



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 15 OF 2019

BERNARD KIINI GITAU.....APPELLANT

VERSUS

RICHARD NJOROGE KABUGI.....RESPONDENT

(Being an appeal from the judgement and decree delivered on the 8th February 2019

by Hon. M.W. WANJALA (SRM) in Chief Magistrate Court Civil Suit No 955 of 2012).

JUDGEMENT

By an Amended Plaint dated **15th October 2018**, the Plaintiff (Respondent) **RICHARD NJOROGE KABUGI**, brought a suit against the Defendant **BERNARD KIINI GITAU (Appellant)**, in the Chief Magistrate's Court at Thika, seeking for orders;

(a) That the contract signed between the Plaintiff and the Defendant on the 26th of July 2012, be rescinded.

(b) That the Defendant does transfer land parcel number MAKUYU KIMORORI BLOCK 1/1426, to the Plaintiff while executing all essential documents inclusive of documents transferring ownership of land parcel number MAKUYU KIMORORI BLOCK 1/1426, from the estate of WAIRIMU KIINI GITAU (deceased) to the Defendant and if he fails to cooperate, the Executive Officer of this honorable Court to execute the transfer documents with the Registrar of Lands dispensing with the production of the Defendant's personal documents and photographs.

In his claim, the Plaintiff (Respondent) averred that on **26 July 2012**, he contracted with the Defendant (Appellant) who purported to convey title and ownership of **MAKUYU KIMORORI BLOCK 1/ 1426**, to him and thereby obtained under false pretence **Kshs 2,200,000/=** and on **22nd of August 2012**, he paid the whole balance with part of the balance amounting to **Kshs.1,580,000/=** which funds were transferred to the Defendant in his account held at **Equity Bank**. He further averred that the Defendant (Appellant) herein had already been charged with a Criminal offence in **Criminal Case No. 1195 of 2012**, at Senior Principal Magistrate Court at Muranga, and that the Defendant (Appellant) had since regularized the Succession of his deceased mother's estate by filing a proper **Succession Cause Number 3170 of 2014**, in the High Court of Kenya at Nairobi, whereby a grant had been issued.

The suit was contested and the Defendant (Appellant) filed a statement of Defence dated **5th March 2018**. In his statement of Defence, the Defendant denied all the allegations made in the Plaint and averred that the case was compromised as between the complainant, who is the Defendant's sister and the Plaintiff (Respondent) was informed to release the money frozen, but he refused and since he refused to unfreeze the Defendant's account, he frustrated the agreement.

The Plaintiff further filed a reply to Defendant's Defence dated **20th November 2018**, and prayed that the Defendants Defence be struck out and be dismissed with costs.

On **28 November 2014**, an order was issued upon hearing the Plaintiff's application dated **27th November 2012**, and it was ordered that the Account Number **0890 19950 5880**, held at **Equity Bank** belonging to **BERNARD KIINI GITAU (Appellant)** be attached/ frozen.

The matter proceeded by way of *viva voce* evidence on **22nd November 2018**, in the lower Court whereby **PW 1 RICHARD NJOROGE KABUGI** testified and closed the Plaintiff's case.

The Defendant's counsel sought an adjournment, but the Court ruled thus *"this was a very old case, the Defendant was served with a hearing notice and a copy of the ruling on 15th November 2018, which clearly stated the time frame for amending the Defence and he did not amend it within the time given by the Court and the reason why the Defendant is not in Court today has no merit at all and the*

application for an adjournment is declined”

Hon Wanjala (SRM) delivered a Judgement on **8th February 2019**, and allowed the prayers in the Plaintiff’s (Respondent’s) suit in terms of prayer **(a), (a)(i) and (c)**. This was to the effect that the contract signed between the Plaintiff (Respondent) and Defendant (Appellant) dated **26th July 2012**, be rescinded. The Defendant(Appellant) was further ordered to transfer the land parcel **Makuyu/Kimorori/Block 1/1426** to the Plaintiff (Respondent).

The Appellant (Defendant) was aggrieved by the above determination of the lower Court in favor of the (Plaintiff) Respondent thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **14th February 2019**.

The Appellant sought for the setting aside of the Judgment delivered on the **8th February 2019** by **Hon. M.W. WANJALA (SRM) in Chief Magistrate’s Court Civil Suit No 955 of 2012**.

The Appellant being aggrieved by the said decision puts forth the following grounds of appeal;

- 1. The Learned Magistrate erred in fact and in law by failing to take cognizance of the fact that the case was filed in the year 2012, and the Respondent never took steps to prosecute the same to the conclusion or at all.*
- 2. The learned trial magistrate erred in fact and in law by failing to take into consideration that the Respondent had obtained a Court order dated 28 November 2014 for the refund of the amount deposited in the appellant's account which order had not been vacated thereby concluding the matter.*
- 3. The learned trial magistrate erred in fact and in law by failing to take into consideration that it was the Plaintiff who was ready for hearing by complying with Order 11 of the Civil Procedure Rules 2010.*
- 4. The learned trial magistrate erred in fact and in law by allowing the appellant to amend the plaint when pleadings had closed thereby changing the course of action and not allowing the appellant sufficient time to amend the defence and file a counterclaim as per the law.*
- 5. The learned trial magistrate erred in fact and in law by failing to appreciate that the amendment introduced had changed the nature of the prayers for which the appellant was entitled to an amendment and be given the mandatory of filing defence.*
- 6. The learned trial magistrate erred in fact and in law by not allowing parties time to comply with order 11 of the civil procedure rules 2010 after the amendment and there leading to the wrong issues being Framed for determination.*
- 7. The learned trial magistrate erred in fact and in law by rejecting an application for an adjournment on the part of the appellant do it was the first such application.*
- 8. The learned trial magistrate erred in law by not allowing the appellant application to be prosecuted on the grounds that the case had to proceed for hearing irrespective of the issues raised by the application.*
- 9. The learned trial magistrate erred in fact and in law by not framing the issues for determination.*

The Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of KIBOI & CO ADVOCATES**, filed his written submissions dated **5th March 2020**, while the Respondent filed his submissions dated **19th March 2021**, through the **Law Firm of ISHMAEL & CO. ADVOCATES**.

ANALYSIS AND DETERMINATION

The Court has considered the **Memorandum of Appeal** and the evidence at the lower Court as well as the rival submissions by parties, together with the authorities relied on and renders itself as follows;

This Court recognizes that it neither saw nor heard the witnesses, and must therefore give allowance to that. The Court has also carefully considered the findings of the trial Court, the submissions by the Counsels and finds as follows;-

As this is a first Appeal, it is the Court’s duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of ***Selle v Associated Motor Boat Co. [1968] EA 123*** where the Court held 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (***Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270***).*

Further as the Court determines this Appeal, it will take into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of *Mbogo vs Shah (1968) EA at Page 93* where the Court held that:-

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

The main issues from determination are;

- i Whether the Court Order dated 28 November 2014, essentially concluded the matter.***
- ii. Whether the trial magistrate erred by not allowing the appellant sufficient time to amend their defence and file a counterclaim.***
- iii. Whether the trial magistrate erred by not granting adjournment to the appellant to prosecute this matter.***
- iv. Whether the Amendment of the Plaintiff was properly done as envisaged the Civil Procedure Rules 2010, and goes to the core of the case.***
- v. Whether the judgement of the lower Court is moot for being contradictory by granting prayers that are discrepant and incapable of being enforced***

On the first issue, the Appellant contended that the orders were irrefutable in nature and had the effect of concluding the matter and preempted the main suit.

It is this Courts reasoned opinion that the amount held in **Equity Bank** Account Number **0890 1995 05 880**, was held as security for the suit as ordered in clause 2. Notably so, the Court has perused entire proceedings and finds that there is no justification upon which the Appellant has built his allegations.

On the second issue, the Court finds that the Appellant was served with the **Hearing Notice** and time frame was given for him to amend his Defence. Further, an application seeking to review the Orders of **22nd November 2018**, was never prosecuted by the Appellant thus allegations raised by the Appellant are baseless. The Court takes cognizance of the *dicta* by Madan, J. in the Court of Appeal **Civil Appeal No. 33 of 1977, B. Gupta -v- Continental Builders Limited**, where it was stated that **‘if a Defendant is able to raise a prima facie triable issue, he is entitled in law to defend’**. Thus, the Court finds that, in the present case, the Defendant slept on his rights entirely.

On the third issue, this Court finds that the trial Court never erred in declining an application for adjournment as the lower Court had discretion as the matter was an old one and had been adjourned severally.

On the 4th issue, the Court finds that the Amendment of the Plaintiff was proper. What that means is that the lower Court had a very wide berth in granting leave to amend. In the case of **Simonian v Johar, (1962) EA.336 (K)**, the Court approved amendment to a Plaintiff which raised new cause of action, because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction. Whether or not the Plaintiff (Respondent) was entitled to leave to amend his Plaintiff in accordance to the rules, is a discretion to be exercised by the Court within the ambit of the principles of natural justice. There was no evidence that the trial magistrate abused the said discretion.

On the last issue, the Appellant had an option in law to arrest the Judgement before it was delivered. The material before this Court is insufficient to persuade the Court to exercise discretion in favour of the Appellant on this issue. The appellant allege that the deficit of **Kshs.400,000/=** was not accounted for or how it was paid by the Respondent. It is this Court’s considered view that the same was not proved. **Section 112 of the Evidence Act** provides thus:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

Having now carefully considered the available evidence, as tendered at the lower Court, and having evaluated the same and coming to its own independent conclusion, this Court finds and holds that the trial Magistrate did **not err**, nor misapprehended the facts, Law and evidence on record.

Consequently, the Court finds that the instant Appeal is **not** merited and the same is dismissed entirely with costs to the Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 13th day of May 2021.

L. GACHERU

JUDGE

13/5/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kiboi for the Appellant

M/s Wanjiru holding brief for Mr. Nguring'a for the Respondent

L. GACHERU

JUDGE

13/5/2021