



**Lengusuranga v Lenaiyara (Environment and Land Appeal  
14 of 2018) [2022] KEELC 2674 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2674 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL 14 OF 2018**

**YM ANGIMA, J**

**JULY 14, 2022**

**BETWEEN**

**EDWARD MOONGE LENGUSURANGA ..... APPELLANT**

**AND**

**JAMES LENAIYARA ..... RESPONDENT**

*(Appeal from Judgment of the Principal Magistrate Court by Hon.  
Richard K. Koech dated 9th day of October, 2018 in Maralal Law Courts)*

**JUDGMENT**

**Background**

1. This is an appeal against the judgment and decree of Hon. Richard K. Koech (PM) dated 09.10.2018 in Maralal PMCC No.10 of 2015 – James Lenaiyara –vs- Edward Moonge Lengusuranga. By the said judgment, the trial court allowed the Respondent’s suit seeking a refund of the purchase price of Kshs.500,000/= together with costs and interest thereon at court rates.

**B. Background**

2. The material on record shows that vide a plaint dated 07.11.2015, amended on 13.7.2016 and further amended on 05.05.2017 the Respondent sued the Appellant before the trial court seeking a refund of Kshs.500,000/= being the purchase price paid for a sale transaction involving the abortive sale of the Appellant’s Title No. Samburu/Poro ‘A’/189 (parcel 189). The Respondent also sought costs of the suit and interest at court rates from the date of judgment until payment in full.
3. The Respondent pleaded that vide an oral sale agreement made in 2006 or thereabouts the Appellant agreed to sell to him parcel 189 at an agreed consideration of Kshs.500,000/= out of which Kshs.150,000/= was to be paid in form of goats and sheep whereas the balance of Kshs.300,000/= was to be paid in cash. The Respondent pleaded that despite full pay the Appellant had failed to obtain the



consent of the Land Control Board (LCB) for the transaction hence it became impossible to finalize the transaction.

4. The Respondent further pleaded that when he demanded a refund of the purchase price the Appellant undertook to refund the same on several occasions including in 2012 but he did not keep his word hence the suit.
5. The Appellant filed a defence to the further amended plaint on 12.06.2017 in which he denied the Respondent's claim in its entirety. The Appellant denied ever selling parcel 189 to the Respondent at all and denied the existence of any sale agreement to that effect. The Appellant pleaded that the Respondent had no evidence to support his "adventurous" claim and that, in any event, the suit was time-barred under the Limitation of Actions Act(Cap.22). He consequently prayed for dismissal of the Respondent's claim with costs.
6. The material on record shows that upon a full hearing of the suit at which the parties tendered evidence in support of their respective cases, the trial court held that the Respondent had proved his case against the Appellant to the required standard. The court found and held that the Respondent had proved the existence of a sale agreement for parcel 189 between the parties, and that the Respondent was entitled to a refund of the purchase price since the transaction was rendered void for lack of consent of the LCB. The trial court consequently entered judgment for the Respondent as prayed in the further amended plaint and awarded him costs of the suit.

### **C. The grounds of appeal**

7. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 01.11.2018 raising the following twelve (12) grounds of appeal:
  - a. That the learned trial magistrate erred in law and fact in finding that the Respondent had paid an amount of Kshs.500,000/= as consideration for purchase of L.R. No.Samburu/Poro "A"/189.
  - b. That learned trial magistrate erred in law and fact in finding that the Respondent had delivered 50 goats and sheep to the Appellant while no sufficient evidence was tendered in support.
  - c. That learned trial magistrate erred in law and fact in finding that there was a valid contract for sale of Samburu/Poro "A" 189 between the Appellant and the Respondent.
  - d. That learned trial magistrate erred in law and fact in making findings and conclusions not supported by evidence.
  - e. That learned trial magistrate erred in law and fact in making findings and conclusions not supported by evidence.
  - f. That the trial magistrate erred in law and fact by finding that the Respondent was entitled to refund of Kshs.500,000/= on account of consideration paid in regard to the sale of Samburu/Poro "A" 189.
  - g. That the learned trial magistrate erred in law and fact by finding that the Respondent's case was not time barred.
  - h. That the trial magistrate erred in law and fact by failing to accord probative value to the documents produced by the Appellant in evidence.
  - i. That the learned trial magistrate erred in law and fact by not finding that the facts relied on and documents produced by the Appellant were relevant as they explained facts in issue.



- j. That the trial magistrate erred in law and fact by relying on contradictory evidence in reaching his findings.
  - k. That the learned trial magistrate erred in making conclusions whose effect was to shift the burden of proof to the Appellant to prove that he did not receive the Kshs.500,000/= from the Respondent.
  - l. That the learned trial magistrate erred in law and fact in giving a judgment that was against the weight of the evidence.
8. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the judgment and decree of the trial court be varied or set aside.
  - b. That the Respondent's suit before the trial court be dismissed.
  - c. That the Appellant be awarded costs of the appeal

#### **D. Directions on submissions**

9. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed his submissions on 25.04.2022 whereas the Respondent's submissions were not on record by the time of preparation of the judgment.

#### **E. The issues for determination**

10. Although the Appellant raised 12 grounds of appeal in his memorandum of appeal, the court is of the opinion that the appeal may be effectively determined by resolution of the following 3 issues:
- a. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim to the required standard.
  - b. Whether the trial court erred in law in failing to hold that the Respondent's suit was time-barred.
  - c. Who shall bear costs of the appeal

#### **F. The applicable legal principles**

11. As a first appellate court, the court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA. 123 at page 126 as follows:

“...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 nor heard the witnesses and should make due allowance in that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”



12. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O'Connor, P. rendered the applicable principles as follows:

“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

13. In the same case, *Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt v Thomas* [1947] A.C 424 at page 429 - 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

## **G. Analysis and Determination**

- a. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim to the required standard
14. The court has considered the material and submissions on record on this issue. The Appellant submitted that there was no sufficient evidence before the trial court to demonstrate payment of the purchase price of Kshs.500,000/=. In particular, it was contended that there was no evidence of payment of 50 goats and sheep worth Kshs.150,000 by the Respondent and that there was no evidence of payment of Kshs.350,000/= in cash. It was contended that the Respondent's evidence on the payment of the purchase price was contradictory and unreliable hence the trial court ought not to have relied upon it.
15. The court has considered the evidence tendered by the parties before the trial court. The Appellant's evidence on the payments recorded in the note book produced as exhibit D-1 was that the payments reflected therein were for a different transaction for the sale of parcel 'A' 87 and not parcel 'A' 189. The



trial court found it strange and incredible that the Appellant could give the original title deed for parcel 'A' 189 to the Respondent as an assurance that he would transfer parcel 'A' 87 to him.

16. In the judgment, the trial court concluded as follows:

“It is my finding that the defendant gave the original title for L.R.No. Samburu/Poro 'A' 87 & 'A' 189 to the plaintiff after selling both parcels to the plaintiff. Both parcels were sold through oral agreements entered into by the parties when they were enjoying mutual trust and friendship. The oral agreements were open ended with no stated completion dates. As time elapsed and values of land appreciated the defendant felt cheated that he had to receive the agreed cost per acre which the plaintiff paid in small tranches over a long period of time. That's why the defendant attempted to vary the purchase price to reflect the then existing realities on the ground. The defendant did not plead that he only sold L.R. Samburu/Poro "A"/87 as opposed to Samburu/Poro "A"/189 as alleged by the plaintiff, he is bound by his pleadings on the subject. In answer to the three issues for determination I do find the 1<sup>st</sup> and 2<sup>nd</sup> issues in the affirmative. As regards the 3<sup>rd</sup> issue I do find that the claim for a refund of the consideration paid cannot be said to be time barred. This is considering that the oral agreement between the parties had no completion date.”

17. It is evident from the material on record that both sides gave inconsistent and sometimes incredible evidence on the matters in controversy in the suit. The trial court had the benefit of hearing and seeing the witnesses and observing their demeanor. Where the trial court has heard contradictory evidence on a matter and chosen to believe one side and not the other, the appellate court should not lightly interfere with such finding. All the trial court was required to do was to satisfy itself on a balance of probabilities, and not beyond reasonable doubt, that there existed a sale agreement between the parties for the sale of parcel 'A' 189 and that the purchase price had been paid. On the basis of the material on record the court is satisfied that the trial court arrived at the right decision. Accordingly, the 1<sup>st</sup> issue is answered in the negative.

b. Whether the trial court erred in law in failing to hold that the Respondent's suit was time-barred

18. The court has considered the material and submissions on record on this issue. The Appellant submitted that the sale agreement in question having been made in 2006 or thereabouts, then the Respondent's cause of action must have occurred within 6 months of the making of the agreement. The material on record shows that the issue of limitation was considered by the trial court as a preliminary objection and overruled before the trial of the action. It was held that the issue of limitation could only be conclusively determined upon a full hearing. There is no indication on record of the Appellant having appealed against the trial court's decision on the preliminary objection.

19. The trial court was of the opinion that the suit for a refund of the purchase price paid was not statute barred because the oral agreement for sale did not have a completion date as it was open ended. The court has noted that according to the Appellant's exhibit D-1 he continued receiving more payments on account of the purchase price until the year 2010 or thereabouts. The court has further noted that in his amended plaint and supplementary statement the Respondent contended that the Appellant had undertaken to refund the purchase price in 2012 but failed to do so. The Appellant did not seriously contest this allegation at the trial. The court is thus of the opinion that the claim for a refund and the purchase price filed in 2016 was not statute barred under the Limitation of Actions Act(Cap.22). Accordingly, the court finds no fault with the trial court's finding on the issue of limitation.

c. Who shall bear costs of the appeal



20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the appeal. Accordingly, the Respondent shall be awarded costs of the appeal.

### **Conclusion and Disposal**

22. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the appeal is hereby dismissed with costs to the Respondent.

It is so ordered.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 14TH DAY OF JULY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

### **In the presence of:**

N/A for the Appellant

Mr. Kiriaku for the Respondent

C/A - Carol

.....

**Y. M. ANGIMA**

**JUDGE**

