



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 343 “A” of 2004**

**SAMUEL WAMUTU WAIGANJO.....APPELLANT**

**VERSUS**

**MRS. ZOHRA BARAKA.....1<sup>ST</sup> RESPONDENT**

**MOHAMED BARAKA.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal against the judgment dated and delivered on 29<sup>th</sup> April, 2004 by Principal Magistrate, Hon. N.A. Owino (Mrs.) at Chief Magistrate’s Court at Milimani, Nairobi)**

**J U D G M E N T**

1. This appeal arises from a suit which was filed in the Chief Magistrate’s Court at Nairobi by Samuel Wamutu Waiganjo, (hereinafter referred to as the appellant) against Mrs. Zohra Baraka and Mohamed Baraka, (hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively). The appellant sought judgment against the respondents for Kshs.513,845/= being amount due from the respondents to the appellant for goods sold and delivered pursuant to an agreement entered into between the appellant and the respondents.
2. The respondents filed a joint defence in which the 1<sup>st</sup> respondent denied having entered into any agreement with the appellant, whilst the 2<sup>nd</sup> respondent denied knowing the appellant and urged the Court to strike out the suit against him for misjoinder. It was further contended that the appellant delivered woodblocks to the 1<sup>st</sup> respondent’s premises on an understanding with the 1<sup>st</sup> respondent’s contractor. The contractor had no authority to enter into any agreement with 3<sup>rd</sup> parties on behalf of the 1<sup>st</sup> respondent and therefore the 1<sup>st</sup> respondent out rightly rejected the woodblocks. Despite persistent requests the appellant failed to remove the woodblocks from the 1<sup>st</sup> respondent’s premises.
3. During the hearing before the lower Court, the appellant and one Samuel Gitonga Nderitu (Gitonga) testified in support of the appellant’s case. Their evidence was that the respondents were constructing a house at Spring Valley. Gitonga was the contractor. The respondents needed woodblocks, and Gitonga who had also constructed a house for the appellant, knew that the appellant had some surplus woodblocks. Sometime in April, 2002 after consulting the appellant, Gitonga took the 1<sup>st</sup> respondent and another person to the appellant’s premises at Karen where they saw the woodblocks. Sometime in June 2002, the 1<sup>st</sup> respondent and the appellant discussed and agreed on a price of Kshs.15 per piece.
4. On 27<sup>th</sup> July, 2002, Gitonga collected a total of 34,324 pieces of woodblocks in two consignments

from the appellant's premises. Both delivery notes were signed by Gitonga and the 1<sup>st</sup> respondent. On the 1<sup>st</sup> respondent's instructions, Gitonga delivered one consignment of 14,280 woodblocks at Embakasi. The other consignment of 20,043 woodblocks was delivered at the 1<sup>st</sup> respondent's site. Thereafter the appellant issued two invoices to the 1<sup>st</sup> respondent for Kshs.300,645/= and 214,200/= respectively. The 1<sup>st</sup> respondent explained that she could not pay immediately as she was waiting for a loan. Notwithstanding demands made to her, the 1<sup>st</sup> respondent only paid a sum of Kshs.1000/= and failed to pay the balance of Kshs.513,845/=.

5. The 1<sup>st</sup> respondent is the one who testified in support of the defence. She explained that Gitonga who was the foreman at her construction site advised her that woodblocks were required. Gitonga took the 1<sup>st</sup> respondent to the home of the appellant, and the 1<sup>st</sup> respondent saw some woodblocks which the appellant was selling. The 1<sup>st</sup> respondent noted that they were alright. One Damaris Osiero a friend of the 1<sup>st</sup> respondent, also required woodblocks. She negotiated with Gitonga and agreed to pay for transport. Later Gitonga went to the 1<sup>st</sup> respondent with delivery notes explaining that he had already delivered the woodblocks to the respondent's site and also to Damaris. The 1<sup>st</sup> respondent signed the two delivery notes.

6. A few days later the 1<sup>st</sup> respondent went to her construction site. She noted that the woodblocks which were delivered were substandard. She therefore instructed Gitonga to return the woodblocks, but he explained that he could not do so as the appellant was away. She maintained that only one bundle of 20,000 woodblocks was delivered to her and the woodblocks were still at her construction site. She explained that the 2<sup>nd</sup> respondent was not involved in the negotiations as he was at the material time away in Tanzania.

7. Counsel for the appellant and the respondent each filed written submissions urging the Court to find in favour of his client. In her judgment, the trial Magistrate noted that the woodblocks were delivered to the respondent's premises by Gitonga during the absence of the respondents. The respondents, who were away at a funeral, rejected the woodblocks when they came back, as the woodblocks were not the same as what the 1<sup>st</sup> respondent had earlier seen in the appellant's house. The 1<sup>st</sup> respondent gave Gitonga a sum of Kshs.1000/= to return the woodblocks. The trial Magistrate found that the goods having been rejected there was no consideration. The trial Magistrate found that the property in the goods had not passed to the respondents and the respondents were therefore not liable to the appellant. She therefore dismissed the appellant's suit with costs.

8. Being aggrieved by that judgment, the appellant has lodged this appeal raising 17 grounds as follows:

- (i) that the learned Magistrate erred in law in finding that what existed between the plaintiff and the 1<sup>st</sup> defendant was desire or agreement to purchase the woodblocks from the plaintiff.
- (ii) The learned Magistrate erred in law and fact in finding that the agreement did not have to pass and still found that it is enforceable in law.
- (iii) The learned Magistrate erred in law and fact in finding that the woodblocks were to be delivered, accepted before payment. They were collected by the defendant's employee and the 1<sup>st</sup> defendant accepted this.
- (iv) The learned Magistrate erred in law and fact in finding that the woodblocks were not accepted upon delivery.
- (v) The learned Magistrate erred in law and fact in finding that the woodblocks were rejected by the 1<sup>st</sup> defendant whereas there was no evidence to the effect that they had tried to return the same.
- (vi) The learned Magistrate erred in law and fact in finding that there cannot be any consideration

for the goods whereas the goods were still in custody of the defendants.

- (vii) The learned Magistrate erred in law and fact in failing to find that the purchasers had partly paid for the woodblocks which payment had been duly acknowledged by the plaintiff.
- (viii) The learned Magistrate erred in law and fact in finding that the property in the woodblocks had not yet passed to the defendants.
- (ix) The learned Magistrate erred in law and fact in finding that the property in the goods is still with the plaintiff.
- (x) The learned Magistrate erred in law and fact in finding that the Contractor Samuel Gitonga was an agent of the plaintiff whereas the evidence by both parties was to the contrary.
- (xi) The learned Magistrate erred in law and fact in finding that the defendant's contractor was a mediator.
- (xii) The learned Magistrate erred in law and fact in finding that the contractor Samuel Gitonga was given Kshs.1000/= to facilitate the return of the woodblocks.
- (xiii) The learned Magistrate erred in law and fact in finding that the 2<sup>nd</sup> defendant is not mentioned anywhere as having been a party to the contract.
- (xiv) The learned Magistrate erred in law and fact in finding that the inclusion of the 2<sup>nd</sup> defendant in the delivery notes is illegal.
- (xv) The learned Magistrate erred in law and fact in failing to note that the application by the 2<sup>nd</sup> defendant not to be enjoined in the suit had been dismissed by the Court due to non appearance on 7<sup>th</sup> May 2004. He was therefore lawfully enjoined in the suit. The matter was *res judicata*.
- (xvi) The learned Magistrate erred in law and fact in failing to note the 1<sup>st</sup> defendant's sworn testimony on cross-examination that she signed the delivery notes and that signing of the delivery notes showed that she accepted the goods.
- (xvii) The learned Magistrate erred in law and fact in failing to find that Mr. Samuel Gitonga Nderitu was employed by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants.

9. During the hearing of the appeal, there was no attendance by the respondents or their counsel, despite the hearing date having been fixed by consent. Hearing of the appeal therefore proceeded *ex parte* in accordance with Order XLI Rule 14(2) of the Civil Procedure Rules.

10. Mr. Macharia who argued the appeal on behalf of the appellant, compressed all the 17 grounds of appeal into one as follows:

“That the trial Magistrate erred in law and fact by reaching conclusions of facts that are not supported by the evidence adduced at the trial.”

Mr. Macharia submitted that there was clear evidence that there was an agreement for sale of the woodblocks at a price of Kshs.15/= per piece, and that the goods were duly delivered and delivery notes signed. The trial Magistrate was therefore wrong in finding that there was no agreement to sale but a desire to purchase the woodblocks.

11. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Magistrate. I have also given due consideration to the submissions made before the trial Court and the submissions made before me. In her evidence before the trial Court, the 1<sup>st</sup> respondent did admit that she

went to the appellant's premises and saw the woodblocks which were being offered for sale. The 1<sup>st</sup> respondent conceded under cross-examination that she liked the woodblocks and negotiated the price with the appellant and they agreed on a price of Kshs.15/= per piece. It was pursuant to that agreement that the woodblocks were delivered and the 1<sup>st</sup> respondent signed for the delivery.

12. Contrary to the defence filed by the respondents that there was no agreement and that the woodblocks were delivered without their authority, the evidence adduced before the trial Magistrate disclosed that there was an agreement for sale of the woodblocks between the 1<sup>st</sup> respondent and the appellant, and that the terms of the agreement were clear and agreed. The woodblocks were delivered at the 1<sup>st</sup> respondent's request and the deliveries were signed for by the 1<sup>st</sup> respondent who directed part of the goods to be delivered to her friend Damaris who had no relationship with the appellant. Moreover, nowhere in her evidence did the 1<sup>st</sup> respondent testify to having been away at a funeral at the time the delivery was made. Thus the trial Magistrate's finding in this regard was not supported by evidence.

13. The 1<sup>st</sup> respondent claimed that the woodblocks supplied were sub-standard. However there is no evidence that the 1<sup>st</sup> respondent returned the goods back to the appellant or informed the appellant of any such rejection of the goods. Nor is there any evidence that Damaris had a similar complaint or returned the woodblocks. The 1<sup>st</sup> respondent to whom the delivery was made was therefore fully liable to the appellant for the goods.

14. With regard to the claim against the 2<sup>nd</sup> respondent, there is no evidence that he entered into any negotiations with the appellant or that the 1<sup>st</sup> respondent was acting on his behalf. For that reason I find that he was wrongly enjoined in the suit.

15. The upshot of the above is that the trial Magistrate was wrong in dismissing the appellant's suit. Consequently, I allow the appeal, set aside the judgment of the lower Court and substitute thereof a judgment in favour of the appellant as against the 1<sup>st</sup> respondent for Khs.513,845/= together with costs and interest thereon at Court rates, from the date of filing suit until payment in full. I dismiss the suit as against the 2<sup>nd</sup> respondent.

Those shall be the orders of the Court.

Dated and delivered this 30<sup>th</sup> day of September, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Macharia for the Appellant

Madara for the respondent

Eric, court clerk