



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Civil Appeal 187 of 2002**

**PETER NDUMIA GATHUMA.....APPELLANT**

*Versus*

**WILSON GATHU MAGOTI.....RESPONDENT**

*(Being an appeal from the entire judgment and orders of Mr. Omosa M. N. Resident*

*Magistrate, Nyeri, delivered on 7<sup>th</sup> November 2002 in Nyeri Magistrate's Civil Case No. 357 of 1999)*

**JUDGMENT**

The Appellant by his plaint in the lower court pleaded that by agreement dated 9<sup>th</sup> February 1999, the Defendant agreed to exchange his motor vehicle registration number KYM 198 in exchange for the plaintiff's 10 acres on land parcel **NO. 1172 MUHOTETU**. The express term of that agreement was that the Respondent would additionally pay the Defendant Ksh.77,700/= before 30<sup>th</sup> March 1999. The Appellant averred in his pleadings that he transferred 10 acres to the Respondent pursuant to that agreement. In breach of the agreement he pleaded that the Respondent failed to pay Ksh.77,700/=. The Appellant prayed for judgment for that amount plus Ksh.4,000/= which was money he used as a consequence of the transaction. In total the Appellant therefore prayed for Ksh.81,700/=.

The Respondent in the lower court filed a defence and counter claim. In his counter claim he pleaded that there was a prior agreement dated 30<sup>th</sup> December 1998. That prior agreement he averred was incorporated into the one dated 9<sup>th</sup> February 1999. The prior agreement provided that the amount of Kshs.77,800/= would be paid in the form of repair of the motor vehicle. He pleaded that he did the repair of the vehicle. He further pleaded that the Appellant breached the agreement by stopping the transfer of 10 acres to himself. The Respondent therefore prayed for an order that the Appellant would transfer the 10 acres and in the alternative he prayed for the value of the motor vehicle. By its judgment the Magistrate's Court found that the Respondent had not breached the agreement for he had carried out repairs of the motor vehicle. The magistrate found that the Appellant on his part had failed to transfer the 10 acres to the Respondent. The judgment of the lower court was an award of 10 acres to the Respondent.

The Appellant was aggrieved by that judgment and therefore filed this present appeal. The Appellant relied on the following grounds:

1. ***THAT the learned Resident Magistrate erred in law and in fact in finding the defendant having proved the counter claim when there was no evident to support this finding.***
2. ***....abandoned***

3. ***THAT the learned Magistrate erred in law and in fact in holding that the defendant had proved a case of counterclaim against the plaintiff.***
4. ***THAT the learned Magistrate erred in law infact in finding that the plaintiff had not transferred land to the defendant without appreciating the evidence of plaintiff's witness (P.W.2)***
5. ***THE learned magistrate erred in law and infact in failing to distinguish the issue arising from the first and the second contracts made on 30.12.98 and on 9.2.99.***
6. ***THAT learned magistrate erred in law and in fact in awarding cost of the suit and interest to the defendant.***

Before considering the grounds of appeal as stated hereinbefore, it is important to first consider the submissions of the Respondent in regard to the competency of the Memorandum of Appeal. The Respondent submitted as follows:

*“The Memorandum of Appeal as drawn is in competent as it does not state the relief the Appellant is seeking. It does not say whether the Appellant wants the lower court’s judgment set aside or affirmed. The same should therefore be dismissed.”*

As it will be seen from the grounds of appeal quoted in this judgment, the Appellant did not pray for the setting aside of the lower court’s judgment and a substitution of the Appellant court’s judgment. Indeed after setting out the grounds of appeal the Appellant simply put a date to the Memorandum of Appeal. The Appellant failed to make his prayer in that Memorandum of Appeal. What the court needs to consider is whether that failure is fatal to the appeal as argued by the Respondent. *Order XLI Rules 26 and 27* are relevant. These two rules provide what the Appellant court should do at the hearing of the appeal. For a better understanding it is important to put these rules in this judgment.

***“The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the court to which the appeal is preferred may pass a decree or make an order accordingly.***

***The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal.”***

In view of the provisions of those rules the court makes a finding that the appeal is not incompetent for failing to make the final prayers. Additionally the court notes that by *Order XLI Rule 2* the court is not confined to the grounds drawn by the Appellant in making its decision.

The Appellant in his evidence in the lower court stated that by agreement dated 9<sup>th</sup> February 1999 which agreement was made before an advocate, he agreed to transfer 10 acres of his land to the Respondent in exchange of a transfer of motor vehicle in his favour. That the Respondent additionally agreed to pay Ksh.77,700/=. He confirmed in evidence that the Respondent transferred the vehicle to him but did not pay the amount of Ksh.77,700/=. He said that he was a member of Muhotetu Farmers Company Limited and he did inform that company of his decision to transfer 10 acres to the Respondent. He confirmed that at one time he wrote to the land buying company retracting his instructions to transfer but the board of that company refused to honour his cancellation of the transfer. That accordingly the Respondent was given 10 acres. The Appellant referred to the earlier agreement where in exchange of his 10 acres it had been agreed that the Respondent would transfer the vehicle and repair it to the value of Ksh.77,700/=. The Respondent failed to carry out the repairs and hence they entered into the second agreement dated 9<sup>th</sup> February 1999. The Appellant called as a witness the chairman of Muhotetu Farmers Company Limited. He confirmed that the Appellant gave instructions for the transfer of 10 acres to the Respondent and he confirmed that that transaction had been done on the Respondent paying transfer fees of Ksh.4,000/=. He also said that the Appellant did try to cancel the transfer but that the company refused

to accede to that request. He said that the record of the company showed that 10 acres had been transferred to the Respondent. He further said that none of the members of the land buying company had been issued with title deeds. Since title deeds had not been issued, he said that there was no requirement to attend the land control board to obtain a consent. The Respondent in his evidence stated that at first there was an oral agreement between him and the Appellant whereby they were to exchange the vehicle for 10 acres of land. The Appellant failed to transfer the 10 acres and after discussion they agreed that he would supply the Appellant with a car engine and would repair the seat covers. He said that he supplied an engine worth Ksh.65,000/=, tyres valued at Ksh.7,600/= and had paid for seat covers Ksh.6,200/=. In respect of the transfer of 10 acres he said that he had paid Ksh.4,000/= as transfer fee and Ksh.1,000/= survey fees. He called a witness who confirmed that he delivered two tyres to the Appellant. Those tyres had been given to that witness by the Respondent.

Witness No. 3 said that he had been paid by the Respondent Ksh.6,200/= for the repair of seat covers. The Appellant chose the material for the seat covers but did not take the vehicle for the repairs to be undertaken. The Appellant in support of the appeal argued that the agreement dated 9<sup>th</sup> February 1999 had superseded the earlier one dated 30<sup>th</sup> December 1998. That the lower court in its judgment gave effect to the latter agreement which had been superseded. The agreement of 9<sup>th</sup> February 1999 specifically provided according to the Appellant the payment of Ksh.77,700/=.

A variation of an agreement can amount to a rescission of the old contract. In this case the court finds that as correctly argued by the Appellant, the earlier contract of 1998 was rescinded by the variation of the subsequent agreement.

What the court needs to consider is whether there was consideration for that rescission. The court finds that there is indeed consideration because that variation was beneficial to both parties. By requiring the Respondent to pay Ksh.77,700/= rather than repair the motor vehicle the Respondent benefited by being relieved from carrying out repairs. The Appellant also benefited in that he did not have to await the repairs to be carried out. The Appellant could carry out the repairs on receipt of that amount. In this case I do find that the parties in entering into the subsequent written agreement of 9<sup>th</sup> February 1999 they were rescinding the earlier agreement and accordingly that earlier agreement of 30<sup>th</sup> December 1988 was not available for enforcement by the court. The latter agreement obligated the Respondent to pay money to the Appellant. The Respondent in carrying out the terms of the earlier agreement by doing the repairs to the car, if indeed he did so, did not extinguish his responsibility to pay Ksh.77,700/=. The learned magistrate did not state why he disregarded the evidence of P.W.2 which evidence was not subjected to much cross-examination by the Respondent's counsel. P.W.2 clearly said that none of the shareholders of Muhotetu Farmers Company had been issued with title deeds. He however, confirmed that the company's register reflected the Respondent as the owner of 10 acres previously owned by the Appellant.

That being the evidence presented to the court, it was not open to the court to make a finding that the Appellant failed to transfer 10 acres. It was also not open to the court to order the Appellant to proceed with that transfer. Accordingly I do find that the Appeal does succeed for the reasons stated hereinbefore.

Before concluding this judgment it is important to note that the Respondent attempted in his written submissions to include fresh evidence by exhibiting a title that was not before the lower court. Such attempt to include new evidence without leave is disallowed. The judgment of this court is that the judgment of the lower court delivered on 7<sup>th</sup> November 2002 is hereby set aside. There shall be judgment for the Appellant against the Respondent for Ksh.77,700/=. The Appellant is awarded costs of this appeal.

**MARY KASANGO**

JUDGE

*Dated and delivered at Nyeri this 2<sup>nd</sup> day of November 2007.*

**By: M. S. A. MAKHANDIA**

JUDGE