



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 167 OF 2009**

**ROSEMARY WAKALO ..... APPELLANT**

**VERSUS**

**GIDEON ONYANGO BENDACK..... RESPONDENT**

**(An appeal against the judgment and decree of Hon. R. Ondieki, RM delivered on 4<sup>th</sup> September, 2009 in Mombasa CMCC No. 4368 of 1999).**

**JUDGMENT**

**Background**

1. The appellant and the respondent entered into an agreement on 5<sup>th</sup> March, 1999 for a goodwill to facilitate the plaintiff/respondent, Gideon Onyango Bendack, to take over premises that were being used by the defendant/appellant, Rosemary Wakalo, where she was running a business going by the name of Steffie saloon. The agreement ran into headwinds when it came to the landlord's attention that the respondent and not the appellant was in actual possession of the premises. As at that time, the respondent had already paid the appellant Kshs. 280,000/= out of the Kshs. 300,000/= that he was supposed to pay. The landlord by the name Integer Ltd, threatened to evict the respondent. The respondent in turn filed a suit in the lower court for recovery of Kshs. 280,000/= being the part-payment of the goodwill and Kshs. 15,500/= for 2 months' rent that he had given to the appellant to pay Integer Ltd.

2. The Hon. Magistrate after hearing the evidence of the parties and the submissions by their Counsel, entered Judgment in the sum of Kshs. 295,550/= as prayed in the plaint in favour of the respondent as against the appellant on 4<sup>th</sup> September, 2009.

**The appeal**

3. The appellant being aggrieved by the said decision filed a memorandum of appeal on 14<sup>th</sup> September, 2009 raising the following grounds of appeal:-

- (i) That the Learned Senior Resident Magistrate erred in fact and in law in failing to find that the plaintiff had failed to prove his case against the defendant and misdirected himself in entering judgment for the plaintiff against the defendant;
- (ii) The Learned Senior Resident Magistrate erred in fact and in law in failing to consider the oral and documentary evidence tendered by the defendant and in failing to find that the plaintiff had failed to discharge the burden of proof which onus of proof never shifts and therefore did not shift to the defendant;
- (iii) The Learned Magistrate erred in both law and in fact when he completely disregarded the cast iron evidence tendered by the defence against the fictitious claim brought forward by the respondent;
- (iv) The Learned Senior Resident Magistrate erred in law and in fact when he failed and/or refused to appreciate the unassailable and irrefutable testimony and exhibits tendered by the defence despite the said evidence withstanding cross-examination by the plaintiff;
- (v) The Learned Senior Resident Magistrate erred in both fact and law when he proceeded to prefer, adopt and thereby sanitize the plaintiff's evidence as against the defendant's more credible evidence without putting forward any justifiable reason, formula and/or legal principle;
- (vi) The Learned Senior Resident Magistrate erred both in fact and law by failing to appreciate the facts laid down before him by the

plaintiff and the defendant but instead descended into the arena of the trial and proceeded to re-state his own version of facts in complete departure from the pleadings before him;

(vii) The Learned Senior Resident Magistrate erred in both fact and law in failing to rule and/or make a finding or at all in respect of the counter-claim lodged by the appellant/defendant notwithstanding evidence having been led in support of the same;

(viii) That the Learned Senior Resident Magistrate erred in fact and in law in failing to consider and appreciate the submission of the defendant's counsel;

(ix) The Learned Senior Resident Magistrate erred in both fact and law when he handed down a judgment propelled by whimsical and capricious reasoning whose sum effect was tantamount to an assault to the cherished principles of due process and the adversarial system.

The appellant prays for orders that:-

(a) The appeal be allowed with costs; and

(b) The Judgment be entered for the plaintiff against the defendant in the lower court be set aside and the said Judgment be substituted with another order dismissing the plaintiff's suit.

4. It is to be noted that the appellant in the lower court filed a statement of defence and counterclaim in which she denied having breached the agreement. She claimed the equivalent of rent arrears for the premises which she continued to pay electricity, water and telephone bills, which were being charged on her account. The appellant averred that she reserved the right to ascertain the sums due by tendering the relevant bills at the time of the hearing of the case.

5. The appellant's Counsel filed his submissions on 17th July, 2015 and Counsel for the respondent filed his on 3<sup>rd</sup> November, 2016. Ms. Kisingo, Learned Counsel for the appellant condensed grounds No. 1, 2, 3, 4 and 5 of the appeal into one line of argument. She submitted that the Hon. Magistrate failed to appreciate the weight of the evidence tendered. She indicated that the appellant was sued for failure to deliver the premises in issue wherein goodwill was sold by the appellant to the respondent for Kshs. 300,000/=.

6. It was submitted that on 1st April, 1999, the appellant handed over the goodwill of Steffie saloon which she used to operate along Moi Avenue, to the respondent. Counsel argued that section 97 of the Evidence Act provides that when there is an agreement between parties, no other document shall be used in support of the agreement other than the document signed by the parties.

7. Ms. Kisingo further argued that after taking up the premises, the respondent realized that the monthly rent was expensive since the landlord decided to increase rent as the respondent was not interested in running a saloon but started a fast food business instead.

8. She contended that the respondent filed the suit in the court below to distance himself from the goodwill agreement. She referred to a letter dated 24<sup>th</sup> September, 1999 by Ogola & Ochwa Advocates that explains the reason as to why the respondent wanted to distance himself from the goodwill. She stated that the appellant was under no obligation to continue paying monthly rent pursuant to the goodwill agreement.

9. On grounds No. 6, 7, 8 and 9 which Ms. Kisingo condensed into the 2<sup>nd</sup> main ground of appeal, she submitted that the Hon. Magistrate failed to give weight to contractual terms of the agreement. It was submitted that the agreement was validly executed and that it had no correlation to the monthly rent. Counsel stated that the respondent in the plaint filed before the lower court made an attempt to rewrite the terms of the agreement and that the Hon. Magistrate assisted the respondent to introduce terms that were not in the agreement.

10. Counsel relied on the authorities cited in their written submissions namely, **Peters vs Sunday Post** [1958] EA 424 which espouses the duty of the first appellate court. She also relied on the case of **L'estrange vs Graucob** [1934] 2 ALL ER where Lord Justice Scruton strongly objected to deal with allegations of fraud, where it was not expressly pleaded.

11. Ms. Kisingo relied on the case of **Caesar Njagi Kunguru vs Kenya Commercial Bank**, Nairobi HCC No. 1543 of 2000, where Ringera J., (as he then was) stated that the courts exist to interpret and give effect to the contracts which litigants have freely entered into and that it is not part of the courts mandate to rewrite or modify contracts.

12. In brief submissions Learned Counsel for the respondent, Mr. Nyaboye, in opposing the appeal fully relied on his written submissions. He highlighted that the appellant pretended to sell goodwill in a premises where the lease had expired which material facts, he did not disclose to the respondent. Counsel stated that there was therefore no shop to be taken over by the respondent due to expiry of the lease. He added that the Hon. Magistrate considered the evidence and held that one cannot give what she does not have.

### **Analysis and determination**

The issue for determination is if there was a breach of the agreement dated 5th March, 1999.

13. In the case before the lower court, the respondent testified as PW1. He stated that the appellant was his neighbour at his Kiosk where she went to one day and told the respondent that she could assist by giving him a shop. They settled for a sum of Kshs. 300,000/= for goodwill. They went to an Advocate and he ended up paying Kshs. 280,000/= in 3 installments. The two of them paid the Advocates fee. They agreed that before the respondent started work therein, he would be taken to the appellant's landlord, as she was a tenant in the said premises. They also agreed that she would leave the premises by the end of May, 1999. He was to pay the rent in her name but later, he would pay in his

name. He indicated that he did not know if she had a lease with the landlord.

14. In the lower court the respondent had informed the court that the appellant was running a saloon but he told her that he wanted to turn the shop into a hotel. The appellant told him that the owner of the premises had agreed to him using the shop. The agreement entered into by the appellant and the respondent was produced as plf. exhibit 1. Although the appellant entered the shop he did not do any business. He stated that after he paid Kshs. 200,000/=, an agent went to paint. He was asked who he was and they said they did not know him. The appellant told him not to worry.

15. It was the respondent's evidence in the court below that he would pay rent to the appellant and she would take receipts to him. The rent was Kshs. 7,775/= (per month). He indicated that he had no contact with or agreement with Integer Ltd. On 7th September, 1999 Integer Ltd. wrote him a letter stating that they did not know him. He produced the letter as plf. exh. 2. He was ordered to leave the house which had a debt which she had not told him about. He stated that was captured in the letter dated 7th September, 1999 addressed to Shaffie (sic) and produced as plf. exh. 3.

16. It was the respondent's evidence that an employee of Integer Ltd., went to his shop and told him to remove his things or Auctioneers would visit him. He produced a letter to that effect dated 4<sup>th</sup> October, 1999 as plf. exh. 4. He went to the Police Station on 18th August, 1999 and they gave him a letter to take to the appellant. He produced the said letter as plf. exh. 5. He adduced evidence that Ogola Advocate defended the appellant and when he went back to the Police, he was chased away. The said Advocate gave him a note dated 12th August, 1999 to take to the appellant, of which he produced a copy as plf. exh. 6.

17. The respondent in the lower court had testified that he went to an Advocate who wrote a letter to the appellant dated 23<sup>rd</sup> August, 1999, which he produced as plf. exh. 7. Ogola Advocate wrote to him on 27th September, 1999. He produced the letter as plf. exh. 8. He also produced two receipts for rent as plf. exh. 9.

18. In winding up his evidence, he asserted that the appellant sold to him goodwill but he was never given the shop. He also stated that the house was in arrears as at the time he was getting into it and he was never given the initial receipts for rent.

19. On being cross-examined, the respondent stated that the goodwill was for the saloon and that the appellant gave him the keys to the house. He stated that he never told the appellant to state (to Integer Ltd.) that he wanted to change the business of a hotel and the issue was not put in the agreement. He indicated that they did not have a name for the hotel but the appellant wrote and said it would be called Takeaway cafe. He emphasized that he used to pay rent through her although he did not see a lease agreement between the appellant and the landlord. On being shown plf. exh 9, the respondent stated that the receipt showed that the money (rent) was paid by Tufta. He clarified that the shop was called Tufta.

20. He admitted that he was in the house in issue in June to August (1999). He would give the appellant money, she would take to the landlord and take to him the receipt. He gave the appellant Kshs. 15,550 to pay rent. He further stated that he returned the keys on 14<sup>th</sup> September, 1999. He confirmed that he did not pay the appellant the balance of Kshs. 20,000/= for the goodwill.

21. The appellant gave evidence as DW1 in the lower court. She indicated that she used to run a saloon and the respondent a cafe off Moi Avenue, and he was interested in taking over her saloon. They prepared a goodwill agreement for the sum of Kshs. 300,000/=. The respondent paid Kshs. 280,000/= and she handed over the premises to him on 1<sup>st</sup> April, 1999. He however did not pay her Kshs. 20,000/=. She denied that he paid her Kshs. 15,500/=. She also denied that she was to introduce him to the landlady (sic).

22. It was the appellant's evidence in the court below that on 10<sup>th</sup> March, 1999, she wrote to the landlord seeking the change of the premises from a saloon to a cafe. She produced the said letter as def. exh. 1. The landlord gave approval subject to certain conditions being met as per the letter dated 11<sup>th</sup> May, 1999 that she produced as def. exh.2.

23. She testified that a few months later, the respondent took her to the Police alleging that she conned him. She received a letter from the Police dated 18th August, 1999 which she produced as def. exh. 3. She took the letter to the Advocate who had drawn the agreement, who in turn wrote to the Police, as per the letter she produced as def. exh. 4. She testified that the premises were not in arrears when she handed it over to the respondent on 1/07/09 (sic). She later learnt that the respondent was not paying rent as per the letter dated 8th December, 1999, which she produced as def. exh. 5.

24. She stated that she did carry out her part of the agreement by handing over the premises to the respondent. She denied having taken money from him on behalf of their landlord. She stated that the premises had no debt as at the time she handed it to the respondent, and that she had never issued him with a receipt for rent. The appellant demanded the balance of Kshs. 20,000/= in goodwill. On referring to plf. exh.3, she stated that the respondent was in arrears from June 1999 to September, 1999.

25. On cross-examination the appellant stated in the court below that she had no agreement with Integer Ltd but she wrote a letter to them to allow her to sell the premises. She admitted that she did not introduce the respondent to the landlord. She indicated that the landlord used to go to the shops to collect rent and that she never took rent on behalf of the landlord from the respondent. She stated that they did not agree that she would introduce the respondent to the landlord. On being referred to the letter produced as plf. exh. 3, addressed to the appellant, she indicated that it shows that it was written that she owes the landlord rent arrears.

26. On further cross-examination, she admitted that she did not have a lease agreement with Integer Ltd. She admitted that she was not supposed to lease the premises to another person. She also admitted that her lease expired on 31st December, 1998 but she entered into an agreement with the respondent on 31<sup>st</sup> March, 1999, which was three (3) months after expiry of the lease.

27. She stated that she had goodwill to sell to the respondent in March 1999. She admitted having received a demand letter from the respondent and that she took Kshs. 280,000/= from him. The appellant stated that the respondent was to pay rent after taking over the premises from her.

28. This court notes that the agreement dated 5<sup>th</sup> March, 1999 is very clear that the appellant sold to the respondent goodwill in respect to premises that were occupied by Steffie saloon in the center of town, off Moi Avenue, Mombasa. The consideration was the sum of Kshs. 300,000/= payable in three (3) equal installments. The premises was to be given to the respondent in vacant possession on 1<sup>st</sup> April, 1999. According to the agreement, the business was to run in its current name but the respondent was to change the business particulars such as the address and remove the appellant's name from the business name.

29. The definition of goodwill was captured by Lord Mcnaughten in the case of **Commissioner of Inland Revenue vs Muller & Co. Margarine Ltd.** [1900 – 1903] ALL ER 413 as follows:-

***“It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing that distinguishes an old established business from a business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.”***  
(emphasis added).

30. The above definition of goodwill applies to the intention of the appellant and the respondent as at the time they signed the agreement on 5<sup>th</sup> March, 1999. The parties agreed that the respondent's business would run in the name Steffi saloon. It is however evident from the documents produced in court that the appellant sought approval for change of business of the said premises from Integer Ltd through a letter dated 10<sup>th</sup> March, 1999 where she expressed interest to change the type of business to a fast food take -away cafe going by the name of Steffie's T-Away cafe. On 11<sup>th</sup> May, 1999, Integer Ltd responded approving the change of business subject to the appellant meeting the conditions set out in the said letter. The 4<sup>th</sup> condition required the appellant to execute a formal lease for a period of not less than 5 years charged at Kshs. 42.50 per square foot for the first year, with annual escalation of 10 %. The letter further stated that the author of the letter, one S. C. Mbinda Jr. would be in Mombasa between 17<sup>th</sup> to 19<sup>th</sup> May, 1999 during which period the matter could be finalized.

31. The proceedings and more particularly on cross-examination by the respondent's Counsel, it became clear that as at the time that the appellant entered into a goodwill agreement on 5<sup>th</sup> March, 1999 she had no valid lease agreement with Integer Ltd, as her lease had expired on 31<sup>st</sup> December, 1998. It is thus evident that as at that time, although the appellant was still in occupation of the premises in issue, she could not purport to have a goodwill to sell. In the absence of a valid lease agreement with Integer Ltd, she had no legal right she could confer on the respondent in the business going by the name of Steffi saloon operating in the premises that the respondent was interested in.

32. In **MACFOY VS UNITED AFRICA CO LTD (1963) 3 ALL ER 1169**, Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void, but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect **after** it is declared void; it is not *void ab initio*. What has been done or accomplished before, pursuant to that act, is not affected by the declaration. On the other hand, a nullity is really something that is void, a nothing right from the beginning. In the words of Lord Denning:-

***“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”***

33. The appellant was well aware of the lack of a valid lease agreement between her and Integer Ltd. For the said reason, I hold that the goodwill agreement between her and the respondent was a nullity from the start. The premises were handed over to the respondent on 1<sup>st</sup> of April, 1999 when there was still no valid lease agreement between the appellant and Integer Ltd.

34. It was also clear from the evidence of the respondent that his interest was to run a fast food business and not a saloon. He was therefore duped into entering into the agreement by the appellant who was aware that her lease with Integer Ltd., had elapsed and was due for renewal at a higher rent, thus her letter to change the use of the premises at a later date after the signing of the goodwill agreement. It would be absurd to expect a fast food business to run in the name of a saloon and attract goodwill. The services offered by a fast food business are not similar to those offered by a fast food restaurant. There was therefore no goodwill at all that was capable of being sold to the respondent whose sole aim was to run a fast food restaurant.

35. I am in total agreement with the holding of the Hon. Magistrate that the appellant had nothing to sell to the respondent. It is my finding therefore that Judgment in the lower court was correctly entered in favour of the respondent who discharged his burden of proof on a balance of probabilities. The appellant's counter-claim failed as she could not be awarded Kshs. 20,000/= for having sold nothing to the respondent. Any claim from the appellant based on the goodwill agreement is incapable of enforcement.

36. The issues of whether rent was paid or not by the respondent through Integer Ltd. was not a matter for the lower court to determine as the said company was not a party to the suit. The issue that was determined by the court was on the amount of money amounting to Kshs. 15,500/= that was given by the respondent to the appellant, as rental dues for the premises but for which she could not confer a right to the respondent. The respondent is entitled to a refund for the said amount as well as the Kshs.280,000/= he paid to the appellant as goodwill.

37. The end result is that the Hon. Magistrate properly addressed his mind to the issues that were before him for determination. I uphold his judgment. The appeal herein is dismissed in its entirety. Costs of the lower court case and this appeal are awarded to the respondent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 31<sup>st</sup> day of January, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms. Kisingo holding brief for Mr. Gakuo for the appellant

Mr. Busieka holding brief for Mr. Nyaboye for the respondent.

Mr. Oliver Musundi - Court Assistant