



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 177 OF 2009

1. NZUKA MUTUI

2. JEREMOTH KIMWELE MWASYA APPELLANTS

VERSUS

DANIEL MATI KASOMO RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate's Court at Mwingi of Hon H.M. Nyambergi SRM in Senior Resident Magistrate Case No. 61 of 2006 dated 30th September 2009)

(Before B. Thurairaja J)

J U D G M E N T

1. The Respondent **Daniel Mati Kasomo**, was the Plaintiff in the lower court. Through a plaint dated 18/4/2006, he prayed for judgment against the Appellants **Nzuka Mutui** and **Jeremoth Kimwele Mwasya** (Defendants 1 and 2) for the following reliefs:-
 - a. **An order nullifying, setting aside and/or uplifting any transfer of the suit property known as Plot No. 210, Tseikuru Market from the Plaintiff to either the 1st Defendant or to the 2nd Defendant or both.**
 - b. **The plot No. 210, Tseikuru Market be declared to remain the property of the Plaintiff.**
 - c. **Special Damages Kshs.123,400/=.**
 - d. **General Damages.**
 - e. **Costs of the suit.**
 - f. **Interest on (c) above from the date of filing suit until payment in full and on (d) from the date of judgment until payment in full.**
 - g. **Any other remedies this Honourable Court deems fit to order.**
2. The 1st and 2nd Defendant filed a statement of defence denying the claim and prayed that the Plaintiff's suit be dismissed.
3. In a judgment delivered on 30/9/2009, the lower court entered judgment for the Plaintiff against the Defendants jointly and severally in terms of prayers No. (a) (b) and (e) of the plaint and a sum of Kshs.52,800/= being rental income from the suit plot to be set off from the outstanding debt.

4. The Appellants were aggrieved by the said judgment and appealed to this court. The grounds of appeal can be summarized as follows:-
 - v. **The trial magistrate failed to appreciate the appellants' evidence.**
 - v. **The trial magistrate misdirected himself by holding that there was no valid agreement between the parties.**
 - v. **The trial magistrate erred in holding that the Respondent had leased to the Appellant Plot No. 210 Tseikuru Market.**
 - v. **The trial magistrate erred by holding that the signature on the transfer form for Plot No. 210 Tseikuru market was a forgery.**
 - vi. **Prayers not sought in the pleadings were granted.**
 - v. **The case was decided on a balance of probability.**
 - v. **The agreement between the parties was misinterpreted.**
 - v. **There was no evidence to prove any collection of rent payments by the Respondent.**
 - v. **The court considered the Respondent's evidence only.**
5. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings.
6. The Plaintiff, a resident of **Tseikuru Location** in **Mwingi District** testified as PW1. He described the 1st defendant as his cousin and the 2nd Defendant as a neighbour. The Plaintiff's case was that in the year 1997 he was allocated Plot No. 210 at **Tseikuru Market** (hereinafter the plot) by **Mwingi County Council**. He subsequently developed the plot and in June 2003 started running a butchery business at the premises. However, the business was not doing well and the Plaintiff approached the 1st Defendant for a friendly loan. The Plaintiff managed to obtain from the 1st Defendant a loan of Kshs.15,000/= at an interest of Kshs.4,300/= per month.
7. The Plaintiff's business failed to flourish and he left its management to his wife. The Plaintiff sought greener pastures in Nairobi where he managed to get employed as a barman. The 1st defendant who had only been paid interest for the first three months went to see the Plaintiff at his new place of work and demanded payment of the outstanding Kshs.43,000/=. The Plaintiff and the 1st defendant failed to agree on the figures. The Plaintiff offered the 1st Defendant one of his cows but the 1st Defendant refused to go for it. The 1st Defendant then drafted "**a note**" to the effect that the Plaintiff would surrender to him the plot if he failed to pay him in one month's time.
8. Efforts made by the Plaintiff's wife to pay the 1st Defendant Kshs.15,000/= in the presence of the area chief failed. In January 2005 further efforts were made to pay the 1st Defendant the whole sum of Kshs.43,000/= but he refused to accept the same and demanded more interest.
9. The Plaintiff however discovered that the 1st Defendant had sold the plot to the 2nd Defendant. The Plaintiff testified that the signatures on the transfer forms were a forgery and stated that he did not sign the same. The Plaintiff further testified that the 1st Defendant in the month of April 2004 took over the plot and started collecting rent from the tenant.
10. The case for the 1st Defendant is that the plot is currently registered in his name. The 1st Defendant testified that he gave the Plaintiff eleven (11) goats valued at Kshs.15,400/= which amount the Plaintiff was to refund in instalments of Kshs.3,000/= per month. The 1st Defendant later gave the Plaintiff an additional friendly loan of Kshs.5,000/=. The 1st Defendant's stand was that the Plaintiff owed him Kshs.43,400/= in total but the Plaintiff failed to repay the same. When the 1st Defendant got wind of the Plaintiff's relocation to **Nairobi**, he followed him there and demanded payment. The two ended up entering into an agreement that the Plaintiff would give the 1st Defendant the plot to clear the debt. The 1st Defendant later collected transfer forms from the County Council and forwarded the same to the Plaintiff who signed the same. The plot was thereafter transferred to the 1st Defendant. The Plaintiff then evicted the Plaintiff's tenant who was in the premises. The 1st Defendant thereafter sold the plot to the 2nd Defendant at Kshs.105,000/=. According to the 1st Defendant, he rebuffed attempts made by the Plaintiff's wife to pay him because the Plaintiff's wife wanted to give him Kshs.8,000/= only.
11. The 2nd Defendant in his evidence testified that he bought the plot from the 1st Defendant for

- Kshs.115,000/= in the year 2005. He demolished the house that he found there and came up with his own developments. He then started operating a butchery business at the plot. The 2nd Defendant further testified that he was aware of the transaction between the Plaintiff and the 1st Defendant regarding the exchange of the plot for the money owed. He further testified he confirmed with the County Council that the plot was registered in the name of the 1st Defendant.
12. There is no dispute that the Plaintiff owed the Defendant some money. There is also no dispute that attempts made by the Plaintiff to repay some of the money were not successful. It is also not in dispute that the Plaintiff and the 1st Defendant entered into an agreement for the Plaintiff to give the 1st Defendant the plot to clear the debt.
13. PW2 **Rhoda Kateki Mati** the Plaintiff's wife gave evidence that corroborated the Plaintiff's evidence regarding the loan, the failed business and the renting out of the premises before it was taken over by the 1st Defendant. PW2's evidence was that the total amount of money they owed the 1st Defendant together with accrued interest was Kshs.43,000/=. She further testified that her attempts in January 2004 to pay the 1st defendant Kshs.15,000/= were not successful. That further attempts to pay the 1st Defendant the Kshs.43,000/= in January 2005 failed because the 1st Defendant demanded further interest of Kshs.20,000/=.

According to PW2, the 1st Defendant sold the house to the 2nd Defendant who demolished the roof of the building he found there and re-modelled the building.

14. The evidence of the then area chief PW4 **Solomon Musili Mwinzi** corroborated the evidence of PW1 and PW2 on the attempts made in the year 2004 and 2005 to repay the 1st Defendant. However, according to the chief's evidence, by the time the attempts to pay the Kshs.43,000/= in the year 2005 were made, the 1st Defendant told him that he had already sold the plot.
15. The agreement signed by the Plaintiff and the 1st Defendant is dated 11/1/04. The Plaintiff admitted having signed the said agreement. There was no duress. According to the Plaintiff's evidence, he signed because he did not wish to create a scene as he was only two days old at his new job. The Plaintiff did not point out any acts committed by the 1st Defendant that indicate any form of duress. The evidence of the 1st Defendant and DW2, **Kilonzo Mwenzi** is that the Plaintiff signed the agreement voluntarily.
16. The said agreement (English translation) states as follows:-

"I Mati Kasomo I have agreed to pay Kovo Mutui my two houses and in front which are in Tseikuru Kasarani area. I have Kshs.43,400/= of Kovo Mutui ID 7713840."

The Plaintiff in his evidence explained what he understood the said agreement to mean when he testified as follows:

"He then drafted a note to the effect that I surrender to him my plot at Tseikuru Market. He then told me to sign The note had said that I had a one month grace period to pay the money or else the plot goes."

The Plaintiff's evidence left no doubt that he was giving up his plot if he failed to pay the Kshs. 43,400/=. The issue of a lease agreement did not arise.

The evidence of DW2 **Kilonzo Mwenzi** one of the witnesses named in the said agreement buttresses that position. According to DW2, the Plaintiff gave up the plot to clear the debt. DW2 stated as follows in his evidence:-

"The Plaintiff did not have any money but he was willing to give him his plot in exchange of money."

17. The agreement is dated 11/1/2004 and is signed by both the Plaintiff and the 1st Defendant and two witnesses. This was a valid contract for the sale of land as stipulated in the **Law of Contract**

Act Section 3 (3) which provides as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless –

- a. the contract upon which the suit is founded –
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

The agreement fulfilled all the above requirements.

- 18.The evidence adduced in court establishes that the Plaintiff owed the 1st Defendant money since the year 2003 and the agreement dated 11/1/2004 pegged the amount at Kshs.43,400/=. The said amount was the consideration for the plot.
- 19.Although the Plaintiff contended that he did not sign the transfer forms and alleged that the signatures on the same were forgeries, the Plaintiff did not call any expert evidence to prove that assertion. He who asserts must prove. The evidence of PW3 **Julius Kilonzi Mutua** an administrative officer from **Mwingi County** Council merely confirms that the plot was initially in the name of the Plaintiff before the transfer to the 1st Defendant was effected. Although the evidence of PW3 was that the parties normally sign the transfer form in the presence of their area councilor, the councilor was not called to testify to confirm that position.
- 20.With the foregoing, I hold that by the time the 1st Defendant purchased the plot and started paying rates for the same in the year 2005, the plot was no longer the Plaintiff’s property.
- 21.This court has come to the conclusion that the Plaintiff failed to prove his case on a balance of probability. The appeal therefore has merits and is allowed. Due to the peculiar circumstances of the case, each party to meet own costs in both the lower court and the High Court.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 26th day of September 2013.

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B. THURANIRA JADEN

JUDGE