Kigera t/a Glinis Kigera & Company Advocates v Muhoroni Solar Farm Limited (Civil Appeal 243 of 2020) [2024] KEHC 8445 (KLR) (Civ) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8445 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 243 OF 2020

JN NJAGI, J

JUNE 20, 2024

BETWEEN

GLINIS KIGERA T/A GLINIS KIGERA & COMPANY ADVOCATES ..... APPELLANT

AND

MUHORONI SOLAR FARM LIMITED ..... RESPONDENT

(Being an appeal arising from the judgment and decree of Hon. P.N. Gesora. CM, in Milimani CMCC No. 8840 of 2018 delivered on 28/5/2020)

JUDGMENT

1. The respondent herein who was the plaintiff at the lower court sued the appellant/defendant seeking for refund of Ksh.16,191,351/= deposited with the appellant by Mr. Narven P. Sharma and A.B. Sharma towards the purchase of property known as Kericho/Kipkuror/109 after the appellant failed to release the money to the owners of the property so as to finalize the deal. The respondent also sought for interest at 21% per annum compounded with effect from February 2016 until payment in full. The appellant denied the claim. After a full hearing in which the appellant did not tender in evidence, the trial magistrate rendered a judgment in favour of the respondent thereby allowing the claim as contained in the plaint. The appellant was aggrieved by the judgment and lodged this appeal.

2. The grounds of appeal are that:

    1. The learned trial magistrate erred in fact and in law in finding as he did that the Respondent has explained satisfactorily as to what happened and proceeded to enter judgment in its favour.

2. The learned trial magistrate erred in fact and in law in failing to find that the Respondent did not have the capacity and indeed the locus to institute the suit as it did not advance any monies to the Appellant as claimed or at all.

3. The learned trial magistrate erred in fact and in law in basing his decision on extraneous matters rather than on the evidence on record.

4. The learned trial magistrate erred in fact and in law by awarding the Respondent interest at the rate of 21% per annum without any legal basis and or evidence on record in support thereof.

5. The learned trial magistrate erred in fact and in law in failing to take into consideration the Appellant's submissions and thereby arriving at an erroneous decision.

3. The Appellant prayed for the entire judgment and decree of the trial court be dismissed with costs.

Case for the Respondent at the lower court

4. The respondent called one witness in the case, Naveen Parkash Sharma, PW1.The witness adopted his witness statement dated 10th April 2017. His evidence was that he is a Kenyan citizen and a director and shareholder of the respondent company together with another company known as Innowind Kenya Limited. That in the year 2015 he through his company known as Rishi Limited and Innowind Limited were desirous of acquiring land in the Kisumu/Kericho area. They identified some land known as Kericho/Kipkuror/109 and agreed a price of Ks.16,920,000/= with the owner.

5. That they were at the time represented in the matter by the firm of Michael, Daud & Associates and the appellant who is an advocate of the High Court of Kenya is the one who was handling the matter on behalf of the firm. They intended to operate the project in the name of a company to be known as Muhoroni Solar Farm Limited. Innowind Kenya Limited deposited with the said firm of advocates a sum of Ksh.2,797,335/= as its contribution towards the purchase of the property and Rishi Limited paid Ksh.310,615/= as its contribution. That while the purchase of the property was underway, the appellant left the firm and opened her own law firm. They decided to move with her and their file was released to her by the firm of Michael, Daud & Associates and the deposited money transferred to her.

6. Further that in July 2015, Innowind Kenya Ltd paid the appellant a sum of Ksh.12,960,000/= being its contribution towards the balance of the purchase price for the property. That the appellant then advised them that only an individual Kenyan citizen could purchase the property and Innowind could not feature in any of the documents for the purchase of the property. That they then agreed that the land would be bought in the name of himself, Mr. Naveen to hold in trust of the respondent company. That in order to adhere to acquisition process back in France in respect to Innowind, the appellant was requested to refund the payments made by Innowind and Mr. Naveen would pay the balance of the purchase price. That on the 7th January 2016, he paid the appellant the sum of Ksh.16,000,000/= by RTS and she issued a receipt dated 12th January 2016.

7. That they later identified another property known as Kericho/Kipkuror/295 and Innowind Kenya Limited paid the appellant Ksh.428,032/= as its contribution towards the purchase and Mr. Ashu Sharma paid Ksh.47,559/= as the contribution for Rishi Ltd. After the last payment the appellant was holding the full purchase price.

8. Mr. Naveen then entered into an agreement with the owner of the land. The necessary contents to the sale of the land were obtained and title was issued in the name of Mr. Naveen in February 2016. He instructed the appellant to release the money to the vendor but the vendor told them that she only paid him a sum of Ksh.1,000,000/=. The appellant started to avoid them. They reported to the police.

She was arrested by the police in May 2016. She pleaded with them that they settle the matter amicably which they accepted but she never made good her promise save for payment of Ks.1,200,000/=.

9. As earlier stated the appellant did not tender any evidence at the lower court.

10. The appeal was canvassed by way of written submissions.

Appellant's Submissions

11. The appellant`s submissions revolved around two issues: first, whether the Respondent had the requisite locus to institute the suit; and second, whether the Respondent had proved its claim against the Appellant.

12. On the first issue as to whether the Respondent had the requisite locus to institute the suit, the Appellant submitted that the sum of money in question being Kshs. 16,191,351/= was initially paid by two companies namely: Rishi Limited and Innowind Kenya Limited. The Appellants asserts that the two companies were never a party to the proceedings in the lower court. More so that the letter of instruction dated 28th January 2015 indicates that the instructions were issued by Innowind Kenya Ltd and there is no mention of the respondent.

13. The Appellant submitted that no document whatsoever was placed before the court to show that the Respondent paid money to the Appellant for the purpose of acquisition of property in Kisumu-Kericho area which property was to be owned by the Respondent.

14. The appellant submitted that the evidence was that there were other payments made by Mr. Naveen Sharma and Ashu Tosh Sharma on behalf of Innowind Kenya Ltd but that these were third parties who had not made any claim on her alongside the respondent.

15. On the principles governing locus standi, the appellant cited the case of *Melickzedeck Shem Kamau v Beatrice Waithera Maina & 2 others* [2020] eKLR, where it was held that:

> Courts time and again have held that where there is no locus the Court lacks jurisdiction. In the case of Julian Adoyo Ongunga –vs- Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant:
>
> > "Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings...."

16. Also cited was the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR where the court held that:

> As I understand Mr Mbugua for the 2nd defendant and Mrs Onyango for the 1st and 3rd defendants the test of locus-standi is embodied in HC Misc Application No 58 of 1997 – Hon Raila Odinga vs Hon Justice Abdul Majid Cockar and Republic––vs- GBM Kariuki Misc Cr Appl No 6 of 1994 which are authorities for the proposition that for a party to have locus standi in a matter he ought to show that his own interest particularly has been prejudiced or about to be prejudiced. If the interest in issue is a public one, then the litigant must show that the matter complained of has injured him over and above injury, loss or

prejudice suffered by the rest of the public in order to have a right to appear in court and to be heard on that matter.

17. The Appellant submitted that the Respondent was, as per the certificate of incorporation, incorporated on 22nd June 2015 whereas the payments were made in the month of April 2015. She submitted that the plaintiff had no capacity to claim the money in the first place as it had not been incorporated when the money was paid. The appellant relied on the case of *Simona Rizzoti v Kenya Way Limited* [2021] eKLR where the court held that:

> Until a company has been incorporated, it cannot contract or do any act. In Civil Appeal 189 of 2016 Clement Muturi Kigano v Kibera Development Company Limited [2019] eKLR it was held:
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> > "Until a company has been incorporated, it cannot contract or do any act. Nor once incorporated, can a company become liable for or entitled under contracts purporting to be made on its behalf prior to incorporation - for ratification is not possible when the ostensible principal did not exist. Any preliminary pre-incorporation arrangements will either have to be left to mere gentleman's agreements or the promoters will have to undertake personal liability.
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> (See also Kelner -v- Baxter (1886) KR 2 C.P. 174; see also Newborne -v- Sensolid (Great Britain Limited [1954[1 QB 45 C.A.)"

The appellant submitted that there was no basis at all for the lower court to award the Respondent the money.

18. On whether the Respondent had proved its claim against the Appellant, the Appellant submitted that the Respondent at the lower court did not adduce any evidence to prove that it had paid any money to the Appellant. That the only evidence adduced was for the money paid by third parties who were not parties in the suit at the lower court. In this, the Appellant cited the case of *Netah Njoki Kamau & Another v Eliud Mburu Mwaniki* [2021] eKLR where the court cited the Court of Appeal in the case *Charterhouse Bank Limited (Under Statutory Management vs. Frank N. Kamau* (2016) eKLR where the court had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

19. The respondent submitted that the trial court erred in finding that the respondent had proved its case because the plaintiff had failed to testify in rebuttal to the claim.

20. On interest awarded by the lower court at the rate of 21%, the appellant submitted that the same was awarded without any basis whatsoever.

Respondent's Submissions

21. The Respondent submitted that the sale agreement filed by the respondent in the case was prepared by Glinis Kigera & Co. Advocates and is signed by Mr. Naveen PW1 on behalf of the respondent company.

22. It was submitted that the appellant advised the directors of Rishi Ltd and Innowind Ltd that they could not feature in the agreements since foreigners cannot own land in Kenya. That arising from this advice the appellant refunded the two companies the money that they had paid to the appellant and she thereafter accepted money from A. P. Sharma and N. P. Sharma on behalf of the respondent company for the purchase of the subject land. That the appellant issued a receipt dated 12th January 2016 after receiving the sum of Ksh.16,000,000/=. That the receipt indicates that it is for purchase of Muhoroni land. That this proves that the company was incorporated before the money was paid to the appellant`s firm.

23. It was submitted that the appellant does not deny receiving the money from Mr. Sharma and she has not given evidence that she paid the money to the proprietor of the land. That the appellant is estopped from reneging on the fact that she advised her clients to have the transaction done in the name of Naveen Prakash Sharma. The respondent relied on Section 120 of the *Evidence Act* that provides that:

> " When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

24. The respondent cited the case of *Serah Njeri Mwobi v John Kimani Njoroge* (2013) eKLR where it was held that:

> The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.

25. The respondent submitted that a claimant on the principle of estoppel has to show the following five elements:

3.4.1 Representation

There must be a representation by the representor in words or by acts of conduct.

3.4.2. Reasonableness

The person relying must satisfy the Court that it was reasonable for them to rely on the representation.

3.4.3. Reliance

The victim must demonstrate that he was induced by the representation and in such reliance acted on it.

3.4.4. Unconscionability

The victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

3.4.5. My Lord, it goes without say that the Respondent, acted faithfully on the advise and counsel of the Appellant regarding this particular transaction as their advocate. The Respondent placed reliance on advise given to it and acted upon it to its detriment. The appellant is therefore estopped from reneging on any representation given by herself to her to the Appellant and its directors herein.

26. It was submitted that the respondent acted faithfully on advice and counsel of the appellant regarding the matter as their advocate. That it placed reliance on the counsel given to it and acted upon it to its detriment. That the appellant is estopped from reneging on the legal representation she gave to the appellant and its directors.

27. It was submitted that allowing the appellant`s appeal would be tantamount to supporting a case of unjust enrichment on the part of the appellant.

28. The respondent submitted that the appellant did not appear in court to rebut the averments made against her regarding the suit. That she did not make the payment for the purchase of the property, and has up to date never refunded the sum of Ksh. 16,000,000/= deposited with her for the purchase of the property.

29. It was submitted that the respondent had proved its case against the appellant. Additionally, that the appellant failed in her duties as an advocate in ensuring that her client`s money was utilized towards the purpose it was intended.

Analysis And Determination

30. This being a first appeal, it is the duty of this Court to evaluate the evidence adduced before the lower court afresh and satisfy itself that the decision was well-founded. This principle is well elucidated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, a decision relevant today as it was then. The court held as follows:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

31. I have considered the grounds of appeal, the record of the trial court and the rival submissions of the respective advocates for the parties. I delineate the issues for determination as:

(1) Whether the Respondent had locus standi to institute the suit at the lower court.

(2) If the first issue is answered in the affirmative, whether the respondent discharged the burden of proof required for civil cases.

32. On the first issue, the Appellant's disputes that the respondent had *locus standi* on two fronts. First, the Respondent never paid any sum of money in order to facilitate the transaction leading to the acquisition of the suit property. Second, that the money paid, if any, was paid before the Respondent was incorporated. Therefore, the claim for money held by the Respondent cannot be sustained.

33. The Respondent on the other hand claims that it had the locus standi to institute the suit.

34. I have evaluated the evidence afresh. *Locus standi* signifies the right to be heard. A person must have and demonstrate a sufficiency of interest in order to sustain a standing for the purpose of instituting a suit. The Supreme Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR held as follows on the question of *locus standi*:

> "...The issue of locus standi raises a point of law that touches on jurisdiction of the Court, and it should be resolved at the earliest opportunity..."

35. Whereas an issue touching on *locus standi* ought to be raised at the earlies opportunity, the appellant did not raise the issue immediately after the suit was filed and served. Be that as it may, the issue of locus standi is one of a question of law and this court is bound to determine it.

36. From the evidence on record, it is not dispute that the directors of two companies, Rishi Limited and Innowind Kenya Limited wanted to acquire property known as Kericho/Kipkuror/109. They retained the services of the Appellant, who is an Advocate of the High Court of Kenya to oversee the transaction. The directors deposited some money with the Appellant.

37. The appellant however advised them that under Article 65 of the *Constitution of Kenya*, 2010, a non-citizen cannot hold any property under the freehold tenure. The directors then ceded the acquisition to a one Mr. Narven Sharma who would purchase and hold the property in trust of the respondent by virtue of him being a Kenyan citizen.

38. In the meantime, the Appellant oversaw the incorporation of the Respondent company. The evidence on record indicates that the Respondent was incorporated on 22nd June 2015. After the incorporation, Mr. Narven P. Sharma and A.B. Sharma deposited a sum of Kshs. 16,000,000/= to the Appellant on the 12th January 2016 in order to oversee the purchase of the property in trust of the respondent company.

39. Since the appellant did not testify in the case, the respondent`s evidence as stated above was not controverted. It is clear from the evidence that the appellant incorporated the respondent company with the view of the company purchasing the subject land. The sale agreement that was filed among the documents for the respondent was between the respondent company and the owner of the land. The appellant is the one who drafter the agreement. Why would the appellant have drawn the agreement with the respondent as the purchaser if it had no interest in the matter? I do not agree with assertion by the Appellant that the deposit of Ksh.16,000,000/= was made way before the Respondent was incorporated. Evidence shows that the company was incorporated in June 2015 and the money was paid to the appellant on 12/1/2016 vide a receipt of even date. It is therefore sufficiently clear that the respondent had an interest in the matter as to institute the suit at the lower court.

40. Mr. Naveen in his evidence stated that of the money that they deposited with the appellant, she paid Ksh.1,200,000/= to the owner of the land. This evidence was not challenged. There is no reason why the appellant would pay the money to the said person in an agreement where the respondent was indicated as the purchaser if the respondent had no interest in the matter. I therefore find that the respondent is the one that was buying the land and I accordingly hold that it had locus standi to file the suit. The first issue is therefore found in favour of the respondent.

41. The second issue is whether the respondent discharged the burden of proof by adducing evidence of the payment in the sum of Kshs. 16,000,000/=.

42. The burden of proof in civil matters is on the balance of probabilities. Justice Luka Kimaru (as he then was) answered the question of what amounts to proof on a balance of probabilities in *William Kabogo Giatu v George Thuo & 2 others* [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

43. In the same vein, in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR the Court of Appeal held as follows:

> " Denning J in Miller v Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough."

44. The evidence on record indicates that the sum of Kshs. 16,000,000/= was paid by Narven P. Sharma and A.B. Sharma to the Appellant in order to facilitate the transaction. Mr. Naveen is a director of the respondent. The Appellant did not adduce any evidence at all to rebut the assertions made by the Respondent`s witness. She did not in fact deny that she received the money. I am satisfied that the Respondent had adduced credible evidence that stands in the absence of rebuttal evidence by the appellant – see *Charterhouse Bank Limited (Under Statutory Management vs. Frank N. Kamau* (supra). I find that the respondent had sufficiently discharged its burden of proof.

45. On the issue of interest, it is the discretion of the trial court to apportion interest. This is captured under section 26 of the *Civil Procedure Act*. The respondent in this case was claiming interest at 21%. The trial court did not give reasons why it awarded interest at that rate. Section 26 of the *Civil Procedure Act* requires the interest awarded by the court to be reasonable. The respondent did not give reasons for charging interest at 21%. There is sufficient reason for this court to interfere with the interest awarded by the trial court. I reduce the interest awarded to 14%, adjudged from the date of filing suit.

46. The upshot is that the appeal herein is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20TH JUNE 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Appellant

N/A for Respondent

Court Assistant – Jarso

30 days R/A.