



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 72 of 2001

JAMES RIUNGU APPELLANT

AND

SALOME NDURU MATHIU RESPONDENT

(Being an appeal from the judgment of M.N. Omondi Resident Magistrate delivered on 27.6.2001 in Meru CMCC No. 924 of 1997)

JUDGMENT OF THE COURT

The respondent who was the plaintiff in Meru CMCC No. 924 of 1997 filed a suit by way of plaint on 22.8.1997 seeking judgment against the appellant (as defendant) for:-

- (a) Payment of Kshs. 24,000/=
- (b) The defendant do give vacant possession to the plaintiff
- (c) Costs of the suit and interest at court rates
- (d) Any other relief that the court deems fit and just to grant

The appellant (as defendant) filed defence on 2.10.1997 in which he vehemently denied the respondent's claim against him and also sought judgment on a counter-claim in the sum of Kshs. 18,600/= which he stated was the amount spent by himself in clearing and preparing the quarry allegedly leased to him by the respondent, but which lease the respondent wrongly and unfairly breached. He also claimed general damages for breach of contract.

The respondent's case before the trial court was that in or about the year 1994, she leased out to the appellant her quarry for which the appellant was to pay her Kshs. 400/= per lorry of stone excavated each month for a duration of 2½ years. After the appellant took possession of the quarry, he allegedly totally failed to pay to the plaintiff the agreed price of Kshs. 400/= per lorry excavated and also refused to give the respondent vacant possession. It was as a result of that breach by the appellant and his failure to heed notices given to him by the respondent of intention to sue that the respondent filed the suit in the lower court.

During the hearing of the suit in the lower court, the respondent testified that in the year 1994, she leased her quarry to the appellant at the rate of Kshs. 400/= per lorry of mined stone. That the appellant used to mine two lorries of stone per month. She stated that for the 2½ years when the appellant had possession of the quarry, he refused to pay to the respondent the agreed amounts. The dispute between the

respondent and the appellant landed on the chief's desk but when a solution was not found, she filed suit.

In her further evidence during cross-examination, the respondent testified that her claim of Kshs. 24,000/= against the appellant related to the two years when the appellant remained on the quarry though he did not work the quarry. She also testified that during that time, she could not lease out the quarry to third parties.

The respondent's only witness was one HENRY KAGUTE (PW2) who testified that the appellant deserted the respondent's quarry for about 2½ years without handing over the same to the respondent. He stated that he was the one who leased the quarry from the respondent after the respondent had repossessed the quarry from the appellant. In his further evidence during cross-examination, PW2 stated that in the quarrying business the lessor makes payment to the lessee only after selling whatever has been mined.

For his part, the appellant testified that he leased the quarry from the respondent in or about October 1994 and intended to excavate building stone. That payment was to be made after excavating and measuring the blocks. He stated further that he mined only 1½ lorries but before he was able to sell all that he had excavated, the respondent chased him away from the quarry. He left behind some of the mined stone. He also said he incurred the sum of Kshs. 18,600/= in clearing the quarry. He also told the court that it was the respondent who stopped him from working the quarry and that he used to pay Kshs. 400/= per lorry of stone. He stated further that he left the quarry in 1997 but that between 1994 and 1997 he had mined only 1½ lorries of stone. He admitted that during the 2½ years, when he occupied the quarry, he never paid any money to the respondent. He went on to state that he worked in the quarry for 2½ years and that during that whole time, he only paid the respondent Kshs. 500/= for the entire period, but that he could only have paid the respondent after selling the stone.

From the evidence of DW2, SIMON GUANTAI he was employed by the appellant in the year 1996 and by January 1997, he was still working at the appellant's quarry.

After a full hearing, the learned trial magistrate entered the judgment for the respondent in the sum of Kshs. 24,000/= plus costs and interest. The learned trial magistrate was satisfied that the respondent had proved her case against the appellant. The learned trial magistrate dismissed the appellant's counter-claim.

The appellant has appealed. He filed his Memorandum of Appeal on 18.7.2001 in which he set out five grounds of appeal as follows:-

1. That the learned resident magistrate erred in law and facts (sic) and made a judgment against the appellant which was not supported by any evidence as adduced during the hearing.
2. That the learned resident magistrate erred in law and facts (sic) in considering and being influenced by extraneous matters and factors in coming up with his erroneous and illegal judgment.
3. That the learned resident magistrate erred in law and facts (sic) in making a judgment against the appellant when the entire evidence showed the appellant had not harvested and sold any stones whereas the oral agreement relied on by the respondent showed any payment to the respondent ought to have been based on the lorries of stones harvested and sold.
4. That the learned resident magistrate erred in law and facts in failing to consider the defence case which showed clearly that the stone harvested was paid for and judgment delivered was not based on any facts at all.
5. That the learned magistrate's judgment is bad in law, unjust and irregular.

The above five grounds of appeal were argued as follows:-

Grounds 1 and 2 together, 3 and 4 together and then ground 5 on its own.

Mr. Gikunda Anampiu who appeared for the appellant contended that the learned trial magistrate was wrong in entering judgment for the plaintiff/respondent because the evidence by both parties showed that

payments were to be made only after selling and that the payment was based on each individual lorry of stone mined. He contended further that the judgment was thus wrong and bad in law. He supported his contention by arguing that it is the respondent herself who prevented the appellant from using the quarry and therefore that she cannot now turn round and try to benefit from her own misdeeds. Further, he contended that since the lease in question was not for any specific period, the respondent did not lay a basis for her claim of Kshs. 24,000/= covering some 2½ years of alleged occupation of the quarry by the appellant.

On her part, Mrs. F.K. Gitonga for the respondent contended on behalf of the respondent that the evidence shows that the appellant was supposed to mine 2 lorries of stone every month and that having been in control and possession of the quarry from 1994 to March 1997, the appellant was supposed to have paid to the respondent the contract sums. She further submitted on behalf of the respondent that though he had deserted the quarry, the appellant also prevented the respondent from using the quarry. Mrs. Gitonga dismissed the appellant's contention that the respondent had no capacity to enter into the lease agreement with the appellant. In Mrs. Gitonga's view, the judgment of the learned trial magistrate was properly given.

In his brief judgment, the learned trial magistrate found that the verbal contract between the respondent and the appellant was to the effect that the appellant was to pay the sum of Kshs. 400/= per lorry of mined stone and after selling. He also found that the appellant used to mine 2 lorries of stone per month. The learned trial magistrate did not believe that the appellant mined only 1½ lorries of stone during the entire 2½ period.

The issues that arise for the decision of this court are (1) whether there was a contract between the respondent and the appellant in this case; (2) if the answer to (1) is aye, what the terms of such contract were; (3) for how long did the appellant occupy the quarry and (4) whether the respondent was entitled to the reliefs sought. In dealing with these issues, the court is under a duty to look at the evidence on record afresh and to reach its own conclusions in the matter, remembering of course what **SIR KENNETH O'CONNOR P** said in the case of **PETERS –VRS – SUNDAY POST (1958) EA 424** at page 429: Letter E:-

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusions originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of LORDS in WATT –VS – THOMAS (1) (1947) A.C. 484.

“My Lords, before entering upon an examination of the evidence at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of the trial judge. For convenience Scotland. Apart from the classes of a case in which the powers of the Court of Appeal are limited to deciding a question of law (for example on a case stated or on an appeal under the County Courts Acts), an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion, (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance when estimating the value of verbal testimony, has the advantage (which is denied courts of appeal) of having the witnesses before him and observing the

manner in which their evidence is given.”

At page 487 of the WATTS case (supra), LORD TANKERTON also said that an appellate court “which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge’s conclusion.”

LORD MACMILLAN said at p. 491:-

“So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantage not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be effected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or otherwise to have gone plainly wrong.”

Applying the above principles to this case, I have come to the conclusion that there is no justification of interfering with the decision of the learned trial magistrate. The evidence on record is clear that there was a verbal agreement between the respondent and the appellant under which the appellant agreed to pay to the respondent the sum of Kshs. 400/= for every lorry of stone that was mined and sold. There is also printed evidence to the effect that the appellant occupied and possessed the quarry from 1994 until March 1997 when the respondent leased the quarry to a third party, one HENRY KAGUTE, PW2. It is not quite clear whether during all those years the appellant mined two lorries of stone as alleged by the respondent, but the evidence clearly shows that the appellant occupied the quarry until 1997 and that during that whole period, he never paid the respondent any money except for some Kshs. 500/= which he said was in respect of 1½ lorries mined during the entire period.

Having found as I have that the facts placed before the trial court proved that the respondent was entitled to the relief’s sought. I do not think that there is a reason to disturb the finding by the learned trial magistrate. There is every chance that if I had listened to the respondent’s case as a trial court, my conclusions would most likely have been different but that position notwithstanding, the learned trial magistrate’s conclusion was reasonable in the circumstances.

In the result, I find no merit in the appellant’s appeal. The same is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Meru this 18th day of July, 2006.

RUTH N. SITATI

JUDGE