



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA  
AT NAIROBI**

**MILIMANI LAW COURTS  
CIVIL APPEAL NO.228 OF 1997**

**EDWARD NGUGI NJUGUNA .....APPLICANT**

**VERSUS**

**GATHI MWANGI .....RESPONDENT**

**(From the original Civil Suit No. 1975 of 1995 at Kiambu)**

**JUDGMENT**

The parties to this appeal have been disputing over a piece of land known as L.R. No. Kijabe/Kijabe/1/886 owned by the appellant. He wanted to sell it and the respondent showed an interest to buy it. The piece is/was 5 acres.

The two entered into an agreement wherein the respondent was to buy it for Kshs.80,000/=.

The respondent was put into possession of the land after the agreement was entered into.

But a dispute arose when the appellant said he had not been paid the full purchase price when the respondent wanted to have the title deed.

The appellant said he had only been paid Kshs.45,000/= leaving a balance of Kshs.35,000/=. On the other hand, the respondent stated that he had paid the full purchase price of Kshs.80,000/=: hence he wanted the title deed to the land.

The matter ended up in the court of the Resident Magistrate at Kiambu on 28th July 1995; in a plaint wherein the respondent sought transfer of the suit land into his name or in the alternative a refund of Kshs.80,000/=.

The learned Senior Resident Magistrate (R.K. Mwangi) heard the case on 6th June 1997 when both parties testified. Judgment was delivered on 6th August 1997 wherein the appellant was ordered to refund to the respondent Kshs.80,000/= and this is the cause of the present appeal dated and filed herein on 27th August 1997.

The 6 grounds of appeal dispute that the appellant was paid Kshs.80,000/= by the respondent which he should refund as the said respondent had only paid to him Kshs.45,000/=.

The grounds also challenge the learned magistrate for refusing to admit into evidence certain documentary evidence which showed that the respondent had paid to the appellant Kshs.40,000/= on 29th

July 1993 by bank transfer at Kikuyu Kenya Commercial Bank instead of the Kshs.75,000/= which the respondent had undertaken to pay to the appellant in an agreement dated 29.7.93.

That it is the respondent who had breached the sale agreement by not paying kshs.35,000/= which was the balance of the purchase price, to the appellant.

That the magistrate erred in refusing the appellant's request to call Kamangu, the advocate who drew the sale agreement.

In this court on 5th March 2003 counsel for the appellant referred to Kshs.5,000/= the respondent paid to him in cash and the transfer of kshs.40,000/= to respondent arranged at Kikuyu Kenya Commercial Bank Branch to his – the appellant's account-and insisted this is the only money he was paid and not Kshs.80,000/= he was ordered to refund to the respondent.

But in reply counsel for the respondent referred to the agreement of sale entered into by the parties on 29.5.93 and said in it the appellant had acknowledged receipt of kshs.75,000/=.

That this provision could not have been included and that the advocate could not have witnessed this agreement if money did not change hands.

The parties, in their evidence did not dispute the payment of the initial Kshs.5,000/= in cash to the appellant.

However, though the appellant is said to have acknowledged receipt of Kshs.75,000/= on the signing of the agreement on 29th July 1993, on the same day, the respondent went to the Kikuyu Branch of the Kenya Commercial Bank and transferred a sum of kshs.40,000/= to the appellant. He agreed to have done this when cross-examined but did not say, what this further payment was for if at all he had fully paid the purchase price?

In re-examination he said:-

*“I gave the defendant kshs.75,000/= in cash in the office of advocate”*

Then he added:-

*“I authorized the bank to transfer Kshs.40,000/= to the account of the defendant in the place the defendant gave me 40,000/= this is not part of the land transaction.”*

Why authorize the bank to transfer money from your account to someone else's account for that person to pay you the same money in cash instead of you withdrawing that money to yourself straightaway?

This was not a straightforward explanation and though the magistrate wondered how the appellant would acknowledge receipt of Kshs.75,000/= in the sale agreement and even allow the respondent possession of the suit land before receiving the full purchase price, there was some explaining for the respondent to do about the transfer of the Kshs.40,000/= from his to the appellant's account on the same day of the agreement if indeed he had paid the former the full purchase price.

And one such and more plausible explanation could have been that the appellant acknowledged receiving Kshs.75,000/= from the appellant on the signing of the agreement on belief that such money was to be paid soon after.

Fortunately or otherwise depending on who of the two got what, the respondent was taking advantage of the acknowledgement in the agreement and possession of the suit land to avoid paying the balance of the purchase price; otherwise if one accepts the explanation of the respondent then the purchase price of the suit property was much more than Kshs.80,000/= which does not make any sense.

It is fair to understand that many of the transactions between lay people are based on trust and this must have caused the appellant to accept that he had received Kshs.75,000/= which he believed he would get immediately on leaving the advocates office, only for the respondent to pay him Kshs.40,000/= soon after.

This is what I read into the respondent's action in transferring a sum of Kshs.40,000/= from his account to the appellant's account soon after leaving the advocates office.

On that basis and understanding, and if I was to be put in the learned magistrate's shoes, I would not have ordered the appellant to refund the respondent Kshs.80,000/= but Kshs.35,000/= which the latter had not paid the former.

I would allow this appeal, set aside the lower court order and substitute it with one directing the appellant to pay the respondent Kshs.35,000/= with half ( $\frac{1}{2}$ ) costs of this appeal and the case in the lower court to the appellant.

Delivered this 10th day of April, 2003.

D.K.S. AGANYANYA

PRINCIPAL JUDGE