



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL APPEAL NO 17 OF 2016

VINDO MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED.....APPELLANT

VERSUS

ANDREW MACHOGU

T/A MACHOGU & PARTNERS SURVEYING CONSULTANCY.....RESPONDENT

(Being an appeal from the Judgment of the Honourable Senior Principal Magistrate E. G. Nderitu delivered on 19th September 2016 in Voi SPMCC No93of 2014 Multipurpose Co-operative Society Limited)

JUDGMENT

1. In his Plaint that was dated and filed on 13th June 2014, the Respondent sought the following reliefs:-
 - a. **Payment of the sum of Kshs 1,792,000/= inclusive of the principal sum in arrears and the interest.**
 - b. **Costs of this suit with interest.**
 - c. **Such other relief this Hon court deems fit to grant in the interest of justice.**
2. The Appellant's Statement of Defence and Counter-claim was dated 2nd July 2014 and filed on 7th July 2014. It had sought the following reliefs:-
 16. **The Plaintiff has refused , failed and/or neglected to conduct the survey work as stipulated in clause 1, 2, 3, 5, 7, 8, 9 and 11 of the agreement and accordingly the Plaintiff should be compelled by an order of specific performance to comply and finish the survey work and hand over all the survey documents before any further or final payment is made.**
3. In response thereto, the Respondent filed a Reply to Counter-Claim dated 13th May 2016 on 14th July 2014.
4. In her judgment delivered on 19th September 2016, the Learned Trial Magistrate Hon E. G. Nderitu, Senior Principal Magistrate awarded the Respondent herein a sum of Kshs 1,792,000/= plus costs and interest at court rates thereon from the date of judgment.
5. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed its Memorandum of Appeal dated 13th October 2016 on 18th October 2016. It relied on eleven (11) Grounds

of Appeal.

6. The Appellant filed its Record of Appeal dated 3rd February 2017 on 6th February 2017. Subsequently, it filed its Written submissions dated 6th November 2017 on 10th November 2017. The Respondent filed his Written Submissions dated 24th November 2017 on 27th November 2017.

LEGAL ANALYSIS

7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

9. Having the aforesaid holding in mind and having looked at the Appellant’s grounds of appeal and the parties respective Written Submissions, it was clear to this court that the issues that had been placed before it for consideration and determination were the following:-

a. Whether or not the Respondent had the requisite capacity to enter into the contract;

b. Whether or not the Respondent breached the terms of the Contract;

c. Whether or not the balance of Contract sum in the sum of Kshs 1,400,000/= and interest thereon was due to the Respondent.

10. Before it could delve into considering the said issues, it found it prudent to look at the brief circumstances of case herein as it had noted a preliminary issue that was dealt with later on in this decision.

11. A brief history of the case was that on 13th January 2011, the Appellant and the Respondent entered into an agreement whereby the Respondent was to render surveying and demarcation services to the Appellant’s parcel of land known as Land Reference No. L.R.4957 Voi (hereinafter referred to as “the subject suit”) measuring approximately 5000 acres, situate within Voi municipality. The Agreed contract sum payable to the Respondent for his surveying services was Kshs 7,900,000/=. Subsequently, the said Agreement was modified and a new Agreement with new terms and conditions was entered into on 12th July 2012.

12. The Appellant’s contention was that the Respondent breached the said Agreement and in its Counter-claim, it sought for an order for specific performance to compel the Respondent to complete the survey work and hand over all survey documents before the final payment could be made.

13. On his part, the Respondent contended that the Learned Trial Magistrate acted correctly when she entered judgement in his favour against the Appellant herein for the sum of Kshs 1,792,000/= being the principal sum of the arrears in the sum of Kshs 1,400,000/= plus interest, costs and interest thereon at court rates.

14. This court noted that on 16th March 2015 when the Respondent herein took to the stand to adduce his

evidence, Mr Mwakireti, counsel for the Appellant herein objected to the production of the two (2) Agreements on the ground that the same had not been stamped under the Stamp Duty Act. He was emphatic that the said Agreements had no stamp duty affixed thereon and consequently, they were not admissible in evidence.

15. Mr Mwinzi, counsel for the Respondent contended the issue had not been raised during the Pre-trial and that as it was an agreement between the Appellant and the Respondent, which both parties annexed in their List and Bundle of Documents, they were bound. He therefore urged the Learned Trial Magistrate to dismiss Mr Mwakireti's objection as the same was an afterthought.

16. In her Ruling regarding the said issue, the Learned Trial Magistrate rendered herself as follows:-

“I have duly considered the objection and reply. I have as well considered the relevant provision of the law. The law requires that substance rather than procedure be given precedent in deciding a matter. I do note that the agreement being tendered by the plaintiff are the same documents the defendant is relying upon. Indeed, it is confirmed by Counsels that the fact of their being an agreement is not an issue for that reason I do not see the prejudice if the agreement (sic) are admitted in their present form.”

17. Section 19(1) of the Stamp Duty Act Cap 480 (Laws of Kenya) provides as follows:-

“Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall(emphasis court)be received in evidence in any proceedings whatsoever, except—

a. in criminal proceedings; and

b. in civil proceedings by a collector to recover stamp duty,

unless it is duly stamped.”

18. This court took a different view from that of the Learned Trial Magistrate. As had rightly been pointed out by Mr Mwakireti, it was mandatory that the two(2) Agreements be stamped as is required under the Stamp Duty for them to have been admissible. The Respondent's counsel had an opportunity to stand the Respondent down, have the said Agreements duly stamped before he could tender the same in evidence.

19. The issue of the objection not having been raised during the Pre-trial was neither here nor there. Indeed, a defendant is under no obligation to assist a plaintiff in proving his or her case. The legal and evidentiary burden falls on a plaintiff. For that reason, neither the Appellant nor the Respondent could have relied on the said Agreements to prove their respective cases for the reason that they were not admissible in evidence.

20. While the Learned Trial Magistrate held that the fact of the Appellant and the Respondent having entered into an agreement as aforesaid was not a contested issue, she could proceed to determine the case on inadmissible evidence. Indeed Section 19(1) of the Stamp Act was couched in mandatory terms. It was not a matter of discretion or form as the Learned Trial Magistrate averred. Rather it was a matter of substance that could not be excused under the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities.

21. While hearing the case of **Pelican Haulage Contractors Limited vs Khalid Salim Mohamed [2018] eKLR**, this very court found and held the agreement the plaintiff therein had relied upon was inadmissible for the reason that the same had not complied with the mandatory provisions of Section 19(1) of the Stamp Duty Act.

22. Whereas the Appellant did not raise this issue in its Memorandum of Appeal, this court found itself in

difficulties because it could not allow its Counter-Claim if it found that the Respondent had not proved his case and conversely, it could not dismiss the Appeal herein on the ground that the Appellant had not proved its case for the reason that both parties relied on Agreements which the Learned Trial Magistrate found to have been admissible but which this court found to have been inadmissible. There was clearly an error on the part of the court.

23. Notably, when hearing an appeal from a subordinate court, Section 78(1) of the Civil Procedure Act Cap 21(Laws of Kenya) empowers the High Court to take several actions. The said stipulates as follows:-

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

a. to determine a case finally;

b. to remand a case;

c. to frame issues and refer them for trial;

d. to take additional evidence or to require the evidence to be taken;

e. to order a new trial.”

24. In dealing with the instances of when a re-trial can be ordered, in the case of **Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited [2001] eKLR** the Court of Appeal cited with approval the case of **Preschand vs Deacon & Another (1963) 2 WLR 685**, which is an English decision where it pointed out that the *ratio decidendi* of the majority decision appeared to have been:-

“...that an act done in legal proceedings, in contravention of a statutory provision cannot be regularised by order of the court unless specific provisions exist empowering the court to do so...”

25. In the case of **Njoroge Muchungu vs Wakiha Muchungu [1983] eKLR**, the Court of Appeal also stated as follows:-

“Since I am of the opinion that the case was not properly tried I would allow the appeal, set aside the High Court judgment and in the interest of justice remit the case back to the High Court for retrial. I would award the costs of this appeal to the appellant.”

26. Accordingly, as both the Appellant and the Respondent proceeded on the premise of a misleading decision by the Learned Trial Magistrate, it was the considered opinion of this court that it would be in the interests of justice that this matter be referred for a Re-trial.

27. Proceeding to determine the Appeal on merit would greatly prejudice the Respondent as this court would have no option but to set aside the judgment that was entered in his favour against the Appellant as the Learned Trial Magistrate had no power to regularise the inadmissibility of the aforesaid Agreements merely by an order when there was a mandatory statutory provision requiring that such Agreements be stamped in accordance with Section 19(1) of the Stamp Duty Act.

DISPOSITION

28. For the reasons foregoing, the upshot of this court’s judgment was that the Appellant’s Appeal that was dated 3rd February 2017 and filed on 6th February 2017 is hereby allowed on the following terms:-

a. THAT SPMCC No 93 of 2014 be and is hereby remitted back to the Senior Principal Magistrate’s Court Voi for hearing and determination before any other magistrate other than the Learned Trial Magistrate herein who had and determined the case herein on 19th

September 2016.

b. THAT in view of the circumstances of the case as aforesaid, each party shall bear its own costs of this Appeal.

29. It is so ordered.

DATED and DELIVERED at VOI this 20th day of February 2018

J. KAMAU

JUDGE