



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 108 OF 2016

PAUL KARANU WANJIKU.....APPELLANT

VERSUS

JAWA GEORGE KILANGANI.....RESPONDENT

(An appeal from the judgment and decree of the Hon. Nyakweba, Principal Magistrate in Mombasa RMCC No. 1418 of 2015 delivered on 12th July, 2016).

JUDGMENT

1. The appellant being aggrieved by the decision of the lower court filed a memorandum of appeal on 5th August, 2016. It raises the following grounds of appeal:-

- (i) That the Learned Trial Magistrate erred in law and in fact in holding that the plaintiff had proved his case on a balance of probabilities when the plaintiff's case had been proved to the required standard (sic);
- (ii) The Learned Trial Magistrate erred in law and in fact in holding that the variation of the plot Numbers from MN/1/335/10 and MN/1/395/3 as per the agreement presented in court was material to disentitle the plaintiff recovering sums paid for purchase of the land which never went through;
- (iii) That Learned Trial Magistrate erred in law and in fact by failing to consider that in any event there was a contradiction as to the plot Numbers such mistake was made both by the plaintiff and the defendant and it was inequitable for the court to construe such contradiction in favour of the defendant and against the plaintiff;
- (iv) The Learned Trial Magistrate erred in law and in fact in failing to consider the full impart (sic) of the acknowledgment dated 17th December, 2013 which in any event as read with the agreements and the evidence as a whole showed that the defendant was indeed indebted to the plaintiff for the sum of Kshs. 550,000/=;
- (v) The Learned Magistrate erred in law and in fact by failing to consider the defence, witness statements and documents filed by the defendant and realize that the defendant did not dispute that he was paid and there was absolutely no reason to dismiss the case on account of date of payment or the plot number; and
- (vi) The Learned Magistrate erred in law and in fact in dismissing the suit and in effect allowing the defendant to keep the land and the money and thus unjustly enrich the defendant and leaving the plaintiff without a remedy.

2. The appellant prays for:-

- (i) The judgment and decree of the Learned Magistrate to be set aside and in place thereof, judgment to be entered for the plaintiff as prayed for the sum of Kshs. 550,000/= and interest at 25% per annum as prayed in the plaint; and
- (ii) Costs of the suit in the lower court and this appeal.

3. Although the respondent was served with a hearing notice, he did not attend court or file any submissions to respond to the appeal. An affidavit of service was duly filed in court 20th September, 2017 to confirm that the respondent's Advocate was served with the hearing notice.

4. The appellant's counsel filed written submissions on 15th May, 2017 which he highlighted. He submitted that the claim in the court below was for a sum of Kshs. 550,000/= which the appellant paid to the respondent for purchase of land, but the transaction failed. He submitted that the respondent acknowledged payment of the said amount.

5. Counsel stated that the appellant tendered evidence in court but the respondent did not attend court, thus the appellant's evidence was not rebutted. This court was informed that the Hon. Magistrate noted that there was an error on the date the agreement was entered into. It was submitted that the initial payment was for plot No. MN 1/395/3 but when the second payment was made, the purchaser cited MN 1/335/10. Counsel argued that the fact remains that the appellant made payment to the respondent for purchase of land. He indicated that the court below held that the error would go in favour of the respondent. In Mr. Nyabena's view, an equitable court should not have made that decision.

6. It was argued that the Honourable Magistrate applied a standard higher than the standard in civil case of a balance of probabilities. This court was urged to look at paragraph 5(e) of the agreements on the contradictions as to dates. It was submitted that the Hon. Magistrate ought to have considered that the transaction was completed. Counsel stated that although consideration was received, the transaction was not completed. He prayed for the appeal to be allowed.

ANALYSIS AND DETERMINATION

The issue for determination is if the appellant proved his case in the court below on a balance of probabilities.

7. The duty of the first appellate court was enunciated in the case of **Selle vs Associated Motor Boat Company Ltd.** [1968] E.A. 123 as follows:-

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

8. In the court below, the appellant Paul Karanu Wanjiku testified as PW1. His evidence was to the effect that he bought a piece of land on 9th August, 2013 from Jawa George Kilangani for the purchase price of Kshs. 450,000/=. It was a 40 x 80ft piece of land reference No. MN/1/395/3. He indicated that he paid a down payment of Kshs. 100,000/= he produced the sale agreement dated 9th August, 2013 as plf. exh. 1. He informed the court that the date of the agreement should read 9th August, 2013 not 9th August, 2003. It was his evidence that he later paid Ms. Onjoro & Company Advocates the balance on 28th August, 2013. He produced another agreement as plf. exh. 2. He stated that he paid the Advocate Kshs. 10,000/= as per the receipt produced as plf. exh. 3.

9. The appellant had further testified in the court below that when he entered (the land) to take possession by erecting a fence, it was demolished by the respondent's family members who chased him away when he tried to deposit building materials. The respondent thus failed to put him in quite possession of the property. The appellant stated that the respondent agreed to refund him the purchase price of Kshs. 550,000/= by 6th March, 2014 failing which the money would attract interest at the rate of 25% per annum until payment in full. He produced the agreement for refund of the money as plf. exh. 4 and stated that as at the time he was testifying on 30th March, 2016, the amount had accrued to Kshs. 550,000/=. He stated that he had not been paid the said money. He prayed that he be paid Kshs. 450,000/= with an additional Kshs. 100,000/= for expenses, together with interest and costs.

10. The respondent did not adduce evidence in the court below. The Hon. Magistrate considered the appellant's evidence and found that he had failed to prove his case due to contradictions as to the dates when the agreements were entered into and the description of the land under purchase. Looking at the exhibits produced by the appellant in the court below, plf. exh. 1 gives the date of the agreement as 9th August, 2003. The title number of the plot under purchase was MN/1/395/3 at Mwembelegeza area. The purchase price was Kshs. 450,000/=. Plf. exh. 2 is another agreement which the appellant produced that was entered into by the appellant and the respondent. It is dated 28th August, 2003. The description of the property under sale is given as MN/1/335/10 at Mwembelegeza area. Paragraph 5(e) thereof states: ***“The purchaser has paid one hundred thousand shillings (Kshs. 100,000/=) on the previous agreement dated 2nd July, 2013 and has paid one hundred and fifty thousand (Kshs. 150,000/=) on 9th August, 2013 totaling to Kenya shillings two hundred and fifty thousand (Kshs. 250,000/=) and the remaining Kshs. 200,000/= to be paid today the 28th August, 2013 totaling to Kshs. 450,000/= as the final amount agreed signing this (sic).”*** (emphasis added).

11. It is noteworthy that the agreement dated 9th August, 2003 in paragraph 5(e) states - ***“The purchaser has paid One Hundred Thousand shillings (Kshs. 100,000/=) on the previous agreement dated 2nd July, 2013 and has paid the one hundred and fifty thousand (Kshs. 150,000) today 9th August, 2013 totaling to Kenya shillings Two Hundred and Fifty Thousand (Kshs. 250,000/=) and the remaining Kshs. 200,000 to be paid within three months from the date of signing this agreement.”*** (emphasis added).

12. Paragraphs 5(e) of the two agreements are a pointer to the fact that there was an error on the year that agreement was entered into. As the appellant indicated, I am persuaded that the agreement was entered into in the year 2013 not 2003. It is clear that the errors in the two agreements were occasioned at the time the agreements were drafted.

13. The bone of contention however is that the two agreements refer to two different plots. The first agreement makes reference to plot No. MN/1/395/3 and the second agreement to plot No. MN/1/335/10. It is instructive to note that second agreement makes reference to the payment made on 9th August, 2013 totaling Two Hundred and fifty Thousand, but gives a different description of the plot under purchase.

14. The variance in the description of the properties in the two agreements was not clarified by the appellant when he testified in the court below. The two agreements in paragraphs 5(e) make reference to the purchaser having paid Kshs. 100,000/= on a previous agreement dated 2nd July, 2013. The said agreement was not produced to shed light on the series of transactions that took place.

15. As the Hon. Magistrate held, the acknowledgement dated 17th December, 2013 does not disclose that it was in respect to land parcel No. MN/1/335/10, the subject matter of the suit. 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.”

16. Having analyzed the evidence adduced by the appellant and more so, bearing in mind the lack of clarity as to why the two agreements he produced before the court below gave descriptions of two different parcels of land, I find that the appellant failed to prove his case on a balance of probabilities. The appeal is hereby dismissed. There will be no order as to costs of the appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of March, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Nyabena for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant