



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 27 OF 2016

MARY WAKANYEI KAMURUA.....APPELLANT

V E R S U S

JANE WANGARI MICHEK.....RESPONDENT

JUDGMENT

The appellant Mary Wakanyei Kamurua filed a suit before Wanguru Court in PMCC 14/2015 by way of a plaint. She was claiming Kshs 530,000/- plus interests at 30% per annum for a failed consideration arising out of a contract for sale of land.

From the evidence which was tendered before the trial Magistrate it was not in dispute that an agreement was entered on 23/7/2014 between Sabina Wangechi Kamurua and Jane Wangari Michek. The agreement was produced as **exhibit -1-**. The appellant alleged that she paid the full consideration but the respondent failed to transfer the rice holding to her.

The respondent's defence was that she only received Kshs 140,000/-. That she was ready and willing to complete the agreement but the plaintiff breached the agreement and caused the defendant to be arrested and charged with the offence of obtaining money by false pretence long before the completion period had lapsed. That the plaintiff was only entitled to the deposit paid.

The trial Magistrate delivered his judgment on 19/4/16 and held that the sale agreement was between the respondent and Sabina Wangechi Kamurua and the plaintiff was not privy to the agreement. That the sale agreement was to be completed on 3/12/2014 but the plaintiff breached the agreement by having the respondent charged in a criminal case. The trial Magistrate then ordered the respondent to refund Kshs 250,000/- to Sabina Wangechi who was not a party. The appellant lodged this appeal against the Judgment raising the following grounds:

1. The learned trial Magistrate erred in fact and in law in finding that there was no agreement for sale proved between the plaintiff and the defendant.
2. The learned trial Magistrate erred in misapprehending the evidence on record; thereby misdirected himself on it and arrived at the wrong conclusion.
3. The learned trial Magistrate erred in departing from the findings of the competent court when there was no reason to.
4. The learned trial Magistrate erred in awarding Judgment to a person who was not a party to the case.
5. The learned trial Magistrate erred in fact and in law in taking into account irrelevant matter thereby arriving at the wrong conclusion in law and fact.

She prays that the appeal be allowed. The Judgment and decree be set aside and appropriately reviewed.

I have considered the appeal and the submissions.

This being a first appeal the first duty of this court is to consider the evidence tendered before the trial court. It is in essence a retrial based on the evidence tendered. The court then makes orders based on the evidence. **Section 78 Civil Procedure Act** Provides:

78. (1) 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.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits situated therein.

The suit was filed by the plaintiff Mary Wakanyeki Kamurua vide a plaint dated 27/1/15 and she was claiming a refund of Kshs 530,000/- with 30% interest per month and at court rates from the date of filing suit and costs. The claim was against Jane Wangari Michek the defendant who is the respondent in this appeal. Her claim was that she entered an agreement for the sale of a rice holding No. 1781 at an agreed price of Kshs 530,000/= which was paid in full. The defendant failed to transfer the rice holding and or refund the purchase price at the agreed interest of 30% per month.

The appellant Mary Wakanyeki Kamurua testified that she agreed with the defendant that she would pay Kshs 200,000/- through her sister Sabina Wangechi Kamurua. An agreement was entered between Sabina Jane Wangari and the respondent Jane Wangari. This agreement was produced as **exhibit P.1** and shows that the respondent was paid Kshs 200,000/- out of the agreed purchase price leaving a balance of Kshs 530,000/-. The appellant paid a further Kshs 50,000/- on 20/8/14 which the respondent acknowledged vide **exhibit P-2-**. Later she paid the balance of Kshs 280,000/- and entered an agreement **exhibit P-3-**. The agreement was entered between the vendor Jane Wangari Michek and Mary Wakanyeki Kamurua. In the agreement, the vendor acknowledged having received Kshs 200,000/- on 23/7/2014, Kshs 50,000/- on 20/8/2014 and the balance of Kshs 280,000/- on 13/11/2014, the date the agreement was signed. After that the defendant refused to transfer the rice holding.

It is clear that the agreement entered on 13/11/2014 consolidated the agreement entered on 23/7/14 where the respondent received Kshs 200,000/- and the acknowledgement of Kshs 50,000/- entered on 20/8/14. It was also between the parties to the sale agreement that is the appellant and the respondent.

Sabina Wangechi (PW-2-) confirmed that she paid the respondent Kshs 200,000/- on behalf of her sister who is the appellant. They signed an agreement, **Exhibit P-1-**. She further paid the respondent Kshs 50,000/- and they signed an acknowledgment **exhibit P-2-**.

The respondent on her part admitted that she entered the agreement with appellant's sister (PW-2-), exhibit P-1- and D-1-. She contends that the appellant did not give her time to complete her part of the agreement as she reported the matter to the police. She further stated that the appellant breached the agreement and she could not refund money to her as she had no agreement. In cross-examination the respondent admitted that she received Kshs 250,000/- from PW-2- and entered an agreement with the appellant which she signed. She denied that she received Kshs 280,000/- which I find is a mere denial as she admitted that she entered an agreement with the appellant and signed by writing her name. In any case a party is bound by her pleadings. In her defence she stated that she only received Kshs 140,000/- from the appellant and she was ready and willing to complete the agreement within the agreed time. In court she departed from her pleadings.

Upon considering this evidence which was tendered before the trial Magistrate, I find that the appellant did prove that she paid the respondent Kshs 530,000/- toward the purchase of Rice Holding No. 1781 Unit 3 but the respondent failed to transfer or give vacant possession. The agreement **Exhibit P-3-** clearly shows that it is the appellant who was buying the plot.

Grounds of Appeal:

The trial Magistrate erred by holding that the appellant did not feature anywhere and by failing to consider the second agreement **exhibit P-3-** which consolidated the agreement of 23/7/2014 and the acknowledgment of Kshs 50,000/- and the payment of the balance of Kshs 280,000/- by the appellant. It was absurd for the trial Magistrate to state that the plaintiff does not feature anywhere in the agreement of 23-7-2014 and she was not privy to it and at the same time hold that it is the appellant who breached the agreement. It is clear that the trial Magistrate for unknown reasons gave a blind eye to the agreement **exhibit P-3-** which the respondent admitted in court when she was shown in court and she stated that she signed it. The trial Magistrate also erred by failing to consider the evidence of PW-2- who stated that the money she paid to respondent was paid on behalf of the appellant and she had no claim against the respondent.

The trial Magistrate erred in law and in fact by failing to appreciate that the appellant was claiming Kshs 530,000/- as opposed to the sum of Kshs 200,000/- in the agreement entered between the respondent and PW-2- effectively denying the appellant the amount of Kshs 280,000/= paid in the agreement **exhibit P-3-**. The trial Magistrate erred in law and fact by ordering a refund of Kshs 250,000/- to Sabina Wangechi who was not a party to the suit and had no claim against the respondent.

The trial Magistrate did not only misapprehend the evidence but also ignored the evidence tendered before him and arrived at a wrong conclusion. Pleadings were also not considered as the respondent had in her defence admitted that she had received Kshs 140,000/- from the plaintiff. The respondent was charged with a criminal case over the same transaction and the trial Magistrate found as a fact that it was proved beyond any reasonable doubts that the respondent had received Kshs 530,000/-, that is Criminal Case No. 637/2014 P.M's Court Wang'uru, Page 61-85 of the Record of Appeal. There was no appeal by either party. It is therefore curious as submitted by the appellant that the trial Magistrate reached a different finding based on the same facts, evidence and documents.

I find that the appellant has proved the grounds of appeal pleaded.

On the issue of breach of contract, the agreement **exhibit -P3-** at clause -3- stated that the vendor should transfer the same property with immediate effect. This effectively changed the completion date of 3/12/14 to 13/11/14 when the agreement was entered. The respondent was not able to transfer the rice holding to the appellant because her family failed to turn up at the offices of N.I.B. The proceedings in the Criminal Case show that the respondent was charged in court on 25/11/2014. Considering that the agreement of 13/11/14 was stated that the respondent was to transfer the property with immediate effect, the appellant did not breach the agreement in any way. The appellant performed her part of the contract and the respondent was under an obligation to give her the rice holding free from any encumbrances. The respondent failed to perform her part of the deal. The agreement **exhibit P.3.** at clause -6- states that in the event of breach on the part of the vendor, she shall refund the paid up money with interest at 30%. The respondent proved that the vendor was in breach and she should therefore refund the money with interest as per the terms of the agreement.

In Conclusion:

I find that the appellant has proved the grounds of appeal. The Judgment of the trial Magistrate was wrong as it was arrived at by misapprehending and ignoring the evidence tendered before him. At the end of the day he entered a Judgment which could not be executed as it was against a person who was not a party in the suit and had no claim for the respondent. The Judgment cannot stand.

I make the following orders:

1. The Judgment of the trial Magistrate is set aside.
2. There shall be Judgment for the appellant in the sum of Kshs 530,000/- with interest as follows:
 - (i) 30% interest per month from 13/11/2014 to the date of filing the suit, that is to say 27/1/2015.
 - (ii) Thereafter interest shall be at courts rates from the date of filing suit to the date of the decree of the Lower Court.
 - (iii) Thereafter Interest shall be paid at 6% per annum to the date of payment.
3. Costs to the appellant in both the Lower Court and in this appeal.

Dated at Kerugoya this 28th day of September 2018.

L. W. GITARI

JUDGE