aggrieved man seeking justice.

20. Appellant submitted that due to respondent's negligence he suffered loss in his timber business; that he incurred heavy penalties and interest from his clients and subcontractors and the prayers sought are intended to put him back to the position he would have been if the respondent acted diligently by ensuring that he obtained possession of the trees.

RESPONDENT'S SUBMISSIONS

21. Respondent confirmed that the respondent invited applications for people interested in harvesting trees and that the appellant applied for 20 trees at Menengai-Rongai and another 20 at Nakuru town; respondent confirmed that the appellant paid for the trees at a rate of kshs.200 each. Respondent submitted that the appellant harvested 20 trees at Nakuru and claimed he was told the trees in Menengai –Rongai was in Mutula farm.

22. Respondent submitted that the name Mutula farm does not feature anywhere in the letter dated 25th August 2009, neither is it in the plaint, demand letter dated 21st March 2010 and the respondent's witness denied that the trees were owned by any other persons.

23. That the appellant failed to call one Samuel whom he said informed him that the trees belong to Mutula farm.

24. Further, the respondent submitted that it availed four witnesses to confirm that the appellant harvested trees and that he ferried in a white canter which respondent produced photographs.

25. Respondent urged court to dismiss the appeal; that on a balance of probabilities respondent showed that the appellant harvested 20 trees and ferried from Menengai-Rongai section.

ANALYSIS AND DETERMINATION

26. This being the first appellate court, I have a duty to reevaluate evidence adduced in the trial court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never got opportunity to take evidence first hand and observe

demeanor of witnesses; for this I give due allowance.

27. The guiding principle in respect to duty of first appeal was set out in the case of **Selle & Another vs Associated motor Boat Co. Ltd & Another [1968] EA 123** where the court held as follows:-

“My duty is to evaluate and reexamine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect...”

28. I have perused and considered the record of appeal and submissions by the parties. From record, there is no dispute that the respondent advertised for persons to express interest in buying trees to harvest at Nakuru and Menengai-Rongai sections. It is not also disputed that the appellant expressed interest and entered into a contract with the respondent to harvest 20 trees from Nakuru and 20 trees from Menengai-Rongai.

29. Appellant's contention is that, despite paying for the trees, he was never harvested trees from Menengai-Rongai as Mutula Farm Ltd claimed ownership. The respondent had not denied that the appellant paid Kshs.125,000 for the trees.

30. What I consider to be in issue is whether the evidence adduced proved on a balance of probabilities that the appellant harvested the trees.

31. In submissions the respondent contend that the appellant harvested trees and the witnesses who testified never witnessed for the respondent in the lower court never witnessed the harvesting of trees and the court was right in dismissing the case.

32. In his testimony, PW3 who is area assistant chief testified the appellant went to him for a letter to harvest trees. He further said that the appellant left his power saw in his house and later went for it. PW3 said after taking power saw he witnessed the appellant harvest trees along the railway line. He said the land belonged to Kenya Railways the respondent herein. He said that the appellant never complained to him that he was denied to harvest trees.

33. PW4 testified that she lived in houses belonging to respondent. She testified that one **Mutisya** who is security officer for respondent informed her that the appellant had been allowed to harvest trees and she asked her to assist him where necessary. She testified that she gave the appellant food as he harvested the trees. She said one of the appellant's workers was **Kariuki** whom she also gave food on 19th August 2009 and 20th August 2009. He said the trees were marked blue and that appellant showed her authorization letter to harvest trees. She said tree harvest continued from 19th to 20th August 2009.

34. Record show that the appellant never availed any witness. Evidence of payment and authorization to harvest trees is not disputed. Having considered evidence adduced, I find that evidence adduced by respondent to the effect that appellant harvest trees is consistent. PW3 the area chief confirmed that the appellant went with power saw to his house. He picked it according to him and went to harvest trees after getting authorization letter from PW3. PW3 confirmed that the site belonged to PW3. He never received any complaint later from appellant that he was prevented from harvesting the trees or any other party laid claim on the trees. If that happened PW3, who is area assistant chief would have known.

35. PW4 testified as an eyewitness to the harvesting of trees by the appellant. She even gave a name of one of the workers of appellants who were harvesting trees. I see consistency in her evidence and the same is corroborated by evidence of PW3.

36. From the foregoing, I find that the trial magistrate was right in finding that the appellant failed to prove his case on a balance of probabilities.

37. FINAL ORDERS

1. Appeal is hereby dismissed

2. Costs to the respondent.

Judgment dated, signed and delivered at Nakuru this 28th day of November, 2019.

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Makau holding for Mutai Counsel for Appellant

No appearance for Counsel for Respondent