REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 107 of 2001

JOSEPH WAMBUA NZIOKA …….. APPELLANT

VERSUS

HENRY KAVITA MUTISO ……..……..……. RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate Hon S. Pareno (RM) in Machakos Principal Magistrate Case No. 459 of 1998 dated 9th

August 2001)

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(Before B. Thuranira Jaden J)

J U D G M E N T

By a plaint dated 7/7/1998, the Respondent **Henry Kavita Mutiso** sued the Appellant, **Joseph Wambua Nzioka** for a refund of Kshs.190,000/=. The Respondent's claim was that during the period between 16/5/1995 and April 1998, he paid a total of Kshs.190,000/= to the Appellant as part of the purchase price for a parcel of land. The Respondent did not get any land from the Appellant and demands made for the refund of the money were not met. This prompted the Respondent to file suit.

The claim was denied by the Appellant in his statement of defence. According to the defence, the Respondent and the Appellant had jointly contributed Kshs.314,000/= which was paid to the vendor. The Appellant denied that he had any obligation to refund any money to the Respondent who was at liberty to seek the refund from the seller.

After hearing the evidence, the trial magistrate entered judgment for the Respondent against the Appellant for the sum of Kshs.190,000/= plus interests and costs.

The Appellant was against the judgment and appealed to this court on the following grounds:-

1. The learned magistrate erred in law and fact in holding that the Appellant did not get the land he agreed to fetch for the Respondent.

2. The learned magistrate erred in law and facts in finding that the Respondent paid Sh.190,000/= to the Appellant whilst there was evidence to the effect that the sum of Kshs.190,000/= was equally contributed by both parties.

3. The learned magistrate erred in law and fact in his interpretation of the two agreements entered by the parties and dated 16/5/1995 and 1st July 1995 respectively as supplemental to each other.

4. The learned magistrate erred in law and fact in failing to find that the Appellant had performed his part of the agreement and therefore the Respondent interests was in the land they had purchased jointly with the Appellant and not the purchase price which had been paid to the owner of the land.

5. The learned magistrate erred in law and fact in awarding interests and particularly in calculating interests from the time of the agreement whilst interests runs from the time of the judgment.

6. The decision of the magistrate is against the weight of evidence."

The firm of **Paul Kisongoa** appeared for the Appellant while **Manthi Masika Advocates** appeared for the Respondent. The appeal was canvassed by way of written submissions which I have duly considered.

This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See* **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs Ali Mohamed Sholan (1955), 22 E.A.C.A. 270".

The Respondent, PW1 **Joseph Wambua Nzioka** described himself as a tailor. According to the Respondent, the Appellant borrowed Kshs.50,000/= from him for payment of school fees for the Appellant's child. The Respondent further testified that instead of being refunded the Kshs.50,000/=, he was to give the Appellant more money up to a total of Kshs.200,000/= then the Appellant would give him 10 acres of land from the 20 acres parcel of land the Appellant was buying in **Katheka-Kai** area. The Appellant and the Respondent subsequently signed an agreement on 16/5/95 wherein the Appellant acknowledged the receipt of a total of Kshs.190,000/= received from the Respondent.

The Respondent declined to take up the 10 acres of the land he was shown by the Appellant, describing the same as rocky. Further attempts to buy another parcel of 5 acres of land at Kshs.49,000/= per acre did not work out as the Appellant did not pay for the same. The Respondent testified that he was not refunded his money and neither did he get any land. During cross-examination, the Respondent stated that the agreement dated 16/5/95 was for 2.5 acres of land for Kshs.50,000/= subject to an agreement for the full purchase price once the land was identified.

Another agreement produced by the Respondent showed that on 1/7/1995 an agreement was entered between the Respondent and the Appellant to purchase 20 acre parcel of land from one **Nathan Kathuku Nthango** and Kshs.168,000/= had already been contributed for the said purchase. The balance was to be paid after the sale of a motor vehicle belonging to the Appellant with the Respondent and one **Isaac N. Mutiso** agreeing to contribute towards the carrying out of repair works for the said motor vehicle first. Although the name of **Isaac N. Mutiso** appears as one of the purchasers in the said agreement, he did not sign the agreement. One **Nathan Kathuku Nthango** who is reflected in the agreement as the seller did not sign the agreement either.

This agreement dated 1/7/1995 does not refer to the earlier agreement dated 16/5/95 which was between the Respondent and the Appellant without any third parties. The acknowledgement of payment of Kshs.190,000/= agreement by the 4/3/97 is signed by the Respondent and the Appellant only. The 4/3/1997 agreement is the last agreement the parties herein have referred to in their evidence. According to the evidence of the Respondent, he paid the Kshs.190,000/= in instalments and the same was not forwarded to the seller, **Nathan Kathuku.**

It also comes out from the evidence of the Respondent during cross-examination of the Respondent that the Appellant's motor vehicle was sold as per the agreement.

The Appellant in his evidence during the defence case stated that the agreement was for the purchase of 20 acres of land and the balance was to be paid after the sale of the motor vehicle. According to the Appellant the later agreement superceded the earlier agreement and Kshs.168,000/= was to be paid to the vendor together with the proceeds of the sale of the motor vehicle.

The Appellant contended that the Respondent contributed Kshs.57,000/= out of the Kshs.190,000/= total contributed by both parties, stating the even part of the Kshs.57,000 was paid by the Respondent directly to the vendor.

The Appellant who described himself as an accountant by profession conceded that there is no signature of the seller in the agreements and also conceded that the Respondent has not received any land from the seller. The Appellant further stated that he **"signed the agreement of Kshs.190,000/= to acknowledge".** It is not stated why he was acknowledging the sum of Kshs.190,000/= when his contention is that the Respondent in total paid Kshs.57,000/=.

From the Appellant's own evidence during cross-examination, he admitted that the Respondent did not get the land. Ground No. 1 of the appeal therefore has no basis.

The agreement for Kshs.190,000/= is signed by both the Respondent and the Appellant only. It states that **"from date 16/5/95 until today 4/3/97 all the money that has been given is Kshs.190,000."** The agreement does not state who gave out the money and who received the same but the agreement dated 16/5/95 for Kshs.50,000/= was from the Respondent to the Appellant. The entry for 16/5/95 to 4/3/97 is on the same piece of paper by the same two parties. The trial magistrate was therefore not wrong in arriving at the conclusion that the Kshs.190,000/= was the total amount of money that had changed hands between the same parties that is the Respondent and the Appellant. The agreement dated 1/7/95 cannot be said to supercede the agreement for the 4/ 3/97 which came later.

The agreement dated 1/7/95 does not state who contributed how much to come to the total of Kshs.168,999/= referred to therein. The amount is reflected as contributed **"towards the purchase of the land".** The said agreement does not say how the Kshs.168,000/= was actually handed over to the vendor. As stated earlier on, the vendor was not even a signatory to the agreement dated 1/3/1995. The vendor was not called by any of the parties to testify.

Although the 2nd agreement makes no mention of the 1st agreement, the 4/3/97 entry is an acknowledgement of the total Kshs.190,000/= received. The agreements between the Respondent and the appellant did not involve any of the sellers. There was no sale agreement with any of the vendors. It was also conceded by the Appellant that the Respondent did not get any land. Since the Respondent's agreement was with the Appellant, the Respondent can only claim his money from the Appellant. The Appellant's contention that he paid some of the money to the vendor was not proved as he did not call the alleged vendor.

The Respondent proved his case on a balance of probabilities. The trial magistrate was in my view right in entering judgment for the Respondent.

The judgment was for Kshs.190,000/= plus costs and interests. The ground of appeal that the trial

magistrate calculated interest from the time of agreement therefore has no basis.

The appeal has no merits. I dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **18th** day of **April** 2013.

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JUDGE