



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**APPEAL NO. 17 OF 2021**

**LUKA JOHN MAENDE.....APPELLANT**

**VERSUS**

**JOSEPH KIVISHA.....RESPONDENT**

*(Being an appeal against the decision of Hon. L.T Lewa, Resident Magistrate,*

*delivered on 29 January 2016 in Mombasa CMCC No. 3997 of 2004)*

**JUDGMENT**

*(Appellant filing suit claiming that he had an agreement in 1998 with the respondent where the respondent advanced to him a loan and he gave his house as security; appellant producing a copy of a purported agreement said to be the loan agreement; respondent refuting the claim of the appellant and contending that the agreement they had was in 1996 and the same was for the sale of the house; appellant only having a photocopy of the purported loan agreement while respondent had the original sale agreement; witness who is said to have attested the document not having any document to identify himself; trial magistrate casting doubt on the identity of the witness and dismissing the appellant's suit; appellant filing appeal against the said decision; court unable to fault the decision; no reason to disturb the findings that the witness could not be verified as he had no identity with him; suspicious that the alleged person had claimed to lost his identity card which he could not even remember the number; given the doubt about the attesting witness the purported loan agreement remained unproven; surrounding circumstances also casting doubt on the allegation that the agreement was a loan and not sale agreement; appeal dismissed)*

1. On 24 August 2004, the appellant filed suit against the respondent in the Chief Magistrate's Court at Mombasa. In it, he pleaded that on 23 October 1998, he approached the respondent for a friendly loan of Kshs. 13,000/= and that as security, he gave his house at Kongowea, and allowed the respondent to pay himself by receiving the monthly rent collection. Later in the year, he called the respondent to receive back his money and vacate the house but the respondent refused. The appellant therefore filed the suit seeking orders that the respondent immediately surrenders the house and for an injunction to restrain the respondent from collecting any more rent and to refund any money collected by him.

2. The respondent filed defence where he contended that the agreement that they had was one entered into in the year 1996, and that it was for sale of the house which he described as a mud thatched house of four rooms. He pleaded that he paid the appellant Kshs. 13,000/= for it and took possession. He averred that at the time of sale, the house was unoccupied since the thatched roof had burnt down. He stated that he reconstructed the house and placed tenants. It was also pleaded that the suit is time barred. He asked that the appellant's suit be dismissed.

3. In his evidence, the appellant testified that he purchased the house in the year 1989 for Kshs. 18,900/=. He testified that on 23 October 1998, he approached the respondent for a loan of Kshs. 13,000/= which the respondent agreed with the house being used as security. He testified that this was a six roomed house but he lived in two of the rooms. He stated that it was agreed that the respondent could collect rent on the other four rooms until he is repaid in full then he would give back the house. He added that the rent was of Kshs. 600/= per room and the house had 4 tenants. He testified that the respondent had the original agreement. He had with him a photocopy which he produced as an exhibit. It was produced after an objection by the respondent, on the ground that the photocopy was different from the original that the respondent had, was overruled. According to the appellant, the loan agreement was attested by three witnesses, Mr. Wabwire, Mr. Suba and Mr. Wandera, with the latter two said to be deceased.

4. He was cross-examined on what the respondent claimed to be the correct agreement, one dated 23 October 1996, which he denied signing and claimed to be a forgery. He denied that it was him who had forged the 1998 agreement. He called John Wabwire Ngina as his witness. Mr. Wabwire testified that he witnessed the 1998 loan agreement that the appellant relied on. There was an issue about the identity of PW-2 for he did not have his ID, which he said got lost, and what he had was a police abstract.

5. In his evidence, the respondent contended to have purchased the disputed house in an agreement dated 23 October 1996. He described the house as a four roomed house with a makuti roof which had burnt. He denied that the house was sold to him with tenants. He testified that the appellant later came wishing to refund him the purchase price but he refused. He further stated that the appellant had other houses which he sold and he had also taken the purchasers to court. Cross-examined by the appellant, he asserted that the agreement they had is that of 1996 and that there was no agreement in 1998. He also did not know the people mentioned in the 1998 agreement. The witness to their 1996 agreement was deceased.

6. Parties filed their submissions and judgment was delivered on 29 January 2016. The honourable magistrate was doubtful of the credibility of PW-2, the person who purported to have attested the loan agreement. She observed that this witness had no identity card on him and it could not be affirmed that he was truly the person that he said he was. She also noted his evidence that he had moved into the area in the year 1998 and was a relative of the appellant thus could be biased towards the appellant. She found both agreements not sufficiently corroborated. She held that the evidence adduced by the appellant was not enough to allow her make an order of transfer of the property to the appellant. The case of the appellant was thus dismissed.

7. In this appeal, the appellant lists 24 grounds. I need not list all these grounds. From what I can see, the appellant faults the trial magistrate for doubting the evidence of PW-2 and his alleged loan agreement.

8. Both appellant and respondent filed written submissions. I have considered them.

9. This is a first appellate court and I stand guided by the principles set out in the case of *Selle & Another vs Associated Motor Boat Company & Others (1968) EA 123*, where the court stated as follows :-

*“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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in 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 on the case generally”*

10. The principles above would still apply to an appeal to this court from the Magistrate’s Court. I will proceed to determine this appeal being alive to the above.

11. It is apparent that what the appellant presented was that the nature of agreement he had with the respondent was a loan agreement entered into on 23 October 1998. The defence mounted by the respondent was that the parties had a sale agreement on 23 October 1996 and that there was never any loan agreement as claimed by the appellant which was entered into on 23 October 1998. It should be remembered that this was the appellant’s case and therefore the burden of proving the case rested on him. The question that one needs to ask is whether he indeed proved his case on a balance of probabilities in view of the evidence that he himself provided as weighed against the evidence that the respondent adduced.

12. I have seen the two agreements that the parties produced. What I find very striking is that the two agreements look almost similar. They were certainly written by the same handwriting, and save that one states that it is a sale and the other that the house is security, you would imagine that the photocopy produced by the appellant is actually the original tendered by the respondent. The person who wrote the agreement, one John Suba, was said to be deceased so clearly he could not attend to be a witness. What the appellant produced was not an original but a photocopy. He claimed that the original was with the respondent and all that he had was the photocopy. This by itself is unusual because ordinarily each party to an agreement does keep an original copy. That by itself casts doubt on the photocopy that was produced because it is trite that copies are prone to manipulation.

13. To prove the document, the appellant called one John Wabwire Wagira, who was said to be a witness to the loan agreement. There is a name John Wabwire Wagira in the photocopy of the purported loan agreement noted therein as a witness. It is not clear whether the person who actually testified in court as PW-2 was any person bearing the name John Wabwire Wagira. He had no identity card with him and the explanation given was that the identity card got lost. I think the trial magistrate was not wrong to cast doubt on the identity of this person who purportedly called himself John Wabwire Wagira. Firstly, it will be recalled that the alleged loan agreement was disputed by the defendant who was categorical and consistent that no such agreement was ever drawn. Secondly, what was before court was only a photocopy. Now, here was a person who purported to have witnessed the agreement but had no identity on him. Of course he claimed that the identity card got lost and he stated that he had reported the loss to the police station and he was issued with a police abstract. The police abstracts produced were two. The first was of 21 September 2005. The second was of 7 June 2007. They both state that the bearer lost his identity card on 21 September 2005. The identity card number is noted to be “unknown.” If indeed PW-2 lost his identity card in the year 2005, and he already reported the loss in the year 2005, I find it dubious that he is again reporting the same loss in the year 2007. And for some reason, he was comfortable operating without an identity card for more than two years. The fact that he didn’t even know his own identity card number also raises strong suspicion. He also neither had a voter’s card nor a work identity card. Can you really fault the trial Magistrate for doubting the veracity of the person who purported to be John Wabwire Wagira ? I cannot. There was serious doubt on the identity of the person who presented himself to court and claimed to be John Wabwire Wangira and the trial Magistrate was correct in doubting his identity.

14. What the court faced was a situation of one person’s word against the other. Faced with such a scenario, the surrounding circumstances are critical to determine where the truth may lie. In this case, apart from the doubt about the identity of PW-2, I question why, if at all the loan agreement was entered into in the year 1998 for Kshs. 13,000/=, the appellant did not come to court earlier or claim back his land, immediately this loan was paid. It will be recalled that in his evidence, the appellant stated that each room collected Kshs. 600/= as rent. If there were four rooms, the rent per month would be Kshs. 2,400/=. It would only need about six months for the amount of Kshs. 13,000/= to be collected. Why the appellant was comfortable for about 6 years while the respondent continued receiving rent and yet he (the appellant) was financially constrained would be very unusual.

15. Without the purported loan agreement being proved and with all the above rather curious surrounding circumstances, I am unable to fault the trial Magistrate for finding that the appellant had failed to prove his case.

16. The result is that I find no merit in this appeal and it is hereby dismissed with costs.

17. Judgment accordingly.

**DATED AND DELIVERED THIS 10TH DAY OF NOVEMBER 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**