



Kamau (Suing as the legal representative and administrator ad litem of the Estate of the Late Rev Benjamin Kamau Mwangi (Deceased) v Waiganjo & another (Commercial Appeal 22 of 2020) [2023] KEHC 23514 (KLR) (Commercial and Tax) (13 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 22 OF 2020**

**DAS MAJANJA, J
OCTOBER 13, 2023**

BETWEEN

**JOSEPH MACHARIA KAMAU (SUING AS THE LEGAL REPRESENTATIVE
AND ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE REV
BENJAMIN KAMAU MWANGI (DECEASED) APPELLANT**

AND

SAMUEL WAMUTU WAIGANJO 1ST RESPONDENT

EDDAH WANGUI WAIGANJO 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. A.N. Kamau, PM dated 8th th May 2020 at the Nairobi Magistrates Court, Milimani in Civil Case No. 3648 of 2013)

JUDGMENT

Introduction and Background

1. By a judgment dated 08.05.2020, the Subordinate Court dismissed the Appellant's suit against the Respondents. The Appellant is dissatisfied with this decision and has appealed against it through its Memorandum of Appeal dated 10.06.2020.
2. Before delving into the appeal and the parties' positions, I will give a brief background of the facts leading up to the suit in the lower court. By a sale agreement dated 26.05.1993 ("the Sale Agreement"), the Respondents as vendors and Peace Foundation (Africa) as the purchaser entered into a contract for the sale of property L.R. Reference Number 10041/7 situated in Karen, Nairobi ("the suit property") for an agreed purchase price of Kshs. 800,000.00.



3. By a Plaint dated 19.06.2013, the Plaintiff filed suit claiming that the Sale Agreement was actually entered into by his father, the Deceased, who was then trading as Diakonia College and that he had paid the entire purchase price of Kshs. 800,000.00. The Plaintiff claimed that the Deceased had taken up possession of the suit property for a period of 6 years and had in his possession its original title deed. He further claimed that the Respondents had subsequently and fraudulently sold off the suit property to innocent purchasers who had no notice of the said fraud and concealment of facts and that the suit property had since been developed.
4. The Appellant averred that the actions of the Respondents of failing/neglecting and or refusing to refund the estate of the Deceased the said Kshs. 800,000.00 he had advanced them but passed away before he could transfer the suit property to his name, were in clear derogation from all known customs, usages and practices of contracts. Thus, the Appellant sought a declaration to be made that the actions of the Respondents in transferring the suit property and obtaining a provisional certificate pursuant to Gazette Notice no. 5868 dated 15.09.2000 for the suit property was both illegal and criminal and that the court reinstates to the Appellant the advanced sum of Kshs. 800,000.00.
5. In their defence, the Respondents denied the Plaintiff's averments in the Plaint. They stated that the Sale Agreement was between Peace Foundation (Africa) and the Respondents and not the Deceased. That the Deceased, together with other trustees, approached the Respondents to purchase the suit property while acting on behalf of the said Peace Foundation (Africa) and that they issued post-dated cheques drawn in the name of Nairobi Ecumenical Studies Institute for the purchase price of the suit property.
6. The Respondents claimed that the Deceased registered the Diakonia College on 25.11.1993 after the Sale Agreement was made and that there was neither an oral or written agreement between the Respondents and the Appellant to sell the suit property to the Deceased or Diakonia College. That in any case, Diakonia College did not have capacity to make an agreement or own property.
7. The Respondents denied that the Deceased took up possession of the suit property six years before his death as records filed in court showed that he was carrying on the business under the name Diakonia College at L.R. No. 330/259 Dagoretti Lane, off Naivasha Road as at 25th November 1993 and changed his business location on 17.04.1998 when he registered himself as carrying on business at the suit property. The Respondents aver that the Deceased's attempts to do business on the suit property did not succeed as the Respondents did not allow him to do so. The Deceased had raised complaints in writing a letter to the District Officer Karen in his letter dated 05.03.1996 which was copied to the Chief of Karen Langata, and the Officer Commanding Police Station Karen, among others. The Respondents averred that the Director of the Criminal Investigation Department(CID) invited the Respondents to record statements and the CID proceeded to register a caveat on the suit property to prevent any dealings on it until they (CID) completed their investigations. The Police removed their caveat on 19.04.2000 after their investigations which revealed that no crime had been committed against the Deceased by the Respondents and which made it possible for the Trustees of Peace Foundation(Africa) and the Respondents to agree to sell the suit property to a third party, Franciscan Sisters to pay for the debts contracted with the Respondents by Peace Foundation(Africa) under Rev. Benjamin Kamau Mwangi as its General Secretary.
8. The Respondents also claimed that the title to the suit property was reported to have been lost and that the suit property was eventually sold to the third party but that the Respondents never received their claim of Kshs. 800,000.00 from their advocates. The Respondents thus sought for various declarations in their counterclaim including that there was no sale agreement between the Deceased and the Respondents, that the transfer signed by the Respondents in favour of Diakonia Mission and/



- or Benjamin Kamau Mwangi was fraudulent and illegal, that the publication of loss of title was not fraudulent and that the Respondents did not owe Kshs. 800,000.00 or any money to the Deceased.
9. After the close of pleadings, the matter was set down for hearing. The Appellant testified on his own behalf and the Respondents called three witnesses; the 1st Respondent, Michael Mwafu, an employee of Peace Foundation(Africa) and Mary Ngima Mwangi, an advocate. The trial magistrate rendered the judgment on 08.05.2020 adverting to the following key issues for determination; whether there existed a valid sale agreement between the Deceased and the Respondents for the sale of the suit property and whether criminal acts of fraud were established against the Respondents to block the transfer of the suit property to the Deceased.
 10. The trial court observed that the sale transaction of the suit property took place between the Respondents and Peace Foundation and that the Respondents and the Deceased signed the Sale Agreement and that parties to the agreement observed the law and duly executed a valid sale agreement. It was further observed that the suit property was never transferred to the purchasers as agreed and that the same was sold to another party; Fransiscan Sisters, that the Sale Agreement was done in 1993 and that at the time of the Deceased's death, the same was not finalized since no transfer was done. The trial court further found that the Deceased was the founder of both Peace Foundation(Africa) and Diakonia College and that it was presumed that the two were separate entities but that from their documentation and those of Nairobi Ecumenical Studies Programme, they were run by the Deceased, Michael Mwafu and another. The trial court further held that Diakonia College was clearly a trustee and that Kshs. 800,000.00 was paid to the Respondents for the purchase of the suit property as evidenced by the cheques produced which were not denied by the Respondents. That these cheques were drawn from the account of Nairobi Ecumenical Studies Programme's account and that at the time of payment, Diakonia College had not been registered.
 11. The trial court agreed with the Respondents that there was a disconnect between the transfer forms and the Sale Agreement and that there were no express terms defining Peace Foundation(Africa) to be also Diakonia College or the two being one and the same thing. That the suit property was not being bought by the Deceased and if so, he would have had his name in the Sale Agreement or even have the same well described in the terms of the Sale Agreement. The trial court found that the Appellant did not tender documents to prove who Peace Foundation(Africa) was in spite of the Deceased being the founder and that in sum and in light of the aforementioned findings, the Deceased contributed to delays in transferring the suit property to the purchaser, Peace Foundation(Africa).
 12. The trial court found that since the suit property was sold to a third party, then it was prudent in the circumstances for the Respondents to refund the said Kshs. 800,000.00 to Peace Foundation(Africa) and if the entity no longer exists, then to its trustees, directors, their assigns and/or successors. The trial court concluded that the Kshs. 800,000.00 did not entirely belong to the Deceased and that such prayer for refund of this amount could not issue because other trustees of Peace Foundation (Africa) were entitled to a share of it.
 13. The trial court dismissed the Appellant's case and the counterclaim thus triggering this appeal. The appeal was canvassed by way of written submissions. In opposition to the appeal, the Respondents filed a Notice of Motion dated 29.08.2022 challenging the competence of the appeal. I will thus consider this application together with the appeal, if at all, in my analysis and determination below.

Analysis and Determination

14. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the [Civil Procedure Act](#) to evaluate and examine the lower court record and the evidence presented before it in order to



arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

[An appellate 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 always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...

15. Before dealing with the appeal, I will first determine the Respondents' application challenging its competence. The Respondents aver that the court lacks jurisdiction to hear the appeal as it has been filed out of time and there is no certificate of delay. They further aver that the record of appeal does not have a decree and an order giving leave to appeal.
16. The Appellant, through his deposition sworn on 01.09.2022 depones that although the judgment appealed from is dated 08.05.2020, it was delivered via email to counsel for the parties on the 09.06.2020 at around 12.47 P.M and that in essence, both parties became aware of the judgement on the 09.06.2020 when it was delivered to them via email. That this is not a scenario where judgment was delivered online and subsequently sent via email to parties as the operations then were strictly via email. Thus, the Appellant avers that the judgment was in fact delivered via email on the 09.06.2020.
17. The Appellant states that even if court was to hold that judgement was delivered on 08.05.2020, which is not the case, the time period of filing the memorandum is not inordinate. He invites the court take judicial notice that at the material time, the court operations were affected by the COVID-19 lockdown during which time the courts rendered decisions via email. In this case, the Appellant states that he prepared the Memorandum of Appeal on 10.06.2020 and filed it on the e-portal. That payment was done 25.06.2020 and the appeal registered on the 03.07.2020. The Appellant urges that the court has jurisdiction to determine the matter.
18. I do not think it is in dispute that an appeal from the decision of a subordinate court to this court must be filed within 30 days from date of the decision appealed from as provided by section 79G of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya). Even though the judgment is dated 08.05.2020, the Appellant only knew of the same on 09.06.2020 when it was forwarded to all the parties via email. I have gone through the record and note that in the judgement, the trial magistrate indicated that the judgment is dated and was delivered on 08.05.2020 in the absence of counsel for both parties. The Appellant has also stated that the judgment was delivered to the parties by email through the Court Assistant on 09.06.2020. Going through the record, more so the said email trail annexed, even though it is not clear that what was sent to the parties was the lower court's judgment, there is a good chance that the same was actually the judgment. I say so because since the judgment was initially delivered in the absence of the parties, it can only be logical that the same was to delivered to the parties thereafter and this email is proof that it was transmitted to the parties on 09.06.2020. Thus, the appeal having been filed on 23rd June 2020 as per the record, is timely.
19. Turning to the substance of the appeal, the Appellant is aggrieved by the judgment of the trial court dismissing his case against the Respondents for the sum of Kshs. 800,000.00 being a refund for the purchase price paid towards purchase of the suit property. It was not in dispute that the Sale Agreement that was entered into was between Peace Foundation Africa and the Respondents and that the former paid the sum of Kshs. 800,000.00 through various cheques drawn by Nairobi Ecumenical Studies. The Appellant claimed that the Deceased was trading as Peace Foundation Africa at the time of the sale



and to buttress this point, he points out that the Sale Agreement was signed by the Deceased as the entity's General Secretary together with other officials. Whereas the Respondents did not dispute that the Deceased was Peace Foundation Africa's founder, they contended that the same was a trusteeship with officials and staff who included the Deceased. They produced a document titled, "The Status of Human Rights Organizations in Sub-Saharan Africa Kenya" which described Peace Foundation Africa as having "...a Governing Council of thirteen, comprised of clergy, lawyers and other professionals who make policy. A full time General Secretary heads the staff, assisted by a programme officer, an administrative officer, an accountant and a clerk". This position was not controverted by the Appellant. As noted by the trial court, the Appellant did not give a clear insight as to the nature of Peace Foundation Africa. Was it a trust? Was it a partnership? Was it a company? Is it the same entity that morphed into Diakonia College? From the totality of the material on record, I find that there was sufficient evidence to conclude that Peace Foundation Africa was being run by more than one person and it was not solely run by the Deceased. Further, that it was the intention of the parties in the Sale Agreement to purchase the suit property on behalf of Peace Africa Foundation and not the Deceased. I agree with the trial court that if indeed it was the intention of the Deceased to purchase the suit property for himself, then nothing would have been easier than to enter into the agreement in his personal capacity and have the property transferred to himself rather than to a different entity.

20. It is for the above reasons that I find that the sale and purchase of the suit property was between Peace Africa Foundation and the Respondents and that the Deceased only executed the Sale Agreement as an official of the former and not as the purchaser of the suit property. Further, I find that the Kshs. 800,000.00 purchase price paid by the Nairobi Ecumenical Studies was done on behalf of Peace Africa Foundation and not the Deceased. Thus, I am in further agreement with the trial court that any refund that was due from this amount was to Peace Africa Foundation or its trustees, successors and/or assigns and not the Deceased. The Appellant's suit could not succeed and his appeal therefore fails.

Disposition

21. The appeal lacks merit. It is dismissed with costs to the Respondents which costs are assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2023.

D. S. MAJANJA

JUDGE

