



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 9 OF 2015**

**BEATRICE GATHIGIA NDIRANGU.....APPLICANT**

**VERSUS**

**RICHARD IRERI NATHAN**

**LAND REGISTRAR – EMBU.....RESPONDENT**

**RULING**

1. This is an appeal against the decree and judgement of the Senior Principal Magistrate, which awarded the appellant Kshs 21,000/- being interest on the principal sum of Kshs 50,000/- which was ordered refunded to the appellant on his counterclaim against the 1<sup>st</sup> respondent who was the original plaintiff. The judgement was delivered on 16<sup>th</sup> March 2015 by that court sitting at Embu. Each party was ordered to bear its own costs.
2. The evidence tendered in the trial court was that the appellant and the respondent entered into a sale agreement for the purchase of a half an acre of the respondent's land being parcel No. Gaturi/Weru/6383. The purchase price was Kshs 200,000/-. The appellant paid the respondent Kshs 50,000/- and a balance of Kshs 150,000/- remained. The evidence of the respondent (the original plaintiff) was that the appellant failed to pay the total purchase price and as a result he did not obtain the consent of the Land Control Board as mutually agreed.
3. According to the sale agreement which was put in evidence as exhibit 1, the respondent was required to obtain the consent of the Land Control Board by January 2005.
4. The evidence of the appellant was that she bought part of the suit land for Kshs 200,000/- and made an initial payment of Kshs 50,000/-. She testified that the balance was to be paid thereafter. She then paid the respondent Kshs 55,000/- which she did by giving that sum of money to Stephen Njoroge (DW 2), who testified as her witness. Stephen Njoroge (DW 2) was the surveyor who had been contracted by the respondent to subdivide the entire suit land. It was also her evidence that she cultivated maize, beans and planted 800 trees on the half acre plot which she bought from the respondent.
5. She also testified that the respondent failed to take her to the Land Control Board. Thereafter, he served upon the appellant a letter stopping her from developing the parcel of land that she had bought. Additionally, he instructed her to go and get a refund of Kshs 50,000/- through a banker's cheque. In this regard, the appellant put in evidence a letter from his advocate being exhibit D2 in support of her case. As a result, she demanded Kshs 55,000/- which she had paid to the respondent's surveyor (DW2) and Kshs 150,000/- for development that she had done on that land. Additionally, she also claimed damages for breach of contract together with costs and interest.

6. Finally, it was part of her evidence that there was an arbitration clause which bound both parties to seek arbitration in the event of any disputes between them. It is also her evidence that she had not paid the balance of the purchase price, because the respondent had not obtained the consent of the Land Control Board. The appellant also testified that she obeyed the instructions of the respondent, that the money was to be paid to him through the surveyor namely Stephen Njoroge (DW 2). It is this surveyor who showed her the portion of the land that she had bought.

7. Stephen Njoroge (DW 2) gave evidence in support of the appellant. It was his evidence that the respondent paid of Kshs 50,000/- to Stephen Njoroge, being part payment of the total purchase price of Kshs 200,000/-. It also was his evidence that the balance of the purchase price in the sum of Kshs 150,000/- was to be paid after the consent of the Land Control Board had been obtained. Furthermore, it was also his evidence that he received Kshs 55,000/- from the appellant on behalf of the respondent in respect of which he acknowledged receipt as evidenced by exhibit D1. DW 2 then proceeded to put beacons on the respondent's 21 parcels of land, one of which belonged to the appellant. Finally it was also his evidence that he was to be paid Kshs 162,000/- for his services.

8. There was evidence from Fredrick Ngugi (DW 3), who similarly bought 1 acre from the respondent in the sum of Kshs 100,000/- and he paid the respondent through his surveyor (DW 2).

9. The appellant has raised 7 grounds in his memorandum of appeal to this court. I will start with ground 3 of the memorandum of appeal. In ground 3, the appellant has faulted the trial court both in law and fact in failing to find that it is the first respondent who breached the contract and not the appellant. I find that the evidence of the appellant and the surveyor (Stephen Njoroge) that it was the respondent who breached the agreement by failing to obtain the consent of the Land Control Board. The evidence of his two witnesses (DW 1 and DW 2) was also credible. It should have been believed because their evidence was cogent and consistent. In this regard, the evidence of the respondent was that the appellant defaulted in paying the balance of the purchase price and that is what forced him to revoke the purchase agreement. As a result, he instructed the respondent to stop development on the suit land and then proceeded to hand to her a banker's cheque. In the circumstances, this ground of appeal succeeds and I hereby allow it.

10. In ground 4, the appellant has faulted the trial court both in law and fact for failing to find that the 1<sup>st</sup> respondent had also breached the contract by filing the instant suit in court instead of referring the dispute to arbitration as mutually agreed. In terms of the law of arbitration and the agreement, the parties were bound first to refer the dispute to arbitration before filing the case in court. I find that the respondent failed to do so and was therefore in breach of the arbitration clause as mutually agreed. This ground of appeal also succeeds and I allow it.

11. In ground 5, the appellant has faulted the trial court for failing to find that the appellant had proved payment of Ksh 55,000/-, which had been paid to the respondent by the appellant. In this regard, I find that there was ample evidence to support the payment of Ksh 55,000/- to the respondent through Stephen Njoroge (DW 2), the surveyor. There is also supporting evidence from Fredrick Ngugi (DW 3) that the respondent was being paid money through Stephen Njoroge. This was the *modus operandi* in respect of payments to the respondent. In the circumstances, I find that there is ample evidence that the 1<sup>st</sup> respondent was paid Kshs 55,000/- by the appellant. I therefore find that this ground of appeal succeeds and I therefor allow it.

12. In ground 6, the appellant has faulted the trial court for failing to find that the appellant had not done any development on the a half an acre parcel of land which she had bought. In this regard, I find that there was evidence that she had planted maize, beans and 800 trees but the appellant did not prove the monetary value of those 800 trees, maize and beans. This ground of appeal is hereby dismissed.

13. This is a first appeal. I am required as a first appeal court according to ***Peters v. Sunday Post Ltd (1958) EA 424*** to reassess the entire evidence that was tendered at trial and make my own independent findings based on that evidence. I am also required to defer to findings of fact as generally found by the trial court. I have done so and I have come to the conclusion that the appellant and his two witnesses were truthful witnesses. Their evidence is supported by documentary exhibits which was put in

evidence.

14. It therefore follows that the appeal of the appellant is hereby allowed and the judgement of the trial court is hereby set aside except for the order for the refund of Kshs 50,000/- which was ordered refunded to the appellant, which I hereby confirm. I further find that Kshs 55,000/- was paid to the respondent through Stephen Njoroge (DW 2). I therefore enter judgement for the appellant in the sum of Ksh 55,000/-. I dismiss the appellant's claim for Kshs 150,000/- being a claim for development which I find was not proved.

15. In the circumstances, I enter judgement for the appellant in the following sums of Kshs 50,000/- and Kshs 55,000/- totalling Shs 105,000.

16. In ground 7, the appellant has faulted the trial court for failing to find that costs follow the event in terms of section 27 of the Civil Procedure Act and was therefore not justified in refusing to award the costs of the suit to the appellant. I find that the appellant was entitled to the costs of the suit to the extent that she had succeeded in proving that she had paid Kshs 50,000/- being the first payment of the total purchase price of Kshs 200,000/-. There was no justification in refusing to award part of the costs to the appellant. I also find that the appellant's claim of Kshs 55,000/- was proved and therefore she is also entitled to costs on that regard.

17. In the circumstances, I enter judgement for the appellant in the sum of Ksh 105,000/- together with  $\frac{3}{4}$  of the costs of this appeal and interests at court rates from the date of this judgement.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 19<sup>th</sup> day of DECEMBER 2016**

In the presence of Mr Siro holding brief for Ms Fatuma and in the absence of the respondent

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**19.12.16**