



REPUBLIC OF KENYA



**Dhillon (Suing as the Representative of the Estate of Sukhinder Singh Dhillon - Deceased) v Pusikushu (Civil Appeal 21 of 2019) [2023] KEHC 22339 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL 21 OF 2019  
F GIKONYO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**KARANDEEP SINGH DHILLON (SUING AS THE REPRESENTATIVE OF THE ESTATE OF SUKHINDER SINGH DHILLON - DECEASED) ..... APPELLANT**

**AND**

**KOILEKEN OLE PUSIKUSHU ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. W. Juma (CM) delivered on 20.06.2019 in NAROK CMCC No. 134 of 2013)*

**JUDGMENT**

**Impugned judgment**

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. 134 of 2013 delivered on the 20.06.2019. the trial court entered judgment for the appellant in the sum of Kshs. 600,000/= with interest from the date of the said judgment.
2. The trial court made the following findings;
  - a. That the intended agreement was not concluded as intended on 30.08.2008. The final acknowledgement came up on 06.08.2009 almost a year later. The final payment did not state how the Kshs. 1,400,000/= was paid.
  - b. That the appellant cannot prove that he gave the respondent Kshs. 1,400,000/= to pay, what was deposited was Kshs. 1,207,000/= or thereabouts.
  - c. That the appellant cleared money with the bank but did not avail the discharge that led to the release of the title deed.



- d. That the appellant did not prove on a balance of probabilities that he cleared the purchase price therefore the trial court considered what was acknowledged as received.
  - e. That advocate Sena whose evidence would have assisted the parties and more so the appellant was not a preferred witness and the court relied on what was before it.
  - f. That the appellant only partially satisfied the agreement and that he is entitled to the Kshs. 600,000/= which the respondent stated can be paid.
  - g. That since the issue herein is on specific performance, the title deed of the land in question should be the property of the respondent and not the appellant.
3. The amended memorandum of appeal dated 13.08.2019 cited four (4) grounds of appeal as follows;
- i. That learned trial magistrate erred in law and in fact in making judgment against the weight of evidence in respect of the claim awarding Kshs. 600,000/= instead of Kshs. 2,000,000/=.
  - ii. That the learned trial magistrate erred in law and in fact in failing to find that the appellant had proved on a balance of probability that his full claim was for Kshs. 2,000,000/=
  - iii. That the learned trial magistrate erred in law and fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence adduced.
  - iv. That the learned trial magistrate erred in law and in fact in finding that the appellant should return to the respondent the title to the suit property yet no counterclaim was made by the respondent in that respect.

### **Background**

4. The suit arose from a sale agreement entered into between the appellant and the respondent for sale of land parcel number Mara/Lemek /828. It was the appellant's evidence that he made a deposit of Kshs. 100,000/=. That on 07.04.2008 and 25.08.2008 he made payments for the agricultural finance corporation (AFC) loan for Kshs. 85,000/= and Kshs. 507,800/= respectively.
5. The appellant's stated further in evidence that the balance of the price of Kshs. 1,307, 200/= was paid in cash to the respondent who deposited the money in his equity bank account on 06.08.2009.

### **Appellant's Submissions**

6. The Appellant submitted that the learned trial magistrate erred in law and fact in failing to find and hold that the appellant ad proved, on a balance of probability that his full claim was for Kshs. 2,000,000/=. That the parties entered into a sale agreement for the sale of the suit property on 08.10.2007. The cost of the suit property was agreed at Kshs. 2,000,000/=. At the time of the execution of the sale agreement, the appellant paid Kshs. 100,000/= to the respondent. The appellant defrays a loan of Kshs 500,000/= that was owed by the respondent to agricultural finance corporation (AFC) and produced receipts to that effect as was a term of the contract. Further on 06.08.2009, the appellant paid the remaining amount of Kshs. 1,400,000/=. The respondent acknowledged the same by executing an acknowledgement of payment executed on the same day. That it was after full payment of the consideration of kshs. 2,000,000/= that the respondent furnished the appellant with the original title deed for the suit land together with the application for consent from the land control board duly filled and signed in his favour. The respondent undertook to avail duly signed transfer forms in favour of the appellant. That despite the appellant having paid the agreed consideration, vacant possession of



- the suit property was not handed over to him as agreed between the parties. The appellant therefore argues that the respondent breached the terms of the agreement necessitating the filing of this suit.
7. The appellant submitted that he indeed finalized the payment of Kshs. 1,400,00 due to the respondent after defraying the initial Kshs. 600,000/=. The final acknowledgment of the payment of the full purchase price was executed by both parties on 06.08.2009 in the presence of the advocate that took the parties through the subject agreement. That the said document is therefore unequivocal and non-rebuttable proof that the appellant paid the purchase price in full. That the claim by the respondent that he did not receive the full purchase price on the day he signed the document acknowledging such payment is absurd. That on 06.08.2009, the appellant directed his son to withdraw Kshs. 1,307,200/= from national bank Narok branch and hand over to the respondent. After withdrawing the said sum, the appellant's son handed it over to the respondent in the presence of the appellant himself. The respondent then deposited Kshs. 1,205,000/= to his account. That the respondent is estopped from denying the binding nature of a document signed by him. That further the respondent is estopped from denying that he received full payment with regards to the sale of the suit property by dint of appending his signature to the executed final acknowledgement of payment of full purchase price. The appellant relied on the case of Josephine Mwikali Kikenye V Omar Abdalla Kombo & Another [2018] eKLR as quoted with approval in the case of Levison Vs Patent Steam Carpet Cleaning Co. Ltd [1977] 3 ALL ER 498.
  8. The appellant submitted that the trial magistrate failed to take into account the evidence by the appellant in support of his position and the insufficiency of the explanation by the respondent regarding the banking of Kshs. 1,205,000/= in the respondent's bank account on the same day of execution of the final acknowledgement of payment. That DW2-Felix Itima Pusikishu, the respondent's son claimed that the proceeds he gave his father to bank were from the sale of cows. That DW2 stated that he sold unspecified number of cows and did not provide any evidence of the purported sales or particular days he engaged in the said sales. That further the respondent does not remember the particular days his son gave him the said money to bank in his bank account.
  9. The appellant submitted that the respondent seeks to unjustly enrich himself as he received the full consideration from the appellant for the sale of the suit property herein yet seeks to have the appellant revert the title to him in contravention of the agreement between the parties. The appellant urged that court to allow that appeal in its entirety in order to ensure that the appellant's right to own property under article 40 of *the constitution* is upheld. The appellant relied on the cases of Macharia Mwangi Maina & 87 Others Vs David Son Mwangi Kagiri [2014] eKLR, Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR, and Kenyatta International Convention Centre Vs Greenstar Systems Ltd [2018] eKLR.
  10. The appellant submitted that the respondent has not proved any element of fraud with regards to acquisition of the title to the suit property. That the respondent claims that the appellant engaged in fraudulent activities to obtain title to the suit property when the respondent handed over the title to the suit property after the appellant had made good his part of the agreement by paying the full purchase price. That the appellant did not obtain the title deed from AFC as claimed by the respondent. That the respondent failed to lead any evidence in support of his allegations that the appellant while working in cohort with the Narok police station held him under duress and forced him to sign documents whose contents he did not know and which the appellant forcefully claims ownership of the suit property without payment of the full purchase price. That the respondent did not produce copies of OB extract to support his claims of being arrested by the police. The appellant relied on the case of Kinyanjui Kamau V George Kamu [2015] eKLR.



11. The appellant submitted that the evidence of advocate Charles Sena, an advocate who undertook the sale transaction of the suit property between the parties herein was crucial in proving that the appellant indeed finalized the payment of the full purchase price. That the respondent opted to exclude admitting the advocate's witness statement despite making an application under certificate of urgency on 20.03.2014 seeking to include two additional witnesses to his defence.
12. The appellant submitted that the respondent ought to bear costs of the suit in the instant appeal. The appellant relied in the case Republic Vs Rosemary Wairimu Munene , Ex Parte Applicant Vs Ihururu Dairy Farmers Co-Operative Society Ltd Judicial Review Application No. 6 Of 2014.
13. In the end the appellant urged this court to order the respondent to refund the appellant the purchase price of the subject property amounting to Kshs. 2,000,000/= together with costs of the suit.

### **The Respondent's Submissions**

14. The respondent submitted that this court as the first appellate court is not bound by the findings of fact made by the learned trial magistrate and thus this court is under a duty to re-evaluate evidence and reach its own independent conclusions. The respondent relied on the cases of Peters Vs Sunday Post Ltd (1958) EA 424, At Pg. 429, Santosh Hazari Vs Purushottam Tiwari (Deceased) By L.R.S [2001] 3 SCC179, Selle Vs Associated Motor Boat Co. [1968] EA123 And Abdul Hameed Saif Vs Ali Mohamed Sholan (1955) 22 E.A.C.A 270.
15. The respondent submitted that the chief magistrate's court rightfully held that the appellant did not prove on a balance of probability that his full claim was for Kshs. 2,000,000/=. That the evidentiary burden to prove that the purchase price was paid to the respondent lay with the appellant. That there was no documentary evidence produced to persuade the court on the proof of payment. The respondent relied on the cases of Evans Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR, Isaak Ngatia Vs Paul Kaiga Githui Nyeri ELC No. 56 Of 2014.
16. The respondent submitted that advocate Sena was at the centre stage of the whole transaction as between the parties herein and therefore should have been called as a witness to shed light as to what exactly transpired. The respondent relied on the case of Christopher Mwangi Kioi Vs Chief Land Registrar & 2 Others [2017] eKLR Nairobi Civil Appeal Case No. 317 of 2012.
17. The respondent submitted that costs of this appeal ought to be met by the appellant in the event that the appeal is dismissed. The respondent relied in the case of Republic Vs Rosemary Wairimu Munene ( Ex Parte Applicant ) V Ihururu Dairy Farmers Co-Operative Society Ltd , Cicilia Karuru Ngayu Vs Barclays Bank Of Kenya & Another [ 2016]eKLR and section 27 of the Civil Procedure Rules.

### **Analysis And Determination**

#### **Duty of court**

18. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.
19. The first Appellate Court should therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.



## Issues

20. Arising from the pleadings and written submissions of parties are two issues, namely:
- i. Whether the appellant proved his case for the refund of Kshs. 2,000,000/=
  - ii. Who bears the costs of this appeal?

### **Whether the appellant proved his case for the refund of Kshs. 2,000,000/=**

21. The suit is a claim for a refund of the agreed purchase price of Kshs. 2,000,000 purportedly paid by the appellant to the respondent pursuant to an agreement entered into by the parties herein on 08.10.2007 for the purchase of land known as Mara/Lemek/828 measuring 41.48 Ha.
22. The parties do not contest that the respondent received the deposit of Kshs. 100,000/= from the appellant. At the time the parties were entering into an agreement for sale of land there was a loan owed to agricultural finance corporation (AFC) by the respondent. It was one of the agreed terms of the contract that the appellant shall pay the said loan in part payment of the purchase price.
23. PW1- Sukhvidnir Signh Dhillon testified that he paid Kshs 85,000/= and Kshs. 507,800/= to AFC on 07.04.2008 and 25.08.2008 respectively. He produced an AFC loan receipt as P Exh2. The appellant went on to state that he paid Kshs. 1,307,000/= to the respondent where upon the respondent deposited the same in his bank account and handed over the title deed to the appellant. The appellant stated that the money was acknowledged on 06.08.2009 at 3 o'clock at advocate Sena's office. He produced acknowledgement as P Exh 3. Further that some forms were also signed. He produced land control board forms as P Exh 5.
24. The appellant stated that he paid the respondent Kshs. 1,307,200/= whereupon they went together with the respondent to his bank to deposit and eventually the respondent deposited Kshs. 1,205,000/= . The appellant stated that he would provide the withdrawal evidence from national bank but did not provide the same.
25. DW1-Koilekel Ole Pusigishu testified that he entered into an agreement with the appellant for sale of his 50 acres piece of land at ole Sena's office, His shamba is 105 acres. The purchase price was Kshs. 2 million. He acknowledges that the appellant paid him Kshs. 100,000/=. He also admitted that he had a loan with AFC. He claimed he was later arrested and prosecuted for failing to transfer land in a criminal case but the said case was dismissed. He claimed that the money deposited in his bank account was from his son who had sold cows.
26. DW2- Felix Itima Pusigishu testified that he is the son of the respondent.it was his testimony that he gave money to his father, the respondent to deposit the same in the bank after sale of cows. He testified that he gave his father around Kshs. 2,400,000/=.
27. Perusal of the final acknowledgement reveals that a sum of Kshs. 2,000,000 has been paid in respect of their agreement herein. It did not state how the balance of Kshs. 1,400,000 was paid. The appellant stated that the money was paid in cash by his son who had picked it from National Bank. In his evidence, he stated that he withdrew the purported money from National Bank and that he will provide evidence of withdrawal from his account at NBK. But, he did not provide any proof of withdrawal of the Kshs. 1,3007,000/=.
28. Something else; he stated that his son signed the acknowledgement note in his presence because he was carrying the money. Apparently, he did not sign it himself. This is in tandem with the evidence by the respondent that the appellant did not sign the acknowledgement but his son did. The explanation



by the respondent was that the appellant did not come to the office of Sena Advocate, and that he signed the acknowledgement in the belief that Sena Advocate would remit the money to him. He was categorical that he did not receive the money as alleged. According to the respondent and his son, the money he deposited in the bank was from his son and was proceeds of sale of cows. There was however, no proof of the allegation.

29. These two versions are quite disparate and there is no clear evidence setting one of the streams apart as most reliable or believable; which makes this to be simply a case of 'your word against mine'.
30. In such state of affairs, the sword of the law of man will draw blood from the person with the burden of proof. Nevertheless, the final judgment of the ultimate Judge- God, who has commanded, inter alia that: -

'...bring me any case too hard for you and I will hear it.' (NIV Version, Deuteronomy 1:17):

Assuredly, will fall upon the person who has given false testimony.

31. Be that as it may, the acknowledgment in question was prepared by and before Sena Advocate. This was critical person to clarify the lapses in the case. The advocate was never called as a witness. Therefore, the acknowledgment did not benefit from such evidence which could have provided corroborative and probative value support.

### **Conclusions and orders**

32. Upon careful analysis and evaluation of the evidence, facts and applicable law, the following findings are properly grounded, especially;
- h. That the intended agreement was not concluded as intended on 30.08.2008. The final acknowledgement came up on 06.08.2009 almost a year later. The final acknowledgment of payment did not, however, state how the Kshs. 1,400,000/= was paid.
  - i. That the appellant did not prove that he gave the respondent Kshs. 1,400,000/= in cash through his son from which the respondent deposited Kshs. 1,207,000/= or thereabouts into his account.
  - j. That the appellant cleared money with the bank but did not produce the discharge that led to the release of the title deed.
  - k. That the appellant did not prove on a balance of probabilities that he paid the purchase price. Therefore, the trial court correctly entered judgment for sums paid to the respondent and AFC in accordance with their agreement as money acknowledged and received.
  - l. That evidence by advocate Sena would have assisted resolution of the major issue of alleged payment of the balance herein. And, absence thereof, left the trial court to rely only on the evidence before it.
  - m. That the appellant only partially satisfied the agreement and that he is entitled to the Kshs. 600,000/= which the respondent stated is payable.
  - n. That from the pleadings and evidence adduced, this claim is for money paid and received on a contract and not one for specific performance; the latter would fall within the jurisdiction of ELC.
33. In the upshot, the appellant only proved on a balance of probabilities that, pursuant to their agreement herein, he paid and is entitled to a refund of Kshs. 600,000/=. The appellant left a gaping lacunae as



to whether he paid the balance of Kshs. 1,400,000 to the respondent. He did not therefore, prove on a balance of probabilities that he paid the said balance.

34. The appeal therefore fails.

35. In light of the circumstances of this case and the conduct of the parties, each party shall bear own costs of the appeal. Orders accordingly.

36. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

.....

**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Muriithi for the Appellant

M/s Ngugi for Saika for the Respondent

Mr. Muraguri – Court Assistant.

