Maina v Kimemia (Civil Appeal 600 of 2019)
[2023] KEHC 19108 (KLR) (Civ) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19108 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 600 OF 2019

AN ONGERI, J

JUNE 21, 2023

BETWEEN

ROSEMARY MAINA ..... APPELLANT

AND

MARY NDUTA KIMEMIA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon P. N. Gesora (CM) in Milimani CMCC No. 7866 of 2015 delivered on 26/9/2019)

JUDGMENT

1. The appellant Rosemary Maina (hereafter referred to as the appellant only) filed Milimani CMCC no 7866 of 2015 against the respondent (Mary Nduta Kimemia hereinafter referred to as the respondent only) seeking a sum of kshs 222,100/= being refund of contributions she made towards a fund raising by an entity known as Netary Investment Limited where the respondent was the chairlady.

2. The respondent entered appearance and filed a defence to the appellant's claim in which she denied the appellants case and raised a counter claim of ksh 51,900/=.

3. A summary of the appellant's case was that she contributed ksh 643,000/= to the respondent's entity for the purpose of buying a five acre piece of land from Urithi Housing Cooperative Society.

4. The property did not meet the required specifications and it was agreed that the money be refunded.

5. The respondent proposed to the appellant that she should purchase another parcel at Urithi Cooperative Society.

6. The respondent gave the appellant a share certificate but did not tell her how much she purchased the property.

7. The appellant visited the offices of Uriithi Cooperative and discovered the plot was purchased at kshs 320,000.

8. The appellant had asked the respondent to pay one Nelson Kamau Karagu kshs 100,000/= from the money the respondent was holding on behalf of the appellant.

9. The appellant then filed suit to recover the balance of kshs 222,100/=.

10. The respondent's case in summary was that she received kshs 643,100 on behalf of the appellant from Uriithi Cooperative Society.

11. The respondent said she paid the 3rd party Kshs 100,000 on behalf for the appellant.

12. She then entered into an agreement with Uriithi Cooperative to purchase one acre for ksh 1,250,000/= and paid the purchase price in two installments of kshs 874,000 and 376,000.

13. The respondent raised a counterclaim of ksh 51,900 in her defence against the appellant in respect of the money she paid to Uriithi Cooperave for the plot she gave the appellant..

14. The trial court found that the respondent paid kshs 874,000 on 27/2/2015 and the balance of ksh 376,000 was paid later.

15. The trial court found that the appellant and the respondent had agreed to share the property equally and therefore each party was to pay half of the amount the respondent paid.

16. The trial court dismissed the appellant's claim and ordered the appellant to pay the respondent ksh 51,900 in respect of the counter-claim.

17. The appellant has appealed against the judgment and decree of the trial court on the following summarized grounds;

    a. That the learned magistrate erred in law and in fact in completely misapprehending the pleadings filed and evidence tendered and thereby arriving at an erroneous decision of dismissing the plaintiff's case and allowing the counter claim.

    b. That the learned magistrate erred in law and in fact in disregarding the plaintiff's evidence that clearly showed that the defendant was in possession of a sum of Kshs 543,100 entrusted to her by the plaintiff of which she only spent a sum of Kshs 321,000 and failed to account for a sum of Kshs 222,100

    c. The learned Magistrate erred in fact in ignoring the submission filed on behalf of the plaintiff which properly analyzed would have led to the inexplicable conclusion that the plaintiff had proved her case on a balance of probabilities.

18. The parties filed written submissions in the appeal as follows; the appellant submitted that three receipts were produced by PW2 Geoffrey Kilonzo who testified that the appellant purchased Plot 267 for Kshs 321,000. That the crux of her case was that she gave the respondent Kshs 643,100 of which Kshs 100,000 was given to a third party and Kshs 321,000 was spent on registration and plot payment at the Sacco. That therefore, the respondent refused to account for Kshs 222,100.

19. The appellant submitted that the respondent during cross examination confirmed that the Sacco issued the appellant with a share certificate for plot No 267 the same property she was alleging to have bought from the Sacco. That it was strange that she was not aware of the 3 receipts yet she is the one who had paid the Kshs 321,000 to the Sacco on behalf of the appellant.

20. The appellant submitted that the respondent's case in the trial court was premised on the allegation the appellant instructed the defendant to buy her a plot from Urithi Sacco. That she sold plot 267 to the respondent vide a verbal agreement for Kshs 595,000.

21. The appellant in her submission stated that the learned magistrate totally misapprehended the evidence. That PW2 stated and confirmed that a sum of Kshs 321,000 was paid to the sacco by the respondent on behalf of the appellant. The learned magistrate therefore misapprehended when he indicated that the sacco acknowledged the receipt of Kshs 1,250,000 from the respondent meaning that the appellant was obligated to pay half that amount.

22. The appellant submitted that the issue of market price of Plot 267 was never in issue and thus irrelevant. that the claim by the respondent for the sale of plot 267 could not have been founded on a verbal contract. That it is trite law that for an agreement for the sale of land to be valid, must be in writing signed by all the parties and attested by a witness present during execution of the contract as provided under Section 3 (3) of the *Law of Contracts Act* Cap 23 Laws of Kenya.

23. The respondent on the other hand submitted that the burden was on the appellant to prove her case according to Section 107 and 108 of the *Evidence Act*. That the documents the respondent relied upon were issued prior to the appellants documents such as the sale agreement dated February 13, 2015. Prior to execution of the Sale Agreement, the respondent had already paid a sum of Kshs 874,000 to Urithi and the same was acknowledged. The respondent paid the balance sum of Kshs 376,000 on February 20, 2015. The respondent was therefore the owner of Plot Numbers 265, 266, 267 and 268 as of February 20, 2015.

24. The respondent further submitted that the agreement for the sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said Sale Agreement confirms that the same is a valid Sale Agreement which is enforceable by the parties and in support cited *Nelson Kivuvani —vs- Yuda Komora Another*, Nairobi HCCC No 956 of 1991, where the Court held that;

> " The agreement for sale of land which contains the names of the parties, the number of property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract. "

25. The respondent further submitted that parties are bound by contract that they have entered. Urithi and the respondent entered into a Sale Agreement dated February 13, 2015 and are bound by the terms therein and could not introduce other conditions that were not expressly or impliedly provided for in the said agreement.

26. The respondent argued that the said sale agreement provided a termination clause and that it was subject to Law Society of Kenya Conditions of Sale. That in the said Conditions of Sale (1989), Clause 4 on completion provides as follows:-

> " if the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition".

27. That further in the agreement, it was expressly provided that termination shall be by notice in writing by one party to the other party in breach or default specifying the breach or default and allowing the other party a period of not less than fourteen (14) days from the date of the notice (which shall

be referred to as "the completion notice") to rectify the same. No completion notice was issued to the Defendant meaning that she completed her obligations by paying the full purchase price for Plot Numbers 265, 266, 267 and 268.

28. This being the first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at it's own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle –Vs- Associated Motor Boat Co* [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> 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.
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> 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."

29. The issues for determination in this appeal are as follows;

    i. Whether the appellant proved her case against the respondent.

    ii. Whether the trial court failed to comprehend the evidence and arrived at an erroneous conclusion.

    iii. Whether the respondent proved her counter-claim against the appellant.

    iv. Who pays the costs of this appeal?

30. On the issue as to whether the appellant proved her case against the respondent, I find that the appellant's case is that her money ksh 643,000 was paid to the respondent.

31. The appellant said the respondent paid ksh 100,000 to a 3rd party following instructions from the appellant and the respondent remained with a balance of kshs 543,000.

32. The appellant said the respondent bought for her a plot from Uriithi Cooperative Society for ksh 320,000 and she is now claiming the balance of 222,100.

33. The respondent on her part said she purchased the plot for kshs 595,000 and she was claiming ksh 51,900 from the appellant.

34. The duty to prove the appellant's case was upon the appellant. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

> " 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

35. The appellant did not adduce evidence to show the exact purchase price of the property the respondent transferred to her.

36. It was the duty of the appellant to adduce evidence in support of her assertion that the respondent paid kshs 320,000 for plot no 267 which is owned by the appellant.

37. I therefore find that the appellant did not prove her case to the required standard.

38. On the issue as to whether the trial court failed to comprehend the evidence and arrived at an erroneous conclusion, I find that the appellant's case was that the plot the respondent transferred to her was bought at kshs 320,000 but she did not adduce evidence to support her assertion.

39. PW 2, the General Manager Uriithi Housing did not confirm the said evidence. PW 2 confirmed that the respondent paid kshs 874,000 on 27/2/2015 and also made another payment of 376,000. PW 2 did not mention the figure 320,000.

40. I therefore find that the trial court did not misapprehend the evidence and arrive at an erroneous conclusion.

41. On the issue as to whether the respondent proved her counterclaim, I find that there is no evidence that the respondent demanded the sum of kshs 51,900 from the appellant prior to filing of this suit.

42. I find that the said figure is an afterthought. The respondent did not disclose to the appellant how much she paid for the property.

43. The mere fact that there was no evidence how much the property was purchased does not entitle the respondent to claim more money from the appellant.

44. There is no evidence that the respondent demanded any money from the respondent at the time she gave her the share certificate.

45. In the circumstances, I find that the respondent is not entitled to the amount of ksh. 51,900 claimed in the counter claim or any other money from the appellant.

46. I accordingly set aside the judgment of the Trial court in respect of the counterclaim.

47. On the issue as to who pays the costs of the appeal, I find the respondent is not forthright in her dealings with the appellant and it is not fair for her to benefit from her lack of transparency.

48. I dismiss the counter claim and I uphold the trial courts' dismissal of the appellant's case.

49. Since both the main suit and counter claim have failed, I order that each party bears its own costs of both the original suit and the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF JUNE, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent