



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 687 OF 2013

CAIUS OIRERE MATUNDURA.....APPELLANT

-VERSUS-

IRENE WAMBUI MWANGI.....1ST RESPONDENT

ROBERT MURUGU KINUTHIA...2ND RESPONDENT

(Being an appeal from the judgment of Hon. T. S. Nchoe (Mr) Ag. Senior Resident Magistrate, Milimani Commercial Courts dated 3/12/2013)

JUDGEMENT

1. In a suit by way of plaint, the appellant sought reliefs that of:-

- a. Kshs.79,000/=**
- b. Costs.**
- c. Interest interalia.**

2. The claim is based on breach of contract entered into on 4/10/2010 and 6/10/2010.

3. By defence dated 30/3/2010 the respondents denied the claim and put the appellant to strict proof.

4. The trial magistrate after hearing the parties dismissed the appellant's suit with costs.

5. This triggered the filing of the instant appeal in which the appellants set out 6 grounds of appeal namely:-

- a. That the learned trial Ag. Senior Resident Magistrate erred in law and in fact in failing to find the proof and/or acknowledgement of payment as per oral agreement of Kshs. 9,000/= from 1st and 2nd respondents as alleged from the respondents.**
- b. That the learned trial Ag. Senior Resident Magistrate erred in law and in fact in his analysis of evidence produced (exhibit 1-11) and the law applicable thereby making wrong conclusions and overlooking documentary evidence to transfer land and sale of land (work done).**
- c. That the learned trial Ag. Senior Resident Magistrate erred in law and in fact in failing to find proof that there was work diligently done and awarding respondents' costs without assessing income of the appellant.**
- d. That the learned trial Ag. Resident Magistrate erred in law and in fact in failing to call the appellant's witness master G. Kamonde advocates to testify who was waiting outside the court and the 2nd respondent to give testimony in court while he was listening in court who was spectating proceedings in which he was a party to. This clearly showed that he had conceded to the appellant's claim of Kshs. 70,000/=.**
- e. That the learned trial Ag. Senior Resident Magistrate failed to proof from the list of documents adopted in court, the 2nd**

respondent indicated that he was owing the appellant Kshs.500/= as part of appellant's payment.

f. That the learned trial Ag. Senior Resident Magistrate totally misapprehended the facts of the case leading to erroneous application of the facts to law.

6. The parties were given directions to canvass appeal via submission of which they filed and exchanged.

DUTY OF THE FIRST APPELLATE COURT:

7. The duty of the first appellant court is to subject the whole evidence to a fresh and exhaustive scrutiny and make own conclusion about it bearing in mind that court did not have the opportunity of seeing and hearing the witnesses first heard. *See Kenya Power & Lighting Ltd vs E.K.O. & Another [2018] eKLR.*

EVIDENCE ADDUCED IN TRIAL COURT:

8. The summary of the parties' case was that the appellant claimed he facilitated the transfer of parcel of Land L/R No. 13465/19 to the 1st respondent and sold the same on behalf of the respondent. The 1st respondent testified that when she was shown her plot and discovered to have been encroached on, she instructed the firm of G. Kamonde Advocates to act on her behalf. The firm later facilitated the sale of the said piece of land. She paid for the services offered.

9. The validity of the contract that formed the basis of this suit has also been put to question. The 1st respondent who is the registered owner of the piece of land stated that she had not donated a power of attorney to the 2nd respondent and therefore the alleged contract with appellant was a nullity.

PARTIES SUBMISSIONS:

Appellant's Submissions:

10. It was submitted that, from the appellants testimony his evidence and documents produced in court, it is clear that he had demonstrated that he indeed entered into the said oral and written agreements with the 1st and 2nd respondents.

11. He has also averred that he proved his case on a balance of probability that the respondents concealed the truth that they had not paid the appellant his dues that he deserves for work diligently done. The appellant therefore claimed for both special and general damages for the traumatizing experience he had undergone in trying to recover his dues from the 1st and 2nd respondents. He submitted that he was entitled to the sum of Kshs:

a. Total claim for 1 st oral agreement	Kshs. 9,000/=
b. Total claim for 2 nd written agreement	Kshs.35,000/=
c. Total claim for 2 nd written agreement (double if payment dispute is settled in court as per the agreement (Pexb No. 8)	<u>Kshs.35,000/=</u>
Total	Kshs.79,000/=

12. They submitted that he should have been awarded general damages for the agony he had undergone, costs of the suit together with interest thereon at court rates.

Respondents' Submissions:

13. The respondents submitted that the present appeal has no merit and ought to be dismissed with costs for the respondents as:

- a. The judgment is sound and based on evidence adduced by the parties in the lower court.
- b. There was no valid contract of commission between the appellant and the 1st respondent who was the registered owner of L.R. No. 13465/19.
- c. The 1st respondent did not at any time material to this suit donate power of attorney to the 2nd respondent to enter into any contract for commission or otherwise.
- d. The 2nd respondent had no land to be sold on his behalf by the appellant and therefore the issue of commission of sale does not

arise in the circumstances of this case.

e. Even if there was a valid agreement for commission the appellant never sourced for a buyer of the property and was not entitled to any commission. The buyer had encroached on the 1st respondent land and was inclined to purchase the same. The 2nd respondent had no land to sell.

f. The evidence adduced in lower court totally supports the judgment.

14. The respondents urged the court to strike out the appellant's supplementary records of appeal dated 1st November 2018, 6th December 2018 and 3rd May 2019 since he purport to introduce new evidence.

ISSUES:

15. After going through the evidence and submissions herein, I find the issues are; **Was there a valid contract between parties enforceable by the court? If above in affirmative, what were the terms? What is the order as to costs?**

ANALYSIS AND DETERMINATION

16. The undisputed fact is that the contract subject herein was not signed by the first respondent who is the owner of the parcel of land which appellant claimed was contracted to facilitate selling at a fee. The agreement was signed by the second respondent who had no interest in the said parcel of land.

17. The appellant appeared to be shifting his case and allegations to the effect that what he is enforcing is an oral contract. He never demonstrated possessing any power of attorney to do what he purports to have been donee of the first respondent instructions.

18. There was need of a power of attorney (POA). In dictionary same is stated to be power of attorney which is a legal document giving one person (the agent or attorney-in-fact) the power to act for another person (the principal). The agent can have broad legal authority or limited authority to make legal decisions about the principal's property, finances or medical care. The power of attorney is frequently used in the event of a principal's illness or disability, or when the principal can't be present to sign necessary legal documents for financial transactions.

19. The second respondent had no power of attorney donated to him by the owner of land to sell or even instruct agent to sell.

20. The Court of Appeal had an opportunity to discuss and deliberate on the doctrine of privity at length in *Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another (2015) eKLR*. The Court rendered itself as under: -

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In *DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847*, Lord Haldane, LC rendered the principles thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (supra)*, *KENYA NATIONAL CAPITAL CORPORATION LTD v ALBERT MARIO CORDEIRO & ANOTHER (supra)* and *WILLIAM MUTHEE MUTHAMI v BANK OF BARODA (supra)*.

Thus in AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (supra)*, quoting with approval from *Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Havelock JA, as he then was reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

21. As pertains to contract allegedly entered herein the same cannot purport to bind the first respondent as she was not a party to it. The respondent no 2 purported to sign it on first respondent behalf thus the same was a nullity. This court agrees with trial court that the suit was for dismissal.

22. Thus the court finds that the appeal has no merit and the same is dismissed with no orders as to costs in lower court and in this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE