Mwanzia v Mwanzia (Civil Appeal E020 of 2023)
[2024] KEHC 12517 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12517 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E020 OF 2023

FR OLEL, J

OCTOBER 17, 2024

BETWEEN

MERCY MWIKALI MWANZIA ..... APPELLANT

AND

ANTONY NDOO MWANZIA ..... RESPONDENT

(Being an Appeal from the Judgment and Decree made by Hon F.Nekesa SRM on 29th March 2023 at Chief Magistrate at Kitui in Civil suit No 170 of 2021)

JUDGMENT

A. Introduction

1. The Appellant has filed this appeal against the Judgement/Decree passed by Hon F.Nekesa SPM dated March 29, 2023 delivered in Kitui CMCC No 170 of 2021 where the Appellant claim for refund of Kshs.149,000/= being outstanding amount owed to her on account of breach of contract and Kshs.15,000/= being legal fees paid to Kimuli & Co Advocates was dismissed with costs based on failure to prove the same

2. The Appellant being dissatisfied by the decree passed filed her Memorandum of Appeal on August 6, 2021 and raised four (4) grounds of appeal namely: -

    a. That the learned trial magistrate erred in law and fact in her finding that the plaintiff had not proved her case on a balance of probability.

    b. That the learned magistrate erred in law and in fact in failing to consider the evidence before her in totality hence arrived at an erroneous determination.

    c. That the learned trial Magistrate erred in law and in fact in her analysis of the WhatsApp correspondences produced by the plaintiff thus arrived at an erroneous finding.

d. The learned trial Magistrate erred in law and fact in failing to consider the written submissions by the plaintiff on both the law and facts hence arriving at an erroneous and unjust determination.

3. The Appellant prayed that this Appeal be allowed and the judgement of the trial magistrate be set aside and be substituted with an order allowing the Appellants claim as prayed for in the plaint dated June 22, 2021.

B. Pleadings & Evidence

4. The Appellant testified and stated that the respondent was her uncle and he did offer to sell to her a parcel of land registered under his wife's name, which parcel of land was situated within Kitui Town. She physically viewed the said parcel of land and the respondent showed her its Allotment letter dated June 26, 1995, where it was described as Plot; KTI/29/94/13B (The said parcel is hereinafter described as the suit property). On the strength of the said allotment letter and the existing family ties, the Appellant agreed to buy the said property on condition that the respondent would process the necessary documentation and furnish her with a good title.

5. The Appellant further testified that she paid the respondent a sum of Kshs.500,000/=, out of which Kshs.350,000/= was paid through Mpesa and Kshs.150,000/= was paid in cash. She became suspicious due to the respondent's delay in signing the sale agreement/ processing title documents and this eventually led to the transaction falling off. On-demand of the refund, the respondent paid her Kshs.350,000/= but failed to pay her Kshs.149,000/=, hence this suit. Under cross-examination, the Appellant reiterated that Kshs.149,000/= was given to the respondent in cash, though he did not sign any acknowledgment in receipt. After paying the respondent Kshs.500,000/= he changed goalposts and demanded that she pays him Kshs.800,000/= as the purchase price and that is the straw that broke the Camel's back.

6. The respondent on the other hand denied all the Appellant's allegations in his statement of defence and in evidence in chief acknowledged that the Appellant was his niece, daughter to his sister. She wanted to purchase the suit property and after viewing the same, they had settled at a purchase price of Kshs.800,000/=. He received Kshs.350,000/= as the down payment of the purchase price, but the agreement aborted as the Appellant got impatient and stated that he was taking too long to process the suit parcel title. He denied receiving the sum of Kshs.149,000/= from the Appellant nor was he called at any time to go sign the agreement at Kimuli Advocate office. He had refunded the Kshs.350,000/= and did not owe the Appellant any money under the said contract.

7. Upon cross-examination, the respondent confirmed that indeed he had agreed to sell the suit parcel to the Appellant, which parcel was registered under his wife's name, vide the allotment letter dated June 26, 1995, issued by Kitui county Government. They had agreed on the purchase price, but the same was not reduced into writing. The Appellant later cancelled the agreement as she was unable to pay the contract sum balance and he thereafter refunded her what she had paid him. The respondent denied having received Kshs.149,000/= cash from the Appellant and insisted the WhatsApp conversation did not allude to him accepting that he would refund this amount. He prayed for the suit to be dismissed.

C. The Appeal

8. I have considered this appeal, the submissions filed, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it

did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

9. Further in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

> 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 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 allowances in this respect.

10. The only issue for determination in this Appeal is whether the Appellant did indeed prove that, she paid her uncle a sum of Kshs.500,000/= instead of Kshs.350,000/= as he alleges. It is not in dispute that Kshs.350,000/= was paid through various Mpesa transactions and the same was refunded. The appellant further testified that on January 5, 2021, she withdrew Kshs.149,000/= cash from Mambo Communication, Kitui Agent Till No 257002, and handed it over to the respondent, an allegation the respondent strenuously denies.

11. The Appellant further produced an electronic download of their various WhatsApp chat, specifically on February 2, 2021, she had told her uncle to give her the sale agreement for the plot, which she had paid him Kshs.500,000/= and he did reply in affirmative by stating "*Sawa*", to imply that he will deal as requested. She subsequently repeatedly asked for a refund of Kshs.150,000/= but the respondent failed to heed to his promise to refund the same.

12. The trial magistrate did read through the WhatsApp correspondence and made a finding that it showed that the Appellant was still asking for Kshs.150,000/= meaning that the respondent had only paid Kshs.350,000/=. According to her, this meant that there was "no meeting of the mind initially in their conversation. The "*Sawa*" was equivocal". With respect, to the trial court, this finding was erroneous and was based on misapprehension of the evidence tendered.

13. The question before the trial court was what amounted to proof on a balance of probabilities. The Appellant did provide Mpesa statement proof that she withdrew Kshs.149,000/=, and WhatsApp conversation flow, which confirmed that she constantly budged her Uncle for a refund of Kshs.500,000/=. At no point did the respondent deny receiving the said sum. Further conversions, showed the appellant urging the respondent to send the balance of Kshs.150,000/= and even sent him her Cooperative Bank (k) Ltd bank account where he could deposit the same but this was ignored. This evidence presented was therefore credible. In defence the respondent only gave a general denial without specifically addressing why the appellant would be constantly demanding Kshs.150,000/= refund from him.

14. In *William Kabogo Gitau Vs George Thuo & 2 others* (2010) 1 KLR 526 Kimaru J stated that;

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleased 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 opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred."

15. I also refer to *Palace Investments Ltd Vs Geofrey Kariuki Mwnedwa & Another* (2015) eKLR , Where the judges of Appeal referred to "Denning J in *Miller Vs 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 is 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. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained."

16. I do therefore find that the trial Magistrate made an erroneous finding that the Appellant did not prove her case, while the opposite held true. She did indeed prove to a reasonable degree of probability that she advanced her uncle, a sum of Kshs.500,000/= being the purchase price of the suit property, and was only refunded Kshs.350,000/=, thus entitled to a further refund of Kshs.149,000/= from the respondent. As to the issue of Special damages, the Appellant failed to produce a receipt of payment of the sum of Kshs.15,000/= to her Advocate. The same was pleaded as special damages and had to be specifically proved. The same was rightly denied.

E. Disposition

17. Accordingly, this Appeal is successful to that extent. I do therefore order as follows;

    a. The Judgment/decree issued in Kitui CMCC No 170 of 2021, dated March 27, 2023 is hereby set aside and judgment is entered in favour of the Appellant for the sum of Kshs.149,000/= being the outstanding balance owed to her from the respondent on account of the botched sale of Plot No. KTI/29/94/13B.

    b. The said amount will attract interest at 14% P.A. from the date of filing this suit until the date for payment in full.

    c. The Appellant shall have costs of this Appeal, which is assessed at Kshs.120,000/= all-inclusive.

18. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF OCTOBER, 2024.

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 17TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of: -

Mr. Orenge for Appellant

Mr. Mulondo for Respondent

Susan Court Assistant