REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 591 OF 2015

CHARLES MBUVI……APPELLANT

-VERSUS-

MARY SYOMBUA NDETTO……...…….RESPONDENT

(Being an appeal from the judgment delivered by Honourable A. Lorot (Mr.) (Senior Principal Magistrate) on 13th December, 2015 in CMCC NO. 824 OF 2006)

JUDGEMENT

1. Charles Mbuvi, the appellant herein, instituted a suit vide the plaint dated 1st February, 2005 and amended on 2nd May, 2008 claiming general and special damages in the sum of Kshs.1,103,440/= against the respondent plus costs of the suit and interest thereon.

2. The appellant pleaded in his amended plaint that on various dates in July, 1997 the respondent while purporting to have legal capacity to sell and transfer on behalf of Kenya Railways the property known as M11 (*"the subject property*") along Ojijo Road, Taarifa Road and Sports Avenue situated in Parklands area, entered into an agreement with the said appellant in which the appellant agreed to purchase the subject property for a consideration of Kshs.1,800,000/.

3. The appellant pleaded that he drew a banker's cheque no. 330724 from Bank of India in favour of the respondent for the abovementioned sum, only to later learn that the respondent did not have the authority to sell the subject property.

4. It was the appellant's averment that upon his demand for a refund of the consideration, the respondent refunded a total of Kshs.696,560/ leaving an outstanding balance of Kshs.1,103,440/ which remains unpaid.

5. Upon being served with summons to enter appearance, the respondent entered appearance and filed her statement of defence dated 9th February, 2006 and amended on 15th May, 2008 denying the appellant's claim.

6. The respondent averred in the alternative, that, if at all she owed the appellant any monies as claimed, the balance was paid in full. The respondent further pleaded that the subject matter of the suit was also the subject of a criminal complaint lodged by the appellant, the result of which the parties agreed that the remaining balance was Kshs.25,000/ which the respondent paid via cheque no. 000123 issued by Prime Bank Limited, thereby settling the claim.

7. It was equally the respondent's averment that in any event, the appellant's claim is statute barred pursuant to the provisions of the Limitation of Actions Act, Cap. 22 Laws of Kenya.

8. At the hearing, the appellant and respondent testified on behalf of the plaintiff's and defendant's cases respectively, following which written submissions were filed and exchanged.

9. Finally, the trial court dismissed the appellant's suit with costs.

10. Being aggrieved by the aforesaid judgment, the appellant has preferred an appeal against the same. He filed the memorandum of appeal dated 3rd December, 2015 constituting the five (5) grounds hereunder:

> *(i) THAT the learned trial magistrate erred in law and fact in finding and holding that the appellant's suit lacked merit, was a non-starter ab initio and proceeded to dismiss it with costs.*
>
> *(ii) THAT the learned trial magistrate erred in law and fact in finding and holding that the dealings between the appellant and the respondent were shrouded with mystery when the evidence and facts presented before the court were clear.*

(iii) THAT the learned trial magistrate erred in law and fact in failing to enter judgment in favour of the appellant when the sums claimed had been acknowledged in evidence by the respondent and in the absence of evidence of repayment and/or refund to the appellant.

(iv) THAT the learned trial magistrate erred in law and fact in finding that the respondent's testimony was more credible than that of the appellant when no tangible evidence was presented by the respondent in support thereof and contrary to the rules of evidence.

(v) THAT the learned trial magistrate erred in law and fact in finding and holding that the transaction between the parties herein and the appellant's claim was based on trust, when there was evidence to the contrary.

11. The appeal was disposed of through written submissions which the parties' advocates subsequently highlighted. In his submissions, the appellant contended that while he had discharged his burden of proof as to the amount owing to him, the respondent did not prove that she had refunded the entire decretal sum and yet the trial court found her evidence to be more credible in comparison to that brought forth by the appellant.

12. The appellant faulted the trial court for failing to place any evidential burden upon the respondent in line with the provisions of Sections 109 and 112 of the Evidence Act, Cap. 80 Laws of Kenya. The appellant also referred this court to the Court of Appeal's reasoning in the respective cases of **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR** and **Mariano Dinacci v Angelo Lattineli [2015] eKLR** that whereas the legal burden of proof constantly rests with a plaintiff, once such burden is discharged, the evidential burden then shifts and it falls upon the opposing party to adduce evidence to rebut the claim.

13. It was the appellant's submission that the trial court misapprehended the law and evidence, thereby arriving at an erroneous finding which ought to be set aside.

14. *Mr. Makau* advocate for the appellant advanced the above submissions by arguing that the trial court placed reliance on facts and evidence that were never tendered before it instead of appreciating that the appellant's evidence was weightier than that adduced by the respondent.

15. In countering the above submissions, the respondent argued that the burden of proof rested squarely with the appellant, who did not adduce any evidence to show the payments made and the outstanding balance, thus failing to discharge the burden of proof.

16. The respondent also challenged the appellant's claim for general damages on the basis that no proof of entitlement to the same was ever laid before the trial court.

17. Furthermore, the respondent ensured to point out the position previously held by the courts that the burden of proof lies with a party who would fail in the absence of any evidence by the other side. In this regard, the respondent cited the Court of Appeal case of **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR** as well as the High Court authority of **National Bank of Kenya Limited v Patrick Simiyu Kimoi [2006] eKLR** where the above position was echoed.

18. In closing, the respondent reiterated that the issue on whether the suit was statute barred was not addressed by the trial court despite having been submitted on by the respondent. Consequently, the respondent urged this court to find that the suit was statute barred to begin with.

19. The respondent's submissions were reaffirmed by her counsel, *Mr. Murigi* who fully supported the trial court's decision to dismiss the appellant's suit.

20. I have considered the rival submissions on appeal. I have likewise re-evaluated the evidence placed before the trial court. It is well noted that the five (5) grounds of appeal encompassed the trial court's analysis and decision to dismiss the appellant's suit. In that case, I deem it appropriate to deal with the grounds of appeal contemporaneously.

21. I will first address the fundamental issue of limitation raised by the respondent. As earlier mentioned, the respondent under paragraph 7 of her amended statement of defence challenged the suit as being time barred. I have looked at the appellant's amended reply to defence wherein he averred that the limitation period began to run from August, 2003 when he first received repayment of the monies claimed from the respondent.

22. Upon my perusal of the impugned judgment, I have observed that the subject of limitation was not at all addressed by the learned trial magistrate.

23. Needless to say, it is apparent that the subject of the dispute is in the nature a contract/agreement entered into between the parties for the sale of the subject property. That said, the applicable provision is **Section 4(1)** of the **Limitation of Actions Act** which expresses thus:

"The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

…"

24. In light of the foregoing, the law is clear as to the six (6) year window period for bringing suits arising out of a contract. The question

then remains: when does a cause of action accrue? In seeking to answer this, I turn to **South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor [2017] eKLR** where the High Court rendered that:

> ***"It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period."***

25. In the present instance, I have established that the agreement was not put in writing though it is not disputed that the same was entered into sometime in July of 2007.

26. Nevertheless, the appellant averred in paragraph 5 of his amended plaint that he came to learn of the respondent's lack of authority to sell the subject property through Kenya Railways sometime in 1998, prompting him to demand a refund of the monies paid to the respondent. To my mind therefore, it is at this point that the cause of action accrued, which goes to show that the appellant was required to institute his suit within six (6) years from the year 1998.

27. By virtue of its institution on 1st February, 2005 the suit was time barred and ought to consequently have been dismissed on that ground, a fact which the trial court ought to have considered but did not.

28. Needless to say that I will proceed to review the trial court's analysis of the evidence placed before him in line with the grounds of appeal raised.

29. To begin with, the appellant testified before the trial court that he and the respondent had known each other for a while prior to the institution of the suit and that on 13th July, 1997 the respondent approached him with the aim of selling the subject property to him for the sum of Kshs.1,800,000/ which proposal; he agreed to and made the necessary payments.

30. The appellant stated that thereafter, he was informed by Kenya Railways Company Limited that the respondent was not among those issued with plots, and that when he confronted the respondent, she agreed to refund the entire sum but only refunded the amount of Kshs.696,560/, leaving the balance of Kshs.1,103,440/.

31. During cross examination, it was the appellant's testimony that he lodged a complaint with the Criminal Investigation Department (CID) seeking a refund of the outstanding balance but that he was informed that the claim is of a civil nature.

32. Upon being re-examined, the appellant testified that the respondent did not make any mention of a lady by the name Ruth Kiptui as being the intending seller of the subject property or that he knew the said lady. As far as he was aware, the dealings were solely between him and the respondent.

33. On her part, the respondent gave evidence that she knows the appellant quite well and that a government officer named Ruth Kiptui approached her in regards to certain properties including the subject property. The respondent narrated that she was interested in the properties on offer and in turn approached the appellant who also showed interest in the subject property.

34. It was the respondent's testimony that the appellant issued a cheque to her for the abovementioned consideration which she then cashed at the bank before handing it to the aforesaid Ruth. The respondent stated that subsequently, Ruth informed her that the properties in question were fully occupied. According to the respondent, Ruth passed on soon thereafter in a road accident.

35. That following pressure from the appellant, the respondent agreed to refund the monies in a bid to protect Ruth's properties which the appellant had threatened to auction. The respondent stated that she paid an initial sum of Kshs.1,775,000/ followed by the sum of Kshs.25,000/ which was forwarded to the appellant's advocate as full and final repayment of the monies.

36. During cross examination, the respondent clarified that the appellant had no contact with Ruth hence the reason as to why she acted as a go-between for the two. The respondent further admitted that a complaint was lodged against her at the CID and she was advised to only pay the sum of Kshs.25,000/ which she did.

37. It was the respondent's contention on being re-examined that there was no written agreement for sale between her and the appellant but that the monies paid to her by the appellant were aimed at facilitating the purchase of the subject property which was a condemned house.

38. In his analysis, the learned trial magistrate noted that there was no written sale agreement between the parties and in the absence of any evidence tying Ruth who is now deceased to the agreement between the parties, the details of their transaction can only be termed a mystery.

39. The learned trial magistrate went on to reason that the account offered by the respondent was more convincing than that of the appellant since she disclosed more details surrounding the transaction, adding that there is no way of ascertaining whether the appellant was paid in full or not, terming the suit a non-starter *ab initio*.

40. Having re-evaluated the evidence, I take the following view. It is not in dispute that the parties entered into some kind of agreement entailing the sum of Kshs.1,800,000/ purported to constitute the consideration for the purchase of the subject property, which agreement was not reduced in writing owing to a level of trust which subsisted between the parties. It is likewise not contested that the appellant paid the aforementioned sum to the respondent vide the banker's cheque no. 330724 produced as P. Exhibit 1 before the trial court and for which the respondent acknowledged receipt.

41. That said, the issue lies with the amount refunded and whether the same amounted to full repayment of the consideration. From my re-

examination of the evidence on record; I am unable to ascertain as I am sure the trial court was; the exact amount refunded by the respondent, this being because neither of the parties adduced any evidence to support the breakdown of payments laid out in their oral evidence.

42. Going by the evidence tendered, I can only confirm that following the appellant's demand for a refund, the respondent forwarded cheque no. 000123 (D. Exhibit 1) for the sum of Kshs.25,000/ to the appellant. Whereas the respondent deemed the said cheque to be full and final payment as per the letter dated 28th August, 2003 (D. Exhibit 2), the appellant responded with the letter dated 10th September, 2003 (D. Exhibit 3) acknowledging receipt of the cheque but claiming an outstanding balance of Kshs.1,103,440/.

43. The law on evidence is well settled that he who alleges must prove, as has correctly been stated in the rival submissions before me. This principle has equally been reaffirmed and advanced by the courts. Take for instance the Court of Appeal case of **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR** cited by the respondent where it was held thus:

> ***"Section 107 of the Evidence Act provides 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 that those facts exist. Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence."***

44. In the present instance, had I found the suit to be competently before the trial court, I would have concurred with the learned trial magistrate's finding to the extent that there was no evidence from the appellant by way of receipts or acknowledgments to show the monies refunded by the respondent and the outstanding amount as claimed.

45. I would also have found that the learned trial magistrate misdirected himself in his analysis of the burden of proof. I take the view that while the legal burden of proof rests with a plaintiff to prove his or her case, once that burden is discharged, then the evidential burden shifts to the defendant to prove otherwise. On that note, I cite with approval the case of **Mbuthia Macharia V. Annah Mutua Ndwiga & another [2017]eKLR** in the matter hereunder:

> ***"The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:***
>
> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose…***
>
> ***The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."***

46. In the present instance, I have already established that the appellant did not tender any evidence to show the monies were repaid to him by the respondent. Moreover, the respondent on her part took the position that the loan was repaid in full.

47. In the premises, I am not satisfied that the appellant discharged the legal and the evidential burden of proof for the same to shift to the respondent.

48. Under different circumstances, I would have therefore come to the conclusion that the appellant did not prove his case on a balance of probabilities and I would have dismissed it with costs.

49. Since I have already determined that the suit was statute barred, I opine that the same never stood a chance in the absence of an order granting the appellant leave to file it out of time.

50. In the premises, the appeal is hereby dismissed and the trial court's judgment is upheld. Each party shall bear its own costs of the Appeal.

51. It is so ordered.

Dated, signed and delivered at **NAIROBI** this 19th day of December, 2019.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent