



REPUBLIC OF KENYA



KENYA LAW
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Lupere v Mukoba (Civil Appeal 44 of 2017)
[2025] KEHC 1920 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1920 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 44 OF 2017
SC CHIRCHIR, J
FEBRUARY 20, 2025

BETWEEN

BENSON LUPERE APPELLANT

AND

PAUL NASIKE MUKOBA RESPONDENT

*(An appeal from the judgment and decree of Honourable M.I Shimenga
delivered on 12/11/2015 in Butere Resident Magistrate's Court No. 268 of 2013)*

JUDGMENT

1. The Respondent filed suit against the Appellant at the lower court, seeking for an order of specific performance, and costs of the suit. In a judgment delivered on 12/11/2015, the trial Magistrate returned a verdict in favour of the respondent herein and awarded the respondent a sum of Kshs.600,000/=.
2. The Appellant was aggrieved by the judgement, and he proffered this appeal. In his memorandum of Appeal, filed on 19/04/2017 he has set out the following grounds:
 - a. That the learned trial magistrate erred in law and in fact in awarding Kshs.600,000/= to the respondent contrary to the pleadings and evidence on record.
 - b. That the learned trial magistrate erred in law and in fact in holding that the appellant was liable to refund the respondent Kshs.600,000/= contrary to the evidence on record
 - c. The learned trial magistrate erred in law in awarding the respondent Kshs.600,000/= when the same was not specifically pleaded and/or proved.
3. The Appeal was canvassed by way of written submissions.



Appellant's submissions

4. It is the Appellant's submission that there was no agreement between the respondent and the appellant that could be enforced specifically. That the appellant admitted having received Kshs. 300,000/= only from the respondent.
5. It is further submitted that the evidence of the respondent was not in sync with the prayers sought since the agreement sought to be specifically performed was not proved to exist or even produced in Court.
6. It is also submitted that the award had no basis in law since it was not pleaded in the plaint. The Appellant has relied on the case of IEBC and Anor vs Stephen Mutinda Mule & 3 Others (2014) eKLR, wherein the Court of Appeal stated that:

“Parties are bound by their pleadings and the Court sits to hear and determine the issues and not conduct investigations or examination on behalf of the society at large”.
7. The appellant further submits that the money he received was for a third party, one Emily Omusula, who was never sued or called to testify in support of the respondent case at the trial court. The appellant thus submits that contrary to the findings of the trial court, the respondent did not prove his case on a balance of probabilities.
8. The respondent did not file any submissions.

Determination

9. This is the first appellate court and it is trite law that the mandate of a first appellate court to review the evidence presented before the trial court, evaluate it and arrive at its own conclusions. The Appellate court must however bear in mind the fact it is the trial court which had the benefit of hearing and seeing the witnesses first-hand. (Ref: Selle & Anor. vs. Associated Motor Boat Co. Ltd (1968) EA 123).
10. I have considered the grounds of Appeal, the parties' submissions and the lower court record and in my view the only issue for determination is whether the respondent proved his claim on a balance of probabilities.
11. It is trite law that to successfully claim damages for breach of contract, a plaintiff must show that: a contract exists or existed; the contract was breached by the defendant; and the plaintiff suffered damage (loss) as a result of the defendant's breach. (Ref: Hydro Water Well (K) Limited v Sechere & 2 others 2021] KEHC 22 (KLR) (Commercial and Tax) (10 August 2021)
12. The respondent's claim is anchored on an alleged agreement he entered with the Appellant in which the Appellant was to purchase for him a piece of land. To this end he states that he gave ksh. 300,000 to the Appellant. He further stated that the balance of ksh. 300,000 was paid to the Appellant in cash and therefore there was no available record of the latter payment. The Appellant failed to purchase the land and therefore the respondent was demanding for a refund of total sum of ksh. 600,000.
13. On the other hand it is the Appellant's case that, it is the respondent who was in breach as he paid ksh. 300,000 only and failed to pay the balance of ksh. 300,000, and hence he could not buy the land. He denied receiving the balance in cash as alleged.
14. The existence of the presence of the agreement was readily admitted by the Appellant, with the only issue in dispute being the amount of money that passed to the Appellant. There is also an acknowledgment letter dated 23/12/2008 by the Appellant acknowledging receipt of ksh. 300,000 from Martin Otiato and Gabriel Mukunda on behalf of the respondent (PExb 1)



15. From the Evidence of both parties, it emerged that the contract was both oral and written. The initial discussions were never reduced into writing but there was documentary evidence of the receipt of the first deposit of ksh. 300,000.
16. Verbal/oral contracts are valid just like written contracts. This is as long as such contracts are for a lawful purpose, there is mutual agreement, consideration and genuine assent for the contract to be enforceable.
17. The only issue remaining to be addressed is whether the claim for the balance of ksh. 300,000 was proved.
18. The respondent told the court: “ He was someone I trusted, so I informed him that I will send him the money in December 2008. So I gave him ksh. 300,000 through Martin Otiato and Gabriel Mukunda.I have a copy of the agreement that he received ksh. 300,000.... Early in 2009, he came to my office in Nairobi. I gave him ksh. 20,000 . Later he came back to Nairobi and I gave him ksh. 70,000”. On re-examination , he stated that the undocumented ksh. 300,000 was on mutual trust.
19. On the other hand the Appellant in his defence , stated in cross- examination as follows: “ I received ksh. 300,000 through Otiato, ksh. 30,000 via mpesa ksh. 18,000 and ksh2,000 but I cant remember the ksh. 13000. On re-examination he state that the ksh. 30,000 was for other businesses.
20. Thus the respondent, by his own admission had no proof that he gave the Appellant another ksh. 300,000. The Appellant however admitted to have received further payments , the aggregate of which came to ksh. 50,000, (that is ks.30,000+ 18,000+ 2,000).
21. In the absence of any evidence that the Appellant received a further ksh. 300,000 I disagree with the findings of the trial court to that extent. However there is evidence that the Appellant received a further ksh. 50,000 as aforesaid
22. Am therefore satisfied that , on a balance of probability the Respondent did prove that he gave the Appellant a total of ksh. 350,000 and he is entitled to this amount by way of refund.
23. The Appellant has pleaded in this Appeal that the amount of ksh. 600,000 was not pleaded. Whereas the drafting of the plaint was rather wanting , a reading of paragraphs 5, 9 and 10 was sufficient in stating the respondent’s cause of action against the Appellant, which is that he is seeking a refund for the money given to the Appellant.
24. I have further noted the Appellant’s submission to the effect that there was no valid contract and therefore there was no basis for a remedy of specific performance. I have already found that there was a contract , partly written and partly oral . I have further noted that contrary to the pleading in the main body of the plaint, in his prayer the Respondent sought for an order of specific performance instead of a refund. This, I believe is where the Appellant is coming from.
25. I had earlier pointed out about the plaint , wanting in form. However form can not be allowed to override the substance. Further this issue was not raised as a ground of Appeal. It is an afterthought which is being sneaked in at the point of submissions. This court therefore declines to address itself to it.
26. The upshot of this determination is that the appeal herein partially succeeds.
 - a) Consequently the lower court award of ksh. 600,000 is hereby set aside and substituted with ksh. 350,000.
 - b) Each party to meet its own costs in this Appeal



c) For avoidance of doubt , the lower court costs go to the respondent .

DATED, SIGNED AND DELIVERED AT ISIOLO VIA MICROSOFT TEAMS THIS 20TH DAY OF FEBRUARY 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi – Court Assistant.

