

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 95 of 1993

KIILU NDIKUAPPELLANT

VERSUS

DAVID MUTHUKU NDOLO RESPONDENT

(Being an Appeal from the judgment in Civil Case No. 53 of 1993 of the Senior Resident Magistrate's Court at Kangundo by Mr. S Charo SRM on 13.10.1993).

JUDGMENT

1. This Appeal arises from the judgment and decree in Kangundo SRM's Court Civil Case No. 53 of 1993. The Disputes in that case resolved around a friendly loan allegedly advanced to the Appellant by the Respondent on 21.5.1979. The loan was for Kshs. 4,000 which was to be repaid on or before 6.8.1979. It was the Appellant's claim that he repaid the same save for Kshs. 600/= which the Respondent refused to accept and in his Plaint dated 20.5.1993, the Appellant sought orders that the Respondent do ***"receive his money Kshs. 600/= plus costs of the suit."***

2. The Respondent in a Statement of Defence which is on record, claimed that the Kshs. 4000/= was the purchase price for plot No. 50B at Kangundo Town which he purchased from the Appellant in 1973. That the suit was an attempt at repossessing the plot without regard to the fact that it was lawfully purchased.

3. Having heard the parties and their witnesses, the learned Senior Resident Magistrate, Hon. S.Charo delivered his judgment on 13.10.1993 and decided that the order sought could not be granted as the same was an order in vain. In any event, that the Appellant appeared untruthful and the dispute was not about the Kshs. 600/= but the purchase of plot No. 50B at a price of Kshs. 4000/=. That the Appellant decided to disguise the sale as a loan and that was on outright lie. The suit was therefore dismissed with costs.

4. From the memorandum of Appeal and submissions by Mr. Ndungi for the Appellant it is clear to me that the learned magistrate, as is this court, was faced with two conflicting issues regarding the dispute between the parties. The Appellant claimed that in 1979, he took a loan from the Respondent and he was to repay it within a certain period. He paid back Kshs. 3,4000/= and the Respondent refused to accept the balance of Kshs. 600/=. That claim was made in 1993, some 14 years after the money was due. On the other hand, the Respondent claimed that he purchased Plot No.50B aforesaid from the Appellant in 1973 and he was surprised that 20 years later, the Appellant was raising issues about the transaction by disguising it as a matter regarding a friendly loan. I have read the evidence on record and there is no doubt that the suit as framed could not succeed. I say this with respect because D. exhibit 1 was an agreement of sale prepared by DW1, Sammy Ndiku and signed by both parties and witnessed by DW1 aforesaid. It was clear that the Appellant had been paid Kshs. 4,000/= for sale/purchase of Plot No. 50B in Kangundo Town. Compare that irrefutable evidence with Exhibit 1; the alleged loan agreement. None of the parties signed it and it was written by the Appellant alone and proves nothing. The Appellant's witnesses knew nothing of it and their evidence on the whole lacked bearing to the issues at hand. DW2 Benjamin Kilungu, Chief, Kangundo Location had previously arbitrated over the matter and like the subordinate court and this court, found that the Appellant's claim lacked credibility.

5. I will conclude by stating that the claim before the court was one to compel the Respondent to receive Kshs. 600/=. That claim, ridiculous as it was, had no basis in law and in fact and was properly dismissed. Similarly, the appeal before me has no footing and is an incredible show of the human attitude to pursue even the most unlikely matters to dead ends.

6. The Appeal must and is hereby dismissed with costs to the Respondent.

7. Orders accordingly.

Dated and delivered and Machakos this **9th** day of **October 2009**.

Isaac Lenaola

Judge

In the presence of; Mr Ndungi for Appellant

Isaac Lenaola

Judge