Kimani v Maina (Civil Appeal E007 of 2023)
[2025] KEHC 4271 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4271 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL E007 OF 2023

LN MUTENDE, J

APRIL 2, 2025

BETWEEN

MARTHA WAMBUI KIMANI ..... APPELLANT

AND

SIMON GITHINJI MAINA ..... RESPONDENT

JUDGMENT

Introduction and Background

1. The Appellant instituted a suit against the Respondent herein seeking a Judgment for the sum of Kshs.1,000,000/- damages for breach of implied contract and interest, plus costs of the suit. The claim arose out of a verbal agreement between the parties to purchase a parcel of land jointly which made her deposit Kshs.1,000,000/- in an agreed account.

2. In his defence the Defendant denied owing the Plaintiff the stated sum and urged that following their oral agreement, the Plaintiff deposited the sum of Kshs.1,000,000/- being part payment for the parcel of land. That he paid to the proprietors of the land together with his share making it a total of Kshs.2,000,000/-. Dismissing the suit as premature, he called upon its dismissal. Averments that the Plaintiff denied and reiterated her claim.

3. The trial court considered evidence adduced and found the Plaintiff having failed to prove the case on a balance of probabilities hence dismissed the case with costs.

Appeal

4. Aggrieved, the Appellant appealed against the whole judgment on grounds that;

    1. The learned trial Magistrate erred in law and fact and misdirected herself in finding that the Appellant had failed to prove her case to the required standard and heavily relied on the

Respondent's defence which was full of glaring inconsistences and contradictions in dismissing the case.

2. The learned trial Magistrate erred in law and fact in failing to address the substantive issue of money had and received by the Respondent and instead focused on technicalities in the agreement dated 29th May, 2021 in dismissing the Appellant's claim which occasioned a miscarriage of justice.

3. The learned trial magistrate erred in law and face in failing to appreciate that the Respondent did not produce any evidence of sale agreement between himself and alleged third parties claimed to be land vendors contrary to Section 3(3) of the *Law of Contract Act* nor did he tender evidence of payment of any purchase price and as a result, the trial court reached wrong conclusions and findings of fact and law in dismissing the Appellant's claim which has occasioned a miscarriage of justice.

4. The learned trial Magistrate erred in law in misapprehending and failing to properly deal with the evidence adduced in court for the Appellant and thus making a finding which is incongruent with the law of contract, authorities and evidence adduced before court.

5. The learned trial Magistrate erred in law and fact by acknowledging that indeed money was paid and received by the Respondent and as such the prayer for restitution of the Appellant's money ought to have succeeded, but instead dismissed the Appellant's suit with costs to the Respondent which occasioned an unjust enrichment to the latter and a miscarriage of justice to the Appellant.

6. The learned trial Magistrate put undue reliance on and immaterial and irrelevant and oral evidence and/or misconstrued evidence adduced by the Respondent herein thereby reaching wrong conclusions and findings of fact and law which occasioned a miscarriage of justice.

7. The learned trial Magistrate erred in law and fact in dismissing the Appellant's suit and holding that the Appellant did not prove her case on a balance of probabilities.

8. The learned trial Magistrate erred in law and fact in dismissing the Appellant's suit and awarding costs of the suit to the Respondent without considering the submissions and authorities tendered on behalf of the Appellant.

9. The learned trial Magistrate's decision was unjust, against the weight of evidence and based on misguided points of fact and wrong principles of law which has occasioned a miscarriage of justice.

5. The appeal was disposed through written submissions. It is submitted by the Appellant that the court appreciated that the Appellant paid a sum of Kshs.1,000,000/- to the Respondent on a promise to get a portion of one (1) acre of land which the Respondent alleged to be in process of purchasing from the registered proprietors, a transaction that did not go through hence the Appellant's cause of action was a claim for refund of money had and received. Reliance in this respect is placed on Roots Capital Incorporated v Tekangu Farmers Cooperative Society Ltd & Another (2016) eKLR where Ngaah J stated that;

> "The question that follows and which I think would be relevant to the applicant's suit is, would money paid under an illegal contract be recoverable? According to Halsbury's Laws of England (supra) paragraph 883 a claim for the return of money paid over in these circumstances may take one of the four basic forms. It may be: (1) a personal action for a debt (for instance, on a loan); (2) a personal restitutionary claim for money had and received; (3)

an action in tort for the return of identifiable coins or notes or their value; or (4) a proprietary claim in equity even where the money has been paid into a mixed fund. However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received.

But in an appeal urged in the Supreme Court of United Kingdom in Patel versus Mirza (2016) UKSC 42, and whose decision was delivered on 20th July, 2016, barely a week before this application was urged, the Court appeared to depart from this age-old principle and restricted the application of the maxim ex turpi cause oritur non actio only to those actions seeking enforcement of what would otherwise be illegal contracts. According to the Supreme Court, just as policy considerations would bar a claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefited from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is sustainable."

6. That the Respondent alleged that he paid the vendors Kshs.3,000,000/- for the land which was to be sold at Kshs.4,000,000/- and since they were to share 50:50, the Appellant was required to pay a balance of Kshs.1,000,000/- but since he did not have an agreement for payment of the purchase price, then the burden of proof was upon him to demonstrate that the Appellant ought to have pursued the vendors.

7. That the Court of Appeal in Agricultural Finance Corporation v Lengetaia Ltd & Jack Mwangi (1985) eKLR stated that;

> " As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. The fact that a person who is a stranger to the consideration to the consideration of the contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

8. Therefore, the absence of privity of contract between the Appellant and alleged vendors of land, the Appellant could not sue for refund.

9. It is submitted that the Appellant and Respondent decided to jointly buy a piece of land known as L.R. Marmanet/Melwa Block 1/4568 from the registered proprietors agreed at Kshs.4,000,000/- orally agreed to be contributed between them which was contested since the Respondent paid Kshs.2,000,000/- while the Appellant only paid Kshs.1,000,000/-. That failure to pay the balance resulted into the agreement dated 29th May, 2021 but the Respondent failed to pay for the vendor balance.

10. That the sale agreement between the vendors and purchasers (Appellant and Respondent) was never reduced into writing. That by virtue of the agreement dated 29th May 2021, parties expressly and/or by implication conceded or agreed that the sum of Kshs.3,000,000/- had already been paid to the land owners. Therefore, the sum of money the Appellant seeks to recover is not a debt but a consideration meant to be paid to the land owners. That parties who would be called upon to refund the contribution of Kshs.1,000,000/- are the three vendors.

11. Further, that the claim for implied contract is preposterous, unknown in law and completely unsustainable as no evidence was adduced to ascertain the implied terms.

Analysis and Determination

12. This being a first appeal, the duty of the court is to analyse a fresh evidence adduced at trial, re-evaluate and reconsider it so as to reach an independent determination bearing in mind the fact of not having seen or heard witnesses who testified. In the celebrated case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 it was stated as follows;

> " This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and 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 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and Others [1968] EA 123 and Williamson Diamonds Ltd. v Brown [1970] E.A.I.
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> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this court said in Peters vs Sunday Post Ltd [1958] EA 424. In its own words;
>
> "whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide..."

13. The Appellant sought to condense all the grounds of appeal which as correctly submitted by the Respondent can be fused to whether the trial court erred in law and fact by dismissing the Plaintiff's case.

14. The argument put forth by parties herein is that they initially entered into a verbal agreement for purchase of land but subsequently reduced their agreement into writing meaning that the written agreement now took precedence over the verbal one and it became enforceable.

15. The agreement dated 29th May 2021 provides thus;

> " (a) The First Party and the Second Party acknowledge that they entered into a joint venture to purchase the whole of L.R. Marmanet Melwa Block 1/4568.
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> b. The First Party acknowledges that she transferred Kshs.1,000,000/- to the Second Party vide RTGS Transfer on 28th April, 2020.
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> c. The Second Party acknowledges that he has made payments directly to the vendor amount to Kshs.2,000,000/-.
>
> d. And whereas the first and second parties are desirous on offsetting the full purchase price of Kshs.4,000,000/- by settlement of Kshs.1,000,000/- in respect of the outstanding balance amount owed to the vendor on terms and conditions hereinafter set forth and contained."

16. The agreement between parties herein did acknowledge the fact of Kshs.1,000,000/- having been transferred by the Appellant to the Respondent in an endeavour to enter into a joint venture. The

terms of the venture are outlined the intended purchase of land L.R. Marmanet/Melwa 1/4568. The Respondent agreed having combined their resources of Kshs.2,000,000/- and purportedly having made payment of the same to the vendor, though no such evidence was attached.

17. At paragraph 'd' of the agreement is an introduction of payment and a full settlement of the purchase price of Kshs.4,000,000/-, whereby a sum of Kshs.1,000,000/- was to be paid by the Respondent within 120 days from 29th May, 2021. Then at clause (d) of the terms stipulate;

> " 1 (d) That once payment of the outstanding amount is made by the First Party, the Second Party shall cause registration of title number L.R. Marmanet Melwa Block 1/4568 in his name.

18. According to the terms of the agreement, the first party was to pay the outstanding amount not specifically stated. The agreement as drafted was hence ambiguous for failure to determine the parties actual intentions which makes the agreement void.

19. In the judgment of the trial court it was stated thus;

> " The issue for determination is, did the Defendant breach the terms of their agreement/ contract? It is not in dispute that the parties herein did agree to enter into a sale agreement whereby the Defendant was the one transacting with the alleged vendors who were the registered proprietors of the suit land as evidenced by the copy of title deed produced herein. It therefore follows that this being a transaction for sale of land, the same as to comply with Section 3(3) of the Law of Contract which provides as follows;
>
> "(3) No suit shall be brought upon a contract for the disposition of an interest in land unless;
>
> a. The contract upon which the suit is founded;
>
> i. Is in writing
>
> ii. Is signed by all the parties thereto; and
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> b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act*, nor shall anything in it affect the creation of a resulting, implied or constructive trust."
>
> The above law is in black and white and I need not cite any authority. One cannot bring a suit to enforce an agreement for sale of land unless such agreement is in writing. The court can only know that there is such agreement if the document itself is produced as evidence in the case. I have carefully perused the sale agreement produced as exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act.
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> Further the said sale agreement contains the names of the parties, the description of the property, the purchase price and the conditions thereto but I note that the same is not between the registered proprietors of the suit land but an agreement between friends, the parties herein, and what they were going to subdivide the suit land after the Defendant had purchased the same from the registered proprietors. What is obvious from the said agreement is that the Plaintiff blindly believed the Defendant herein that he was purchasing the suit land from the said registered proprietors which caused her to transfer

Kshs.1,000,000/- to the Defendant on 28th April, 2020 more than a year before the parties entered into the above agreement on 29th May, 2021 thus proving it was an afterthought."

20. On the question of breach of an implied contract, by conduct and actions of the Appellant and Respondent there was a suggestion that they did agree to certain terms. In the Aramis [1989] 1 Lloyd's Rep 213, Bingham L.J. stated;

> " As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case – and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist".
>
> "I do not think it is enough for the party seeking the implication of a contract to obtain "It might" as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract".

21. As afore stated due to the ambiguity in the agreement, enforceable obligations could not be created.

22. Reverting to the money transferred by the Appellant considering that the purported land was to be purchased from ghost proprietors, the Appellant should be entitled to refund. In the premises the appeal succeeds, hence the judgment of the trial court dismissing the suit be and is hereby set aside and is substituted by an order entering judgment for the Plaintiff (Appellant) in the sum of Kshs.1,000,000/- plus costs of the suit in the lower court and on appeal.

23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF APRIL, 2025.

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L.N. MUTENDE

JUDGE