



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 44 of 2001

DAVID NTHENGE KITHUKU

EDWARD M.KITHUKU :::::::::::::::::::::::::::::::APPELLANTS

VERSUS

JOHN MAKAU MULI ::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

1. The Appeal herein is brought on the following grounds that :-

“i. *The learned Resident Magistrate erred in law*

in entering a judgment against the Defendant without considering and analyzing the evidence tendered in court and without giving any reasons for finding against the Defendants.

ii. *The learned Resident Magistrate erred in law by dismissing the defence filed by the Defendants and in particular erred in failing to take into account the Defendants’ contention that the contract between the Plaintiff and the 1st Defendant was null and void ab initio and the same could not be enforced by the court.*

iii. *The learned Resident Magistrate further erred in law by failing to consider the Defendant’ defence that the land transaction was null and void for want of consent from the Local Land Control Board.”*

2. The Respondent who was the Plaintiff in the Subordinate Court lodged his claim and sought Kshs. 45,272/= together with costs and interest. The said sum was pleaded as being the balance of monies that he was entitled to after a failed land transaction. Apparently, he had paid the Defendants Kshs. 102,730/= and when the deal aborted, parties agreed that the Defendant would be refunded the whole of that sum. The Defendants only repaid some money but neglected to pay Kshs. 31,000/= and at paragraph 10 of the Plaintiff, the Plaintiff pleaded as follows:-

“The Defendants having failed to pay the Kshs. 31,000/ the Plaintiff had to pursue the matter and thereby incurring further expenses in pursuit thereof and the amount now has risen to Kshs. 45,699/05 to include other payments made by the Plaintiff to other bodies due to the default of the Defendants’ to pay the Kshs. 31,000/=”

3. In their Statement of Defence dated 10.2.1999, the Defendants pleaded that the Plaintiff was only entitled to the purchase price and the sum of Kshs. 45,699.05 had no basis in law and since the whole

transaction was null and void, the suit should be dismissed with costs.

4. I have read the evidence on record and my view is that the civil proceedings were unnecessary because parties were one in their evidence that the Plaintiff and the 1st Defendant entered into a land purchase agreement but the same could not be actualised because of objections by the 2nd Defendant and his mother on the basis that the land was ancestral land. That upon the intervention of Gregory Musyoki Mulwa, PW2 and Chief of Ndalani Location, parties agreed that the Plaintiff would be paid Kshs. 31,000/= and they signed P.Exhibit 10, an agreement to that effect. The Defendant's in their Defence have stated that the agreement was indeed signed but only through coercion, threats and intimidation.

5. I have seen that agreement and it states in part that "***the last installment of Kshs. 31,000/= to be paid on 18.5.1999***". It is signed by the parties and witnesses including the Chief and Assistant Chief, Ngonyi Makau. I have perused the evidence of the Defendants and their witnesses, DW2 James Nzau Syano and DW4, Elijah Munyao and it is my considered view that neither of them were able to prove conclusively that the Defendants were "***forced***" to execute the agreement aforesaid. In fact, the issue appeared more like an afterthought because it was the only raised when the Plaintiff filed the suit seeking the sums aforesaid.

6. That being the case, I do not see how the repayment of the sum of Kshs. 31,000/= can be challenged when parties clearly reached it after all issues were tabled before them and their witnesses. That is an easy matter, at least in my view, but the claim was for Kshs. 45,272/= and it is therefore important to look at the difference of Kshs. 14,272/=. How did it arise? I have perused the documents tabled by the Plaintiff and re-looked at his evidence on oath. Sadly that sum which was outside the purview of the agreement was not properly proved at all. Being a liquidated sum, it ought to have pleaded and strictly proved. Without proof I cannot sustain it.

7. While therefore I find that on the whole the Appeal was argued as if the land sale transaction was challenged, and I have said, it cannot, the claim of Kshs. 45,272/= shall be reduced to Kshs. 31,000/=. The suit in the lower court is allowed to that extent and the balance of Kshs. 14,272 / = is dismissed. Costs of that suit shall be paid to the present Respondent but the Appellants in this Appeal shall have ¼ costs of the Appeal as they have only partly succeeded.

8. The Appeal is allowed in those terms.

9. Orders accordingly.

Dated and delivered at Machakos this 26th day of **November 2008**.

Isaac Lenaola

Judge

In the presence of: Mr Kamanda h/b for Mr. P.M. Mulwa.

Isaac Lenaola

Judge