



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 343 "A" OF 2004**

**SAMUEL WAMUTUTU WAIGANJO. .... APPELLANT**

**VERSUS**

**MRS ZOHRA BARAKA. .... 1<sup>ST</sup> DEFENDANT**

**MOHAMED BARAKA. .... 2<sup>ND</sup> DEFENDANT**

*(From the judgment of N A Owino Chief Magistrate in Nairobi Milimani CMCC No. 9933 of 2002)*

**J U D G M E N T**

The facts from which this appeal arises are as follows: -

One Samuel Gitonga, PW 2 in the suit proceedings at the lower court was a builder. He was employed by the defendants to build a house for them at Spring Valley, Nairobi. In the process he was instructed by the 1<sup>st</sup> Defendant Mrs. Zohra Baraka to look for affordable woodblocks to be used in the construction of their house as they could not afford new woodblocks.

In April 2002, Gitonga who had earlier build for the plaintiff, Samuel Wamutu Waiganjo knew that the Appellant/Plaintiff had such surplus and cheaper woodblocks for sale. Gitonga accordingly took Mrs. Zohra Baraka to the Appellant's house at Mulendili Road, to view and examine the woodblocks. In the presence of the Appellant's wife, Mrs. Zohra Baraka and Gitonga viewed and examined the woodblocks which they found to be alright and they liked them, a decision they communicated to the Appellant/Plaintiff's wife and later to the Plaintiff/Appellant himself.

About two months after the viewing which was in June, Mrs. Zohra Baraka invited the Appellant/Plaintiff to her office along Waiyaki way to negotiate the price. The two agreed on a price of Ksh.15/- per one wood block.

On July 27<sup>th</sup> 2002, Mrs. Zohra Baraka sent his builder Samuel Gitonga to go to the house of the Appellant and collect the woodblocks as earlier agreed. She wanted 34,324 woodblocks. Samuel Gitonga, on Mrs. Zohra's instructions and at her cost, went and collected the 34,324 woodblocks from the Appellant. What Mrs. Zohra did not say to the Appellant but is in evidence, is that she herself wanted only 20,000 woodblocks for her house and 14,324 woodblocks for her friend, One Damaris. Mrs. Zohra duly signed two delivery notes dated the 27<sup>th</sup> July, 2002.

A few days after delivery of the woodblocks at Mrs. Zohra Baraka's house and also at Damaris house, the Apepllant sent two invoices to Mrs. Zohra Baraka for Ksh.300,645/- and Ksh.214,200/-. She paid only Ksh.1000/- apparently on the basis that she did not at the time have funds as she expected loan funds.

Several months passed and in November, 2002 by a demand letter dated 6<sup>th</sup> November, 2002, the Appellant threatened a court action to recover the contract funds.

Same facts are however, in dispute between the two sides. The 1<sup>st</sup> Defendant/Respondent admits in evidence that she visited the Appellant house, examined the woodblocks and liked them before inviting the Appellant to her office to negotiate price. She admitted that the two agreed on the price of Ksh.15/- per woodblock which she had examined and liked. She also admitted that she ordered Samuel Gitonga PW 2, to collect the 34,324 wood blocks which were collected and down loaded at her building site as per her instructions on Samuel Gitonga. What she stated in evidence however, is that she was not at the building site where the wood blocks were deposited at the time when Gitonga delivered the blocks there. She further asserted that she did not therefore, inspect and accept the blocks when they were delivered on 27<sup>th</sup> July, 2002. It was her further evidence that when she later visited her house under construction and saw the wood blocks, at the time in company of her husband Mr. Mohamed Baraka, her husband rejected them as substandard. It was then that Mrs. Zohra, according to her evidence, instructed Mr. Samuel Gitonga to return the blocks to the Appellant but Gitonga did not return the woodblocks which therefore, remained in the 1<sup>st</sup> Defendant's premises until the time the hearing took place.

Samuel Gitonga testified in this case for the plaintiff. He stated that after the price for the wood blocks was agreed upon, he on instructions from Mrs. Zohra Baraka, went to the Plaintiff's house at Karen on 27<sup>th</sup> July, 2002, collected 34324 wood blocks and delivered 20,000 of them at Mr. and Mrs. Zohra Baraka's at Spring Valley and the rest at one Damaris house at Eastleigh. He further testified that Mrs. Zohra Baraka did not at any relevant time reject the wood blocks as not good or as substandard. He testified on the contrary, that he had used the wood blocks from the Plaintiff's block elsewhere before the Baraka's took delivery of the blocks in question and that the wood blocks in question were good.

Upon the above facts the honourable trial magistrate dismissed the Plaintiff's claim of Kenya Shillings Five Hundred and Thirteen Thousand Eight Hundred and Forty Five (Ksh.513,845/-) together with the claimed interests and costs. She found that the wood blocks were delivered at the Defendant's construction site in their absence as the Defendant had travelled to their original country home at the material time. She further found that when the Barakas' visited the building site after returning to Nairobi, they did not like the wood blocks that had been delivered as a result of which they rejected them and asked their builder Samuel Gitonga to return the wood blocks. That they gave Gitonga Ksh.1000/- to facilitate the return of the blocks.

The trial court also found that the 2<sup>nd</sup> Defendant, Mohamed Baraka was not privy to the contract between his wife Zohra BARaka and the Plaintiff, Samuel Wamutu Waiganjo. The court also found that the wood blocks were to be delivered and accepted before payment would be due. She found that the wood blocks were accordingly not accepted up to and on delivery and were actually rejected on inspection at site. The court finally concluded accordingly, that as between the parties only a desire or agreement to purchase existed. That the said agreement did not pass or mature into an enforceable legal contract and that the mere delivery of wood blocks at the 1<sup>st</sup> Defendant's site did not pass the property in them to the Defendants nor qualify the agreement into a legal contract. The honourable trial magistrate accordingly dismissed the Plaintiff's claim and provoked him to file this appeal.

The Memorandum of appeal raises 17 grounds of appeal. Analysis of the grounds would, in the view of the court, tend to show that they are repetitive and therefore, totally unnecessary and contrary Order 42 Rule 1(2) of the civil Procedure Rules. The rule provides that a memorandum of appeal shall set forth concisely and under distinct heads the ground of objection to the decree or order appealed against without argument or narrative.

In the view of the court the first ground of appeal that

***“The learned magistrate erred in law in finding that what existed between the Plaintiff and 1<sup>st</sup> Defendant was a desire or agreement to purchase the wood blocks from the Plaintiff.”***

was adequate to authorize the court to review the whole evidence and come to a final complete decision as to whether the conduct of the plaintiff and Defendants, especially the 1<sup>st</sup> Defendant amounted to a legal contract.

I have carefully perused the pleadings and the supporting evidence from both sides. I have also considered the manner the trial magistrate used the evidence to come to the conclusions she reached. It is clear and there is evidence and there are admissions on the record, that the 1<sup>st</sup> and not the 2<sup>nd</sup> Defendant/Respondent, was the actual party whose conduct was vital in the issues arising in this case.

The evidence shows that Mrs. Zohra Baraka wanted cheaper wood blocks to complete their house. She asked PW 2, Samuel Gitonga their builder to source for such less expensive wood blocks. Gitonga introduced her to the Plaintiff, Samuel Wamutu Waiganjo. In April 2002 they visited the house of Waiganjo and viewed the wood blocks in the presence of Waiganjo's wife. Mrs. Zohra Baraka being encouraged by her builder Gitonga, established the blocks to be good. She liked them. In June 2002 she invited the plaintiff to her office on Waiyaki road and there they agreed on the price of a wood block at Ksh.15/-. On July, 27<sup>th</sup> 2002, Mrs. Zohra sent her builder to collect 34,324 wood blocks, 20,000 for herself and the balance 14324 for her friend, One Damaris of Eastleigh. She hired a vehicle to be used by Gitonga to collect the wood blocks. Gitonga collected the blocks and delivered 20,000 at Mrs. Zohra's house and the rest at Damaris house at Eastleigh.

On delivery of the blocks, Mrs. Zohra duly signed the two delivery notes being carried by Gitonga to confirm proper and safe delivery of the wood blocks. Two days later, on 29<sup>th</sup> July, 2002 the plaintiff served Mrs. Zohra with two invoices for Ksh.300,645 and Ksh.214,200/- for the two batches of the wood blocks delivered to her and Damaris. That is when for the first time trouble started. Mrs. Zohra Baraka could not settle the invoices on the alleged ground that she did not at that moment have funds but was found from form a loan applied for.

This court finds that Mrs. Zohra Baraka admitted the above facts up to and inclusive of being served with the invoices. She admitted under cross-examination that her signing of the delivery notes after earlier viewing the wood blocks and liking them, amounted to acceptance of the goods.

From the evidence on record, it is clear that Mr. Baraka was not present when his wife Zohra went to view and find the wood blocks good. There is no evidence that he took part in instructing their builder, Gitonga to go and collect the wood blocks on 27<sup>th</sup> July, 2002 after she negotiated the price in her office in June, 2002. His appearance in the contract came when he apparently visited the building site and saw the blocks and did not like them, a fact he apparently expressed out to his wife. There is no evidence on record as to when the visit to the site was made.

It is clear to the court however, that the contract was concluded when Mrs. Zohra Baraka signed the delivery notes on 27<sup>th</sup> July, 2002. She had by then seen the wood blocks and liked them. She had herself hired a vehicle personally or through her builder, Gitonga and had collected the wood blocks she had herself liked and satisfied good and agreed on price. Indeed she herself admits in her evidence that it was not herself but her husband who rejected the wood blocks as substandard much later after she had already signed the delivery notes and thus fully accepted the wood blocks and the property in them.

Furthermore, there is no acceptable evidence on the record that the respondents rejected the wood blocks although such evidence could still be too late to make a difference. The 1<sup>st</sup> Respondent, Mrs. Zohra Baraka, failed to return the blocks to the Appellant immediately she allegedly found that they were allegedly substandard. This should have been so since she is the one who went to collect the wood blocks from the Appellants house. It could have been unreasonable for her to expect the Appellant to be the one to go and collect the blocks when he never delivered them in the first place. In any case Mrs. Zohra admits that it was their builder who did not return the blocks but fails to explain why she did not herself return them.

As to the conclusions reached by the trial magistrate, some of them are totally unsupported by the

evidence on the record. For example, there is no evidence that the Barakas were away at the country side home when delivery of the wood blocks was made. There is no evidence also that the wood blocks were to be delivered and accepted before a legal contract which would attract payment, would be reached. The arrangement of actions in this case was that after viewing and accepting the wood blocks at the home of the seller, the purchaser took delivery at the house of the seller although she signed the delivery notes later on the same being presented by Gitonga who clearly was their agent. The conclusion that Gitonga was a mediator was wrong. The 1<sup>st</sup> Respondent admitted that he was their builder and the agent who was sent by the 1<sup>st</sup> Respondent to collect the wood blocks for them.

This court is aware that as an appellate court it should not easily interfere with conclusions of fact reached by the trial court. However, in this case the conclusions reached by the trial magistrate are not only glaringly wrong and contrary to the evidence on record, but also absurd and contrary to reason. The major facts are further admitted by the 1<sup>st</sup> respondent.

In the result, this court finds that this appeal has full merit. The appeal is allowed. The judgment of the lower court dismissing the plaintiff's claim is hereby set aside. A judgment for Ksh.513,835/- for the plaintiff is hereby entered against the 1<sup>st</sup> Defendant only with bank interests as prayed for from the date of filing the suit until full settlement. Costs are to the Appellant, here and below. Orders accordingly.

Dated and delivered at Nairobi this 17th day of February, 2014.

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**D A ONYANCHA**

**JUDGE**