



REPUBLIC OF KENYA



KENYA LAW
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**Gimase v Macharia & another (Civil Appeal E025 of 2023)
[2025] KEHC 539 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E025 OF 2023
FN MUCHEMI, J
JANUARY 23, 2025**

BETWEEN

NYAKIOMA JAMES GIMASE APPELLANT

AND

BERNARD MUNGAI MACHARIA 1ST RESPONDENT

ALICE WAITHIRA KARANJA 2ND RESPONDENT

*(Being an Appeal from the Judgment of Hon. V. Asiyo (PM)
delivered on 5th October 2023 in Thika CMCC No. 623 of 2021)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 623 of 2021 in which the court delivered judgment in favour of the respondents and awarded the special damages in the sum of Kshs. 950,000/- plus costs and interest.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 16 grounds herein summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact by applying the principle of unjust enrichment when the same was not pleaded.
 - b. The learned trial magistrate erred in law and in fact by failing to find that there was a contradiction as the respondents pleaded an oral agreement whereas they produced a written agreement;
 - c. The learned magistrate erred in law and in fact in awarding the respondents special damages of Kshs. 950,000/- whereas they produced a written agreement for a sum of Kshs. 450,000/-.



- d. The learned magistrate erred in law and in fact in finding that the respondents had proved their case on a balance of probabilities.
3. Parties put in written submissions.

Appellant's Submissions

4. The appellant relies on the case of Ann Wairimu Wanjohi vs James Wambiru Mukabi [2021] eKLR and submits that the trial magistrate erred by applying the principle of unjust enrichment when the respondents did not plead for it. Furthermore, the appellant argues that he was not given an opportunity to address the said issue.
5. The appellant submits that pursuant to Section 3(3) of the Law of Contract an agreement for the sale of land cannot be oral. The respondents pleaded that the agreement was oral yet they produced a written agreement for the sum of Kshs. 450,000/- which the appellant argues is an afterthought and amounts to giving conflicting pleadings.
6. The appellant submits that the 1st respondent produced an agreement dated 15th October 2020 yet he stated in his statement that he could not reach the appellant when he called him for the purposes of executing the agreement. The appellant further submits that the name of the 1st respondent does not appear anywhere in the agreement dated 15th October 2020. Furthermore, the appellant raises the question as to who executed the agreement as the 2nd respondent stated in her witness statement that she and the 1st respondent were unable to reach the appellant when they called him to execute his part.
7. The appellant submits that the 2nd respondent did not produce any document showing that she remitted some money to him or any document authorizing the 1st respondent to pay him on the behalf of the 2nd respondent. Thus, the appellant argues that there was no written agreement between him and there was no privity of contract between him and the 1st respondent with regard to the written agreement dated 15th October 2020 and thus the respondents are not entitled to the amount claimed. Further, the 2nd respondent did not produce any evidence to show that she remitted the money to the appellant.
8. The appellant argues that special damages must be specifically pleaded and proved which the respondents did not do as they produced an agreement amounting to Kshs. 450,000/-.
9. The appellant submits that the respondents did not prove their case on a balance of probabilities as they pleaded fraud yet they did not prove the much higher standard of proof required in fraud cases . to support his contentions, the appellant relies on the case of Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 Others [2015] eKLR.
10. The appellant submits that there was no search conducted to ascertain whether the respondent was the owner of the subject parcel of land thus he cannot be said to have defrauded the respondent without proof that he was not the owner of the land.

The Respondents' Submissions.

11. The respondents rely on Order 2 Rule 3(1) & (3) of the Civil Procedure Rules and submit that they aptly submitted on the issue of unjust enrichment. The respondents further submit that the subject matter in the lower suit revolved around securing a refund of money received by the appellant and held in exchange for no value contrary to the agreement by the parties. The respondents further submit that they did not seek enforcement or specific performance of an oral agreement on land.



12. The respondents submit that they proved their claim by producing a land sale agreement executed by the appellant and monetary transactional instruments which both show that the appellant received the sum of Kshs. 950,000/- as consideration of land, which sale did not materialize as the land described did not exist.
13. The respondents submit that the appellant in his evidence on cross examination admitted to appending his signature on the land agreement and admitted that the identification number appearing on the said agreement was his. The respondents further submit that the 2nd respondent affirms that he was not the purchaser in the agreement but he was the one paying money on behalf of his mother, the 1st respondent. Furthermore, the appellant admitted to having received the money.
14. The respondents further submit that they produced transactional receipts to show payment of the consideration and the appellant did not raise any issue on the authenticity of the said receipts. The respondents submit that the parties herein had agreed on purchase of two properties but upon receipt of payment of the second parcel of land with the intention to thereafter enter into an agreement, the appellant was unreachable and evaded them.

Issue for determination

15. The main issue for determination is whether the appeal has merit.

The Law

16. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

17. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

18. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and



- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

19. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

(108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

20. The burden of proof was discussed in the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.

21. From the record, the respondents instituted a suit in the lower court vide plaint dated 15th October 2021. The respondents' cause of action arose from a land transaction whereby the appellant presenting himself as the owner of land parcels Plot No. 12 of LR RUIRU EAST BLOCK 2/1001 and property at Ruiru Gwa Kairo (Three Ways). He sold the said parcels to the respondents who paid the purchase price. The respondents laid out particulars of fraudulent misrepresentation and fraud in their plaint and prayed for special damages of Kshs. 950,000/- which is the amount they paid to the appellant as the purchase price for the suit properties.
22. The 1st respondent testified as PW1 that the appellant approached him for the sale of the suit properties on an oral agreement which purchase price was to be remitted to the appellant's telephone number 0725173496 before execution of each individual agreement of the suit properties. The respondent further testified that he was purchasing the properties on behalf of his mother and that he remitted Kshs. 470,000/- to the appellant being the entire purchase price of Plot No. 12 LR RUIRU EAST BLOCK 2/1001 which amount was in excess of Kshs. 20,000/-. The witness testified that he paid the said purchase price on diverse dates between 10th September 2020 until 15th October 2020. Upon completion of the said purchase price, he and the appellant executed the written sale agreement and the appellant promised to initiate the transfer of the said property to the 2nd respondent. The witness further testified that he paid Kshs. 500,000/- in respect of the second suit property through the appellant's mobile number on diverse dates between 29th October 2020 until 13th December 2020. To support his payments, the witness produced his MPESA statements showing the dates he made the said payments.
23. The 1st respondent further testified that upon completion of payments, he tried to reach the appellant to execute the sale agreement but he could not be reached. Furthermore someone showed up at plot no. 12 of LR RUIRU EAST BLOCK 2/1001 claiming that he was the registered owner which prompted him to visit the lands registry to make enquiries about the said land parcel. It was later that the witness



found that the suit premises did not exist and reported the matter at Thika police station whereby the appellant was arrested on 21st May 2021 and charged in court with obtaining money by false pretenses in Criminal Case No. E1949 of 2021.

24. The appellant testified that the respondents were strangers to him and that the agreement the respondents were referring to could not have been oral as it was for a substantiated amount of money. On cross examination, the witness testified that he met the 2nd respondent and that the signature and ID number in the agreement dated 15th October 2022 were his. He further stated that the appellant's phone number was 0725173496 and that he was a merchant. It was therefore evident that the appellant regularly receives money through his Mpesa account in the course of his business.
25. The record shows that the appellant and the 2nd respondent entered into an agreement for the purchase of Plot No. 12 of LR No. RUIRU EAST BLOCK 2/1001 for a consideration of Kshs. 450,000/-. The said agreement was produced by the 1st respondent and the appellant admitted that he executed the said agreement and the ID number in the agreement were his. Furthermore, the 1st respondent proved that he paid Kshs. 970,000/- as purchase price of the parcels of land to the appellant's phone number 0725173496. The Mpesa statements produced indicate that the 1st respondent made various payments to the appellant through his phone number on various dates between 10th September 2020 until 13th December 2020 totaling to Kshs. 970,000/-. The appellant admitted that his phone number was 0725173496 and that he received monies from the 1st respondent via his Mpesa account. The appellant further admitted that he did not refund the money to PW1 and further testified that he did not refund the money to him as the 1st respondent did not make a claim for refund. From the record, it is clear that the appellant received Kshs. 970,000/- and only refunded Kshs. 20,000/- thus leaving a balance of Kshs. 950,000/-. Thus it is evident that the appellant owes the 1st respondent Kshs. 950,000/-. In the circumstances, it is my considered view that the respondents proved their case on a balance of probabilities against the appellant.
26. Furthermore, the appellant alleges that the respondents did not prove fraud because the respondents did not produce an official search document to show who the owner of the suit property was. From the record, PW1 testified that he went to make enquiries at the lands registry and was informed that the suit premises did not exist and that is the reason why he did not produce any search document or green card. The appellant did not controvert the 1st respondent's evidence that he was selling land that did not exist. No ownership documents were produced by the appellant to the effect that he owned any such land. As such, the appellant was not in a position to sell the suit premises. This amounted to fraud and obtaining of money by false pretenses. On their part, the respondents did not conduct due diligence before paying the purchase price to the respondents. However, this omission does not absolve the appellant from refunding the monies he obtained by false pretenses from the 1st respondent as he purported to buy land for his mother, the 2nd respondent.
27. The respondents led evidence that out of the KShs.970,000 paid to the appellant through MPESA, the appellant refunded KShs.20,000. The appellant kind of admitted the claim in cross-examination when he said that the reason for not refunding the balance of KSh.950,000 was because the respondents did not ask for the refund. This statement favours the respondent's case against the appellant.
28. The appellant argued that there was no written agreement produced by the respondents for sale of one parcel of land. However, the record shows that a written agreement executed on 13/10/2020 for sale of L.R. RUIRU EAST BLOCK 2/1001 by the appellant and the 2nd respondent existed in that it was produced in evidence. The appellant in cross-examination admitted signing the said agreement thus admitting the existence of a business transaction between the appellant and the 2nd respondent. It is important to note that the respondent's claim is for money paid to the appellant for a failed agreement.



The claim is not for specific performance and the written agreements may not be very crucial. All that the respondents required to prove was that they paid KShs.950,000/= to appellant which was not refunded after it was found out that the appellant had no land to sell. In regard to the claim of KShs.950,000/= the respondents proved their claim through payments through Mpesa. The Mpesa statements for the appellants phone number 07255173496 were produced in evidence.

29. It is my considered view that the respondents proved their claim before the Magistrate's Court on the balance of probabilities.
30. I find no merit in this appeal and I hereby dismiss it with costs to the respondents.
31. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF JANUARY 2025.

F. MUCHEMI

JUDGE

