REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 4 OF 2007

MURATHA MUTIGA.....APPELLANT

VS

GERALD MURIRA

JULIUS KONGA

JANET NTARARA.....RESPONDENT

JUDGMENT

The Appellant herein Muratha filed a suit in the Chief Magistrates court at Meru C.C. No 243 of 2006 seeking Kshs 32,500/= with interest from the date of filing suit together with costs of suits.

The claim arose out of alleged supply of 87 Kgs of seeds from plaintiff and 30 Kgs from the members between September 2004 and December 2004. The plaintiff claimed he was paid only Kshs 11,000/= and balance of Kenya shillings 32,500/= remained unpaid.

Upon hearing the evidence of the plaintiff and defendant witness the Trial Chief Magistrate (As he was then) found as follows:-

> **"All the a forementioned documents produced by plaintiff clearly indicated that the supply of the seeds to GreenBelt Movement was done by the defendant group and payment received in respect thereof was made to the defendant group. Therefore if the plaintiff was dissatisfied with the payment made to his way a sub-group then he ought to have sued on his own behalf and behalf of members of his sub group with their authority. That if the plaintiff was dissatisfied with the payment made to him as an individual member of his Wanja Group he ought to have sued the sub-group.**
>
> **The institution of this suit by the plaintiff in his individual capacity against the defendant group was improper and misconceived. The Wanja sub-group ought to have sued the defendant if it had not been paid what was due to itself from the Green Belt Movement.**
>
> **The amount claimed by the plaintiff if anything belonged to his Wanja sub-group which was mandated and required to pay its individual members. All in all the claim by the plaintiff against the defendant is not merited. He is not entitled to amount claimed. His case must and is hereby dismissed with costs."**

Being aggrieved by this decision the appellant appealed against the decision on the grounds that:-

1. The Learned Trial Magistrate erred in law and fact in failing to find that the plaintiff's suit was not a representative suit and proceeded to hold that the plaintiff had no locus to bring the suit.

2. That the Learned Trial Magistrate erred in law and fact in failing to find that the plaintiff had proved his claim on a balance of probabilities and proceed to hold in favour of the plaintiff.

3. THAT the learned Trial Magistrate erred in law and fact in failing to consider the plaintiffs submissions and case law cited in support of the claim.

4. THAT the learned trial magistrates' judgment is against the evidence on record.

In determining this appeal as 1st Appellate court, I have the duty to relook and re-evaluate the evidence n record of the trial Magistrate court and the applicable law and exercise as nearly as may be the powers and duties of the original jurisdiction and come up with my conclusion

save that I must keep in mind the fact that I neither saw nor heard the witnesses as they testified as was spelt out in the authority of **Selle vs Associated Motor Bat co [1968] EA 123.** Further in considering the evidence and applicable law as the appellate court, I will only interfere with the Lower courts judgement if the same is founded on wrong principles of fact and for law as held in the **Court of Appeal case of Nkubu vs Nyamiro [1983] KLR 403.**

> **"A court as Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or over misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."**

To fortify this position the Court of Appeal **in Ndiritu vs Ropko and Another EALR 334 – Okubasu, Githinji and Waki JJA** held that:

" the appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the finds of fact are based on no evidence or misapprehension of evidence on where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did" **see also Mwangi & Anther vs Wambugua [1983] 2 KCA 100.**

Having considered the evidence before the trial magistrate adduced by the appellant, and taking into account the grounds of appeal and written submissions by counsels for the appellant and Respondent.

I'm of the view that issues for determination are:-

1. Whether the appellant proved on a balance of probabilities that he was entitiled to claim of Kshs 32,500/= from defendant's who are officials of Thuura Green Belt Movement Network.

2. Whether claim by the appellant was made on his own behalf or on his behalf and on behalf of Wanja Sub group to Thuura GBM Network.

The plaintiff produced Ex P1 – Membership card showing he was member number 21 in Thuura GBM Network. He also produced Ex P2 & P3 showing that 80 Kgs and 2 Kgs of Maesopsis Eminis seeds were received from Thuura Network by GreenBelt Movement on 17th September 2004 and on 14th January 2005. Both deliveries were made by the appellant. Appellant also produced Ex P4 – Handing over Report although it is not very clear how it is relevant to the suit.

Ex P5 is a letter to Thuura Network Meru enclosing a cheque Number 000009 for Kshs 57500/= being compensation of 115 Kgs of seeds that was delivered in the office of Thuura Network. The purpose of the cheque/payment was to improve tree planting activities within Thuura Network.

Ex P6 Letter dated 10.5.05 to Thuura Network from GMB-Nairobi refers to seeds supplied by the Network on 17th September and 9th December to 2004 respectively amounting to 117.00 Kgs. According to Ex P6 Green Belt Movement acknowledged receipt of 117.0 Kgs of seeds from Thuura Network on 17th September and 9th December 2004. The payment shown in Ex P5 for Kshs 57,500/= is for 115 Kgs of seeds and the letter is stamped received on 26th June 2006.

The appellant produced EX P2 and 3 to show he delivered 80 Kgs and 2 Kgs of seeds respectively to GBM on behalf of Thuura Network. There's nothing in these documents to prove the seeds delivered had been a belonged to the appellant personally. There is nothing to show that the seeds were delivered on behalf of the Sub-Group known as Wanja. The trial magistrate therefore rightly found that there was no basis upon which to find that the appellant claim was tenable.

The appellant didn't produce any evidence of defendants acknowledging receipt of seeds from him before delivering to Green Belt Movement in Nairobi. There is nothing to prove his sub group supplied 10 Kgs and he supplied 87 Kgs as alluded to in cross-examination.

On the issue as to whether he sued in a representative capacity, the appellant didn't bring any member of Wanja Sub Group to say they gave him. Consent to sue on their behalf. There was no written consent and he didn't indicate while filing the suit that the suit is representative.

Ground number 1 of appeal cannot therefore stand. According to Respondents EX D1 what was due to appellant was Kshs 11,000/= together with 1,000/= for transport which he was given and he signed. Acknowledging it, DW1 – 1 Respondent said that he collected the money on behalf of his sub-group – Wanja for seeds supplied by its members.

In consideration of my evaluation of the evidence on record in the trial magistrates record, I do find that the judgement therein cannot be disturbed. The appeal herein fails and is dismissed with costs to Respondents. Orders accordingly.

Judgment Signed, Delivered and Dated this 29th Day of June 2017.

HON. A.ONG'INJO

JUDGE

In the presence of:

C/A

Appellant:- Mr Kariuki Advocate

Respondent:- Mr Kiogora Arithi Advocate – N/A

HON. A.ONG'INJO

JUDGE