REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 119 OF 2014

JEREMIAH WANYIRI WAMBUGU.....APPELLANT

VERSUS

GEOFREY WIAGWA WANJOYA .....RESPONDENT

(Being an Appeal Against the Judgment of Hon. P.O. Muholi, Resident Magistrate in Nyahururu P.MC.C. No. 69 of 2003 delivered in 26th November 2013).

JUDGMENT

1.This appeal arises from the judgment of the trial court where the appellant was ordered to refund to the respondent a sum of Kshs.100,000/= paid towards a sale transaction where the appellant, by an agreement dated 12th August 1999 agreed to sell to the respondent a plot Known as **Laikipia/Ngobit/Supuko Block II (Wiyumiririe 975).** Being dissatisfied with the court's judgment, he lodged this appeal based on the following grounds:

> *1. The Learned trial Magistrate erred in law and fact in holding that the sum of Kshs.100,000/= had been paid to the Appellant on the basis of disputed sale agreement which did not meet the requirements of Section 3(3) of the Law of Contract Act.*
>
> *2. The learned trial Magistrate erred in law and fact in entering judgment for the Respondent on the basis of contradictory evidence which was incapable of proving the case on a balance of probabilities.*
>
> *3. The Learned trial magistrate erred in law and fact in failing to consider the Appellant's Counsel's submissions and proceeded on a misapprehension of the law to give a judgment which was against the weight of evidence.*

He sought an order to set aside the said judgment and dismiss the suit.

2. This is the first appellate court. It is mandated to re-assess and re-evaluate the evidence adduced before the trial court but the court is not bound by its findings of fact. See **Selle -vs- Associated Motor Boat Co. Ltd & Others (1968) EA= 123.**

3. The Respondent's case was that in August 1999 he agreed to buy a plot from the appellant at an agreed sum of Kshs.180,000/= and paid him Kshs.100,000/= before execution of a Sale Agreement dated the 12th August 1999 where the balance was to be paid in Instalments. It was his testimony that the agreement was signed by the two parties and witnessed by the appellant's

wife. In the said agreement, the appellant acknowledged having received Kshs.100,000/= prior to the signing of the agreement.

The respondent testified that thereafter, he paid a sum of Kshs.42,300/= to the appellant on various dates but he failed to transfer the plot to him. By his plaint, he sought an order of refund of the sum paid as the contract of sale had aborted.

4. On his part, the appellant testified that there was a formal agreement between him and the respondent for the sale of the plot at Kshs.250,000/= and not Kshs.180,000/= but denied having received any money from the Respondent. He denied signing the purported sale agreement nor receiving any money from the respondent.

5. The respondents PW4 Margaret Gathigia Waigwa, wife to the appellant testified that there was a sale agreement dated 12th August 1999 when a sum of Kshs.100,000/= was paid to the appellant in her presence. PW1 too confirmed that a sum of Kshs.100,000/= was paid to the appellant towards the purchase of the subject plot.

6. The appellant denied there having been a formal sale agreement but stated that the respondent approached him for the sale of the plot and offered to pay the purchase price in instalments. He denied having received the initial Kshs.100,000/= nor signing the sale agreement on grounds that the said agreement dated 12th August 1999 was not witnessed nor did he sign the above. It was his evidence that his signature thereon was a forgery.

7. From the evidence as adduced the following issues arise for determination:

> *1. Whether, there was a sale agreement formally or informally between the parties for the sale of the subject plot at an agreed price of Kshs.180,000/=.*
>
> *2. Whether pursuant to the sale Agreement, the appellant received a sum of Kshs.100,000/= from the respondent and whether the balance was paid.*
>
> *3. Whether the contract of sale aborted and If so, whether the appellant is obligated to refund monies received from the respondent in the sum of Kshs.142,000/=.*

8. There is no dispute that there was a contract for the sale of the plot subject of this appeal. The issue to determine is whether the parties entered into a sale agreement and the terms thereof.

The Respondent by his evidence and that of his witnesses (PW1 and PW4) confirmed that in their presence, a sum of Kshs.100,000/= was paid to the appellant and thereafter by an agreement dated 12th August 1999 and executed by the two parties and witnesses, the appellant acknowledged receipt of the money and that the balance was to be paid in instalments as stated therein. The court notes that the appellant in his defence and evidence put forth general denials of the respondent's claim. He alluded to a sale agreement between the parties but denied signing the same and that his signature was forged. He denied receiving the Kshs.100,000/= and Kshs.42,300/= paid to his daughter through his express instructions. The trial court upon analysis of the evidence made a finding that the agreement dated 12th August 1999 was indeed executed by the appellant and the Respondent and that the appellant received the money, but failed to transfer the plot into the respondent's name by failure to apply and obtain the Land Control Board consent to transfer and for that reason the sale aborted.

9. The trial court further found that both parties were in breach of the contract of sale as it was not proved that the respondent paid the full purchase price and the appellant failed to obtain the Land Control Board consent to transfer the plot to the respondent.

10. This court upon analysis of the evidence finds that, in answer to issue Number 1, that indeed there was a sale agreement though the appellant denied its existence. The fact that he acknowledged an agreement for sale at purchase price of Kshs.250,000/= is sufficient inference that there existed a sale agreement between the parties for the sale of the subject plot, despite the disparity in the purchase price.

The Respondent's witnesses confirmed that the appellant received Kshs.100,000/=. Other than a general denial that he did not receive the money, circumstantial evidence abide that the money was indeed received. It was further proved that a sum of Kshs.42,3000/= was paid to the appellant's daughter upon his instructions.

11. **Law of Contract Section 3(3)** states:

> ***"No suit shall be brought upon a contract for the disposition of an interest in land unless:***
>
> ***(a) the contract upon which the suit is founded***
>
> ***(i) is in writing***
>
> ***(ii) is signed by all the parties thereto.***
>
> ***(iii) The signature of each party has been attested by a witness who is present when the contract was signed by such party."***

12. It is alluded by the appellant that the sale agreement dated 12th August 1999 was not witnessed. I have seen a copy of the said agreement. It is signed by the parties and duly witnessed. The appellant denied signing the same. It is alleged that the dates were altered. It was therefore upon him to call evidence to prove that the signature appended thereto as his was forged. He did not do so. His allegation then remain as such.

It is trite law that he who alleges must prove – See **Section 107, 108** and **109** of the **Evidence Act.**

Section 70 thereof states:

> ***"If a document is alleged to be signed or to have been written wholly or in part by any person the signature or the handwriting or so much of the document is alleged as is alleged to be in that person's handwriting must be proved to be in his handwriting."***

The burden of proof of the allegation of forgery by the appellant, lies not with the respondent as submitted by the appellant, but with the appellant himself as provided under the Evidence Act.

Having made the above observations, the court makes a findings in respect of issue number 2 that the appellant received the sum of Kshs.100,000/= from the respondent.

13. The sale agreement dated 12th August 1999 was to the effect that the appellant would process the Title Deed upon final payment of the purchase price being made. This did not happen as the appellant chased away the respondent from the said plot and reported him to the police when he went to fence the same claiming that he had not authorised him to fence the same. The circumstances are evident that the sale aborted and could not be concluded.

The obvious thing then, was that the appellant had to refund the money received. Just as the trial Magistrate found, no evidence was tendered as to whether the respondent paid the balance of the purchase price to the appellant, a finding that led the trial court to direct that each party pays its costs of the case.

14. This court comes to the same finding that no evidence was led to answer that question. That answers issues No. 3 as framed. As the sale aborted by the actions and/or in action of either of the two parties, the most justifiable conclusion would be that the money received by the appellant ought to be repaid back to the respondent with interest. That would place both parties at equal status as at the time both voluntarily entered into the sale agreement.

15. The appellant submits that the trial Magistrate was wrong to hold that the law applicable in the contract and particularly on the agreement dated 12th August 1999 is the law then applicable where it was not mandatory to put into writing a contract for sale of land as envisaged in **Section 3(3) of the Law of Contract Act.**

Section 3(3) of the **Law of Contract Act** came into force on the 18th January 1991 by virtue of **Act No. 21 of 1990,** and the amendment came into force on the 1st June 2003 long after the parties entered into the sale agreement.

I agree with learned Counsel that the applicable law as at the date of the agreement was as stated in **Section 3(3)** – quoted above. The trial court's finding on that was therefore wrong. This did not however change the fact that the appellant having received money, and the sale transaction having aborted, he was under a duty and obligation to refund the same. He cannot have his cake and keep it. He ought to do the honourable thing by complying with the trial court's judgment which this court finds was based on sound legal and factual findings. The court finds that the Respondent had proved his case on a balance of probability, the required standard.

That standard means a win however narrow. A draw is not enough. If the probabilities are equal, it is not a win.

When the court is unable to decide one way or the other as to which evidence to accept, and when the explanations are equally convincing, the party bearing the burden of proof will loose. See **Ignatious Makau Mutisya -vs- Reuben Musyoki Muli (2015)e KLR,** cited in **Court of Appeal Civil Appeal No. 3 of 2008(2015 e KLR Tadis Travel & Tours Ltd -vs- Astral Aviation Limited.**

16. For the above reasons, the court finds that the evidence adduced by the respondent and his witnesses was sufficient and that the respondent proved his case on a balance of probability.

Consequently, the appeal is found to be devoid of merit and is dismissed with no orders as to costs.

Dated, signed and delivered in open court this 26th day of May 2016.

JANET MULWA

JUDGE