



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Appeal 103 of 2007**

**HERMAN A. ATSIANJI ..... APPELLANT**

**V E R S U S**

**PAUL M. KARANJA ..... RESPONDENT**

***(Appeal against the decision of [MR. B. M. NZAKYO, R.M.] dated 23.7.2007 in the Chief Magistrate's Court at Kakamega in Civil Case No. 35 of 2004)***

**JUDGMENT**

The appellant sued the respondent in Kakamega CMCC 35 of 2004 claiming KShs.18,000/= plus interest. The claim was dismissed leading to the filing of this appeal. The grounds of appeal are that the trial court failed to appreciate the appellant's evidence before the court, that the plaintiff proved his case to the required standards, that the trial court did not analyse the appellant's credible evidence and exhibits and that the appellant's submissions were not considered.

Parties agreed to proceed by way of written submissions and both parties complied. The appellant submitted that he gave the respondent KShs.18,000/= purposes of buying for him a heifer in-calf. The agreement was made in writing but no heifer in-calf was given to the appellant. PW2, the appellant's wife witnessed the agreement. The respondent alleged to have refunded the money but that allegation was not proved. KShs.15,000/= was paid to the court brokers but that amount only covered their lawful fees.

On his part, the respondent submit that he did prove on a balance of probabilities that he had fully settled his claim. He refunded a sum of KShs.8,000/= through PW2 and paid KShs.15,000/= through the auctioneers making a total payment of KShs.23,000/=. The payment of KShs.8,000/= was witnessed by DW2 and DW3.

The record of the trial court show that two witnesses testified for the appellant while three testified for the respondent. the appellant's evidence was that on 8.1.2003 he gave KShs.18,000/= to the respondent to buy him a heifer cow. The agreement was reduced into writing and was produced as an exhibit. He gave notice of intention to sue on 2.9.2003 and no payment was made. He knew the defendant as a cattle merchant. **PW3 VARISH OMBUNI ISAVA** is the appellant's wife. She signed the agreement of 8.1.2003 as a witness. She denied that she went to the respondent's home and received KShs.8,000/=.

On his part, the respondent testified that it was time that he entered into the agreement and received the sum of KShs.18,000/=. However, he bought the cow for KShs.22,000/= and asked the appellant for the difference of KShs.4,000/=. The appellant did not have the money and told him to sell off the cow and

buy him another one for KShs.15,000/=. He sold the cow and before he bought the second cow, the appellant's wife went to his house and took KShs.8,000/= so that they could sort out a problem. The appellant's wife was brought to his house by DW2 on a boda boda and DW3 witnessed the payment. Auctioneers went to his house and he paid them KShs.15,000/=.

**DW2, JAMES MWANJE SHIMWENYI**, testified that he knew both parties and on one occasion he took PW2 to the respondent's house and she was paid KShs.8,000/=. The respondent had told him that he had received KShs.18,000/= from the appellant. He took PW2 on a motor bike to the respondent's house and took her back. He knows PW2 by appearance. **DW3 KEFA SANGA's** evidence is that he was present at the respondent's house when the sum of KShs.8,000/= was refunded. According to DW3, the refund was made on 22.1.2003 and paid to PW2 at about 10.00a.m.

The trial court found that the respondent paid KShs.8,000/= to PW2 and KShs.15,000/= to the auctioneers. That amount satisfied the entire claim and the court dismissed the suit with costs.

The trial court framed two issues in its judgment. Whether there was a legal binding agreement and whether there was any breach of the contract by the defendant. The trial court found that there was a contract whereby the respondent was to buy the cow and he was paid KShs.18,000/=. The court further noted that the contract was uncertain and depended on other oral arrangements. The cost of the cow depended on market prices and concluded that the contract was frustrated by the change in market price.

I have seen the original agreement dated 8.1.2003 written in Kiswahili. The agreement states as follows:-

"Mimi Paul M. Karanja nimepokea Shs.18,000/= kutoka kwa Mr. Herman A. Atsianji ikiwa malipo ya ng'ombe (Heifer in calve) ambaye nimletee baadaye."

Mwenye kupokea	-	9707698
Mwenye kutoa	-	ID NO.5281357
Shahidi	-	Phanice ID NO. 5281357

The above agreement shows that the respondent was paid KShs.18,000/= by the appellant and he was to deliver to him a cow. The respondent's defence is that the price of the cow went up and he was to be paid the difference of the extra KShs.4,000/= but the appellant had no money. He paid KShs.8,000/= to the appellant's wife.

From the evidence on record, I do find that the respondent was paid the sum of KShs.18,000/= by the appellant. According to DW3, the refund of KShs.8,000/= was made on 22.1.2003. The main question is then why did the respondent keep quiet from 22.1.2003 until 22.5.2004 when the auctioneers went to his house? This is a period of over one year. The demand to pay the money was made on 2.9.2003 but the respondent claimed to have received the demand letter. The respondent did not testify that he tried to give the appellant the balance of KShs.10,000/= but he refused. He sold the cow he had bought for KShs.22,000/=. Why then didn't he refund the balance?

From the evidence on record, I do find that the trial court took a wrong direction by dismissing the appellant's suit. There was no written proof that the respondent had bought the cow for KShs.22,000/=. There was no frustration of the agreement. Being a cattle merchant, the respondent knew that he could get the cow for the amount of KShs.18,000/=. Why then didn't the respondent procure another cow for the period of over one year. I do also find that there was no refund of KShs.8,000/= paid to PW2. The initial agreement was made in writing and any other payment was to be in writing. It is the word of PW2 against that of the respondent and his witness. Nothing stopped the respondent from causing PW2 to sign a document acknowledging the receipt of KShs.8,000/=.

By the time the sum of KShs.15,000/= was being paid to the auctioneers, the appellant had already incurred expenses in form of court filing fees, process server's fees and Advocate fees. The trial court was

wrong in concluding that the alleged sum of KShs.23,000/= satisfied the debt without taking into account the fact that the matter was now in court and the appellant had incurred expenses. The warrant issued by the court on 26.4.2004 was for KShs.40,450/=. That amount excluded the auctioneers fees. Even the alleged sum of KShs.23,000/= could not have satisfied the amount in the attachment warrants. The appellant was right to file the suit because, even going by the respondent's evidence, a sum of KShs.10,000/= was still due from the respondent.

This appeal was filed on 13.8.2007. It has taken over five years for a claim of KShs.18,000/= to be settled in court. the initial CMCC No.35 of 2004 was filed on 30.1.2004, that makes it eight years. If the court were to allow interest to accrue to any winning party, that would be unfair to the losing party as the delay was not caused by any of the parties.

In the end, I do find that the appeal is merited and the same is allowed. The sum of KShs.15,000/= shall be treated as the auctioneers fees. The respondent to pay the appellant the sum of KShs.40,450/= plus the disbursements incurred in filing this appeal. In essence, the appellant shall have the costs before the trial court but each party shall meet his own costs of this appeal. The above amount shall attract interest after the delivery of this judgment.

*Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of February, 2013*

**SAID J. CHITEMBWE**  
**J U D G E**