



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 45 of 2008

ESTHER NKATHAAPPELLANT
VERSUS
FRANCIS KARANIRESPONDENT

*(An appeal from the judgment and decree of the Resident Magistrate Court Meru,
Mogute, R.M. in Meru CMCC No. 721 of 2004 dated 27/3/2008)*

JUDGMENT

The respondent according to the appellant's evidence sold her land plot number 99 *Kangaita* to someone else without her authority. He was charged in the lower court with a criminal offence of obtaining money by false pretences contrary to section 313 of the Penal Code. He was also charged with the offence of uttering cancelled documents contrary to section 254 of the Penal Code. The latter charge related to cancellation made to the appellant's share certificate. The appellant sued the respondent seeking judgment as follows:-

- a. *An order for return of plot 199 Kangaita or the same be valued and the defendant (respondent) do pay the plaintiff (appellant) its present value.*

ALTERNATIVE

- b. *An order for return of shares of Kshs. 4,000/= plus Kshs. 16,000 as ordered by the court, interest from date of sale of land.*
c. *Costs and interest thereon."*

The lower court awarded the appellant judgment for Kshs. 16,000/= and Kshs. 4,000/=. The appellant has appealed presenting the following grounds of appeal against that judgment:-

1. *The learned magistrate erred in law and fact in not ordering the return of the plot 199 KANGAITA and/or its market value therefore doing grave injustice to the appellant.*
2. *The learned magistrate erred in law and fact in not awarding interest from the date the amount was taken or fell due and therefore doing injustice to the appellant.*
3. *The judgment is unfair, inequitable and unconstitutional in that appellant did not get fair and adequate compensation for the property she was deprived.*

The appellant is aggrieved with the judgment of the lower court for having failed to order the return of the plot or its value and for the court having failed to award interest as prayed. The Court of Appeal in the case **Forest Lodge Ltd & Devchand Kimchand & Co. Ltd** Civil Appeal No. 110 of 1993 had this to say which is pertinent to the appellant's case:-

"We are satisfied that this is a case where substantial damages may be awarded although the nature of the damages prevents absolute certainty of proof. The fact damages cannot be assessed with certainty does not relieve the wrong power of the necessity of paying damages. Where precise evidence is not obtainable the court must do the best it can."

From that quotation, it is clear that the lower court had the power to assess damages payable to the appellant. I however cannot fault the lower court for failing to award damages as sought by the appellant because the appellant prayed for 2 alternative prayers. She sought for the return of the plot or its value and in alternative for an order for payment of Kshs. 4,000/= and Kshs. 16,000/=. The lower court chose to give an award of payment of Kshs. 4,000 and Kshs. 16,000/=. There was no obligation on the lower court to visit the other prayer having entertained the alternative prayer. The learned magistrate also in awarding the amount prayed for awarded interest rate from the date of filing suit. Section 26(1) of the Civil Procedure Act on interest provides as follows:-

“26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

I am of the view that since the respondent admitted on cross examination that he sold the appellant's land and admitted that he had failed to refund to her the money she claimed it would only be just that interest be applied on the judgment amount from 16th May 2002. That was the date that the respondent was ordered in the criminal case to refund that amount. I therefore grant the following judgment:-

- 1. The appellant appeal succeeds to the extent that interest on judgment amount as per CMCC Meru Case Number 721 of 2004, that is, for Kshs. 4,000 and Kshs. 16,000/= shall attract interest at court rate from 16th May 2002 until payment in full.***
- 2. The appellant is awarded half costs of this appeal.***

Dated and delivered at Meru this 7th day of May 2010.

MARY KASANGO
JUDGE