



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 102 of 2009

PAULINE NYAWIRA NGONGU.....APPELLANT

VERSUS

DAMARIS KAGIO MWANGI.....RESPONDENT

*(Being an Appeal from the Judgment of A.K. ITHUKU Senior Resident Magistrate Kerugoya in SRM Civil Case No. 47 of 2006 on 23/6/2009)*

### J U D G M E N T

PAULINE NYAWIRA NGONGU “the appellant” was the defendant while Damaris Kagio Mwangi “the respondent” was the plaintiff in Kerugoya SPMCC No. 47/2006. The matter proceeded to full hearing and judgment was entered in favour of the respondent. The appellant was aggrieved and has appealed against the judgment citing the following grounds:-

1. *The learned Magistrate erred in law and in fact in accepting and relying on agreement dated 28/8/2005 which the appellant had not signed and as such it was not binding on her.*
2. *The learned Magistrate erred in law and in fact in failure to consider that the claim was contradictory as respondent in the plaint was claiming Kshs.160,500/= while the said letter contract is demanding Kshs.150,000/= and was also demanding interest at the rate of 240% per year then reducing it to 12% p.m.*
3. *The learned Magistrate erred in law and in fact in failure to consider that since this was failed land sale transaction after 6 months the respondent could only get refund of consideration if any without interest, and the plaintiff is still illegally retaining respondent land title.*
4. *The learned Magistrate erred in law and in fact in failure to consider that appellant had proved that she had not received the money demanded.*
5. *The learned Magistrate erred in law and in fact in failure to consider that the respondent was operating illegal money rendering scheme charging immoral interest of Kshs.240% p.a. and as such he cannot be assisted by Court.*
6. *The learned Magistrate erred in law and in fact in failure to consider that if 1st appellant had borrowed any money she had borrowed 38,000/= and had refunded all of it.*
7. *The learned Magistrate erred in law and in fact in failure to consider the fact that respondent had admitted that appellant had refunded all her money.*

8. ***The learned Magistrate erred in law and in fact in failure to consider the fact that the respondent coerced appellant to sign invalid agreement.***
9. ***The learned Magistrate erred in law and in fact in failure to consider the weight of evidence which was in appellant's favour.***

Both counsels agreed to file written submissions on the appeal and they did so. Mr. P.N. Mugo for the appellant has submitted that the agreement dated EXB1 refers to transfer of land for Shs.150,000/= and not Shs.160,500/=. He submits that the respondent and another were illegally lending money and charging exorbitant interests. He has extensively referred to HCCA NO. 103/09.

Mr. Munene has submitted that the grounds of appeal have not been established. And that Mr. Mugo P.N. ought not to have been talking of HCCA 103/09.

This being a first appeal Court, it must review the evidence adduced in the Court below. Ref. ***MANASES KURIA & OTHERS VS NJOROGE CIVIL APPEAL NO. 153/1993 – COURT OF APPEAL NAIROBI.***

The respondent moved the Court vide a plaint dated 23/2/2006 claiming Shs.160,500/= with interest at 12% per annum from 28/8/2005. The claim she said was based on money borrowed by the appellant. The appellant filed in a defence dated 5/4/2006 denying the claim. She further pleaded fraud and illegality by the respondent and outlined the particulars in paragraph 3 of the Defence. She asked the Court to dismiss the respondent's suit.

The respondent gave evidence to the effect that on 28/8/2005 at 3 p.m. she lent the appellant Shs.160,500/= for fees. They entered into an agreement (PEXB1). She was to pay the money within a week. The money was not refunded. The appellant had agreed to transfer land to her and Jane Wanjira which she did not.

Demand letters were written and there were responses. (EXB2-4). The appellant had paid money previously borrowed. She did not call any witness. The appellant in her evidence admitted having borrowed money to the sum of Shs.60,000/= from the respondent. She paid a total of Shs.13,744/=. She offered her land for sale on 21/4/2005. In August she was called to the respondent's house. The husband was there with Jane Wanjira and Joseph Mwangi. She was forced to sign the agreement EXB1 showing the money accrued up to then. She denied borrowing Shs.170,000/=. She produced an agreement of 28/8/2005 (DEXB1). The agreement of 28/8/2005 (EXB1) is in her handwriting. In re-examination she stated that the respondent was a money lender and charged an interest of 20%. Her witness DW1 stated she had only witnessed the payment of Shs.50,000/=. She witnessed the agreement (EXB1) and also signed the same but did not know whether money was paid.

I have carefully considered the grounds of appeal and submissions filed. In civil cases where pleadings are filed, parties are bound by their pleadings. And he who alleges a fact must prove it. The respondent's claim was based on an agreement dated 28/8/2005. It was produced by the respondent as (EXB1). This document though filed in the original record does not form part of the record of appeal. The said document was written and also signed by the appellant – page 9 line 14

***“It is in my handwriting”***

Page 9 line 18

***“I signed the agreement”.***

And what she signed was that she was borrowing Shs.165,500/=. The document was signed by the lender and borrower and a witness (DW1). It does not refer to any prior agreement. Ground 1-3 it cannot therefore stand.

It was the appellant's duty to prove that she had not received the money. She failed to do so when she admitted having written and signed the respondent's document EXB1. It speaks for itself. Her evidence was that she had borrowed Shs.40,000 + 20,000/= making it Shs.60,000/=. She had paid

13,744/=. Though she said the balance was 21,000/=. correct mathematics would leave a balance of Shs.46,256/=. It was her duty to adduce evidence of any payments made of this money in the agreement dated 28/8/2005 (EXB1).

Coercion is a criminal offence and if she was so coerced into writing any documents she should have reported to the police. Her friend Leah (DW2) did not notice any coercion. It is also shown that the appellant and PW2 are teachers and one cannot expect them to sign documents just for the sake of it.

These two parties entered into an agreement with their eyes wide open. They are therefore bound by the terms of their agreement. And on the allegations of the Respondent being an illegal money lender there was no such evidence adduced. The agreements produced herein showed a charge of interest at 20% per annum and not 240% interest. Besides showing the interest rate there was nothing else said about it. This was her case. She had to substantiate her allegations. That's why the learned trial Magistrate indicated that was an issue that was neither here nor there.

Finally she never filed a counter claim demanding for the return of her title deed. The court could not give her what she had not asked for. I therefore find that the learned trial Magistrate analyzed the evidence well and arrived at the correct decision. I will not interfere with the judgment.

I disallow the appeal. Costs to respondent.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 19<sup>TH</sup> DAY OF MARCH 2013.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-**

**Mr. P.N. Mugo for Appellant**

**Njue CC**