

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 48 of 2002

THOMAS WAITHAKA MUMO.....APPELLANT

VERSUS

KHAMISI A. DOMOKO.....RESPONDENT

JUDGMENT

This is an appeal against the decision of A. Ngugi, the then Resident Magistrate, sitting at Mombasa delivered on 27th February 2002.

The background of this appeal can easily be captured from the record presented to this court. On the 10th day of November 1995 Khamisi Ali Domoko (the Respondent) and Thomas Waithaka Mumo (the Appellant) entered into an agreement in which the Appellant sold a café standing on Plot No. 167/Likoni, Mombasa south to the Respondent at a consideration of kshs. 30,000/= . The Respondent paid the aforesaid sum to the Appellant on the 17th day of November 1995. The Appellant then gave notice to Francis Maina Kibara, his tenant notice to vacate the premises latest on 31-1-1996 and that when the Respondent was expected to take up possession of the premises. On the 24th day of November 1995, the premises housing the café was gutted down by fire. This unfortunate event prompted the Respondent to demand a refund of the consideration from the Appellant. When the Appellant refused to refund the money, the Respondent filed the suit before the subordinate court which gave rise to the judgment of 27th February 2002 in which the learned trial Resident Magistrate ordered the Appellant to pay back the money to the Respondent. Being aggrieved by that decision the Appellant preferred this appeal.

It is the argument of the Appellant that he was not liable to refund the money because by then the property had changed hands. He argued that the trial magistrate failed to appreciate this fact thus causing a miscarriage of justice. It is argued that the business premises got destroyed while in the hands of Francis Maina Kibara, a third party hence the Respondent should have pursued the third party instead. On his part the Respondent opposed the appeal on the ground that he had not taken over vacant possession of the premises. He pointed out the fact that the third party used to pay the Appellant rent as his tenant. It is submitted that the contract was frustrated before the Respondent took over possession of the suit premises.

I have carefully considered the arguments presented on appeal. I have also re-assessed and re-evaluated the evidence on record which were tendered before the trial court. It is not in dispute that a third party, Francis Maina Kibara was running the café or kiosk before it got destroyed. There is also no dispute that the Appellant had been paid rent accruing from the premises for the month of November 1995. It is also not disputed that the Appellant gave Francis Maina Kibara, the tenant occupying the premises notice to vacate by 31-1-1996 to give vacant possession to the Respondent. After a careful re-evaluation of the matter I am of the view that the contract was to take effect as from the 31st day of January 1996. That is when the Respondent was expected possession and full control of the premises. Unfortunately the premises were destroyed before possession parted to the Respondent. The premises were still in the control and possession of the Appellant's tenant. The contract was frustrated by forces beyond the control of Appellant. In such circumstances the Appellant will be liable to refund the contract sum and nothing more. No damages for breach of contract would be awarded. In the end I see no merit on this ground of appeal. The Appellant had listed five (5) grounds of appeal but this was the only

ground argued when the appeal came up for hearing.

The upshot of the above is that the appeal is ordered dismissed with costs to the Respondent.

Dated and delivered this 25th day of October 2006

J. K. SERGON

JUDGE

In open court in the absence of the parties.