



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 191 OF 2010

ELIUD MUGO MBUNI.....APPELLANT

VERSUS

MICHAEL NJERU t/a SERAMIK ENTERPRISESRESPONDENT

(arising out of the judgment of Hon. I.K. Orengo

Resident Magistrate Murang'a in Civil suit No. 281 of 2006)

JUDGMENT

1. By a plaint dated 15th August 2006 the Respondent sued the Appellant in respect of sale of LR. MWIRUA/KAGIO /508 wherein it was agreed that the Respondent was entitled to any figure over and above Kshs. 110,000/- per acre being his commission thereon.
2. That the Respondent got a purchaser who paid Kshs. 140,000/- per acre making a total sum of Kshs. 560,000/- payable to the Appellant of which the Respondent was entitled to Kshs. 120,000/- as commission out of which the Appellant paid Kshs. 30,000/- leaving an outstanding balance of Kshs. 90,000/- which the Respondent claimed together with interest.
3. The Appellant filed a defence and counter claim dated 7th November 2006 in which the appellant stated that the Respondent introduced to him one Titus Mwangi as a prospective purchaser for Kshs. 140,000/- per acre but the same disappeared and that the said land was eventually sold to one Ruth Wanjiru.
4. On the counter claim the Appellant stated that the Respondent is liable to a refund to him Kshs. 30,000/- paid to him because he did not discharge his part of the agreement and claimed Kshs. 30,000/- with interest.
5. The Respondents application for summary judgment was dismissed by the trial court with cost on 26th October 2007 and the suit fixed for hearing and the trial magistrate agreed with the Respondent and entered judgment for the same for a sum of Ksh. 90,000/= being the balance due to the plaintiff for the job done.
6. Being aggrieved by the said judgment the Appellant filed this appeal and raised the following grounds of appeal.

1. That the learned magistrate erred in law and fact in making judgment against the weight of evidence.

2. That the learned magistrate erred in law and fact in finding that the appellant was not a truthful witness.

3. That the learned magistrate erred in law and fact in awarding the respondent Kshs. 90,000/- against the appellant.

4. That the learned magistrate erred in law and fact in failing to find that the respondent had not proved his case on a balance of probabilities.

5. That the learned magistrate erred in law and fact in failing to find that the appellant had proved his counter claim on a balance of probabilities.

7. He therefore prays that the appeal be allowed and the judgment made on 21st October 2009 be set aside and be substituted with an order dismissing the Respondents suit and allow the Appellants counter claim.
8. Directions were given that the appeal be determined by way of written submissions which have now been filed.

SUBMISSIONS

9. On behalf of the appellant it was submitted that the Appellant denied the allegations as contained in the plaint by filing a defence and counter claim dated 7th November 2006 to the extent that he had paid Ksh. 30,000/- as deposit to procure a serious purchaser and what was refundable if the Respondent did not get a suitable purchaser.
10. That since the Appellant later sold the property to another purchaser one Ruth Wanjiru Mwangi he is entitled to the refund.
11. It was submitted therefore that the trial magistrate erred in law in making judgment against weight of evidence since an actual agreement for sale was produced to confirm that the said was not sold to the person introduced by the Respondent and that it is only the Appellant who gave tangible evidence to prove the existence of a sale agreement and that the Respondent never produced any sale agreement.
12. It was therefore submitted that the Respondent did not prove his case on a balance of probabilities and that the Appellant had proved his counter claim on a balance of probabilities and therefore it would be unfair for the Respondent to enjoy the amount paid while the same was pegged on the performance of a certain act by himself which he failed to honour.
13. On behalf of the Respondent it was submitted that the Respondent was able to convince the trial court on the evidence before it and that there was no dispute that the Appellant sold the land to a person that had been sought for by the Respondent as exhibited by sale agreement dated 6th February 2006 and as per the instructions given and Kshs. 30,000/- paid to the Respondent six days after the sale agreement.
14. From the submissions however and the pleadings there are only three issues for determination.

a) Whether there was an agreement in respect of commission payable to the Respondent by the Appellant

b) What were the terms of the said agreement and

c) Whether the Respondent fulfilled the said terms and conditions.

15. This being a first appeal the court is entitled to reassess the evidence tendered before the trial court and to come to its own conclusion.
16. The Respondent testified as P.W.2 and stated that he was a business man at Sagana and on 12th November 2005 the Appellant instructed him to sell his land at Kshs. 110,000/- per acre and any money over and above 110,000/- would constitute his commission and in support thereof produced letter dated 12th November 2005 in which the Appellant promises to pay the said commission immediately he received the money from the buyer.
17. He testified that he found a buyer one Mwangi whom he introduced to the Appellant to buy the land at an agreed consideration of Kshs. 140,000/- per acre of which he was entitled to Kshs.

- 120,000/- as commission and that the Appellant paid only Kshs. 30,000/- leaving a balance thereof of Ksh. 90,000/- and that he issued the Appellant with a receipt No. 012 in respect of the Kshs. 30,000/-
18. Under cross examination he confirmed that Titus Mwangi bought the said land and that Ruth is the wife of the said Titus Mwangi.
19. The Appellant testified that he had agreed with the Respondent to get a purchaser and that he paid a deposit of Ksh. 30,000/- and that the Plaintiff brought Titus Mwangi but that he did not buy the land which was sold to Ruth Mwangi.
20. Under cross examination he testified the agreement between him and Ruth Wanjiru is dated 12th February 2006 the same date with the receipt for Kshs. 30,000/-.

DETERMINATION

21. From the evidence herein it is not in dispute that the Appellant had instructed the Respondent to obtain a buyer for his parcel of land at an agreed commission of any sum of money over and above Kshs. 110,000/- and it is not in dispute that the Respondent obtained one Titus Mwangi who was to buy the said land at an agreed consideration of Ksh. 140,000/- per acre.
22. It is also not in dispute that the Appellant paid the Respondent Ksh. 30,000/- which according to him was a deposit while according to the Respondent was part payment.
23. I have looked at the letter of instruction from the Appellant to the Respondent and note that there is no mention of deposit towards the work with the only clearly provision stated thereon being that the appellant would pay to the Respondent the said commission immediately upon receipt of the purchase price.
24. It is clear from the evidence on record that the Appellant paid the Respondent the sum of Ksh. 30,000/- on the same date with the sales agreement herein and therefore find as a fact that the payment was part payment towards the commission and not deposit as alleged by the Appellant which if it was should have been paid on 12th November 2005 the date of instruction.
25. I therefore find that the Respondent fulfilled his part of the contract and was therefore entitled to a sum of Ksh. 120,000/- as a commission from the Appellant and therefore find no fault with the trial courts judgment thereof.
26. The Appellants appeal herein lacks merit and is therefore dismissed with cost to the Respondent.

Dated and delivered at Nyeri This 25th day of July 2013.

J. WAKIAGA

JUDGE

Judgment read in open court in the presence of Mr. Ng'ang'a Advocate for Mr. Magee Advocate and in the absence of the Respondent's Advocate. The appellant has a right of appeal.

J. WAKIAGA

JUDGE