



**REPUBLIC OF KENYA**

**IN THE HIGHCOURT OF KENYA AT NYAHURURU**

**CIVIL APPEAL CASE NO. 39 OF 2017**

**(Formerly Nakuru HCCA No. 92 of 2006)**

**JOHN KAHWAI KABUCHO.....APPELLANT**

**VERSUS**

**JOHNSON NJUGUNA GATHIONGO.....RESPONDENT**

*(An Appeal from the Judgement of the Honorable G.A. M'Masi Ag. Principal Magistrate delivered on 7/6/06 in Nyahururu CM's Court Civ. No. 179 of 2004)*

**JUDGEMENT**

**INTRODUCTION**

1. This is an appeal by John Kahwai Kabucho, the Appellant herein and the Defendant in the original action from the judgement of Honorable G.A. M'Masi Ag. Principal Magistrate delivered on 7<sup>th</sup> June 2006 in Nyahururu PMCC No. 179 of 2004 whereby the Learned Principal Magistrate ruled in favour of the Respondent herein with costs.

2. The appeal is supported by grounds set forth on the Memorandum of Appeal dated 5<sup>th</sup> July 2006 namely;-

**i. That the learned magistrate erred in law and fact by looking at the evidence of the Respondent in isolation**

**ii. n while completely disregarding that of the Appellant.**

**iii. That the learned magistrate erred in law and fact by finding that the Respondent had proved his case on a balance of probability contrary to the evidence on record.**

**iv. That the learned magistrate erred in law and fact by finding that the Appellant had interfered with the letter allocating him the suit plot whereas no evidence was tendered by the allocating authority to the same effect.**

**v. That the learned magistrate erred in law and fact by failing to appreciate the evidence of PW2 and PW3 without giving any reasons for her actions**

**vi. That judgement of the learned trial magistrate in favour of the Respondent lacked any basis on either law or fact and occasioned a serious miscarriage of justice**

**vii. That learned trial magistrate erred in both law and fact by dismissing the Appellant's counter claim when the same was well supported by evidence tabled before her.**

3. Reasons whereof, the Appellant prayed that: -

**-The judgment of the Ag. Principal Magistrate at Nyahururu be set side and or varied and his counter claim be allowed both with costs.**

4. The Appellant and the Respondent herein entered into a sale agreement on 5<sup>th</sup> November 2002 for the sale of all that parcel of land known as UNS RESIDENTIAL PLOT 'A' measuring approximately 0.060 hectares situate within Nyahururu Municipality. The Appellant had allegedly been allocated the said parcel of land by the Government of Kenya vide letter of allotment dated 27<sup>th</sup> July 1999, Ref No. 25011/XXXIII/140. The purchase price was kshs.260,000/- and the vendor was to pay a deposit of kshs.100,000/- at the time of execution if

the agreement and the balance of kshs.160,000/- to be paid on or before 15<sup>th</sup> November 2002.

5. However, before the transaction could be perfected a dispute arose between the two. The Respondent claimed that he was unable to register his development plan over the parcel because when he attempted to do so the plan was rejected on the basis that the parcel was not owned by the Appellant but rather by two third parties in the names of Zachary Muturi Muraya and Grace Wanjiru Mururi. It was alleged that the two had been allocated the parcel by the municipality council of Nyahururu in 1988 and duly acquired ownership of the property. It was further argued that the allotment letter held by the Appellant dated 27<sup>th</sup> July 1999 was a forgery and the Appellant did not have any legitimate interest over the subject parcel and hence did not have any title that could be passed on to the Respondent.

6. Subsequently, the Respondent instituted Nyahururu principal magistrate court civil case no. 179 of 2004 seeking for judgment to be entered against the Appellant for the amount of the purchase price already paid to the Appellant. The Respondent claimed for kshs.225,000/- alleged to be composed of kshs.100,000/- initial deposit paid at the execution of the agreement, a further amount of kshs60,000/- paid pursuant to the acknowledgment note dated 27<sup>th</sup> may 2003 and kshs.5,000/- being monies paid for development plan that was allegedly rejected due to conflicting ownership claims.

7. The Appellant on his part failed his statement of defence and counterclaim dated 22<sup>nd</sup> July 2004 denying that he did not have proper title to the subject parcel and averred that he was legal allottee thereof in possession of all ownership documents and there was no one else laying claim over the parcel and that the same was vacant. He further claimed that it was indeed the Respondent who was in breach of the sale agreement as he had failed to pay the full purchase price as per the said agreement as he had only paid a total of kshs.160,000/- and not kshs.230,000/- as alleged. He prayed for general damages for breach of contract.

8. The matter then proceeded to full hearing and judgment was delivered on 7<sup>th</sup> June 2006 whereby the trial magistrate found as follows:-

*i. That the Appellant did not have a plot as the documents including the allotment letter and the part development plan were superimposed and had varying information even on the acreage.*

*ii. That it was the Appellant who was in breach of the agreement of 5<sup>th</sup> November 2002.*

*iii. That the counterclaim lacked merit and thus dismissed.*

*iv. That the Respondent had paid the Appellant a total of kshs.230,000/- as purchase price and spent a further kshs.5000/- for development plan approval and judgement was entered in his favour for the amount of kshs.235,000/- plus costs of the suit.*

9. The Appellant being aggrieved by the said judgment preferred the current appeal seeking that the judgment of 6<sup>th</sup> June 2006, be set aside and/or varied and his counterclaim be allowed with costs.

#### **APPELLANT'S CASE**

10. The Appellant through the written submissions dated 22<sup>nd</sup> January 2021 restated their evidence before the trial court and submitted that it was clear that the Respondent had imputed fraud on the part of the Appellant however fraud was never pleaded in the pleadings neither was sufficient evidence brought forward to prove that indeed the documentation in possession by the Appellant were a forgery and that he did not own the plot in question. He placed reliance on **Order 2 Rule 4 of the Civil Procedure** and the cases of **Koinange & 13 Others V Chares Karuga Koinange (1986) KLR** and **Vijay Morjaria V Nansingh Madhusing Darbar & Another (2000) eKLR (Civil Appeal No. 16 of 2000)**.

11. The Appellant asserted that there was no evidence whatsoever that he had not properly allocated the said parcel and DW2 and DW3 has confirmed according to the records in their offices that he was the lawful owner of the parcel.

12. It was the Appellant's submission that no officer from the office of the commissioner of lands confirmed that the documentation held by him were indeed a forgery and that they did not emanate from their office. He averred that in absence of any such evidence, a presumption therefore has to be made that the allotment letter dated 27<sup>th</sup> July 1999 was properly issued by the office appearing thereon as having issued them. Reliance was place on **Section 83 of the Evidence Act Cap 80 Laws of Kenya**.

13. The Appellant averred that there was no evidence whatsoever that Zachary Muraya and Grace Mururi or any other person was the legitimate owner thereof, and even if they were alleged to be the owners, whether they were properly allocated the said parcel.

14. Further, the Appellant asserted that it should be noted that according to the agreement dated 5<sup>th</sup> November 2002 there was not timeline given as to when the Appellant was expected to have transferred ownership to the Respondent. Thus even at the time of institution and final determination of the trial suit, the said agreement can be said to be still operative on the part of the Appellant. That subsequently it was erroneous for the trial court to find that the Appellant was in breach of the agreement when all the facts before court indicated otherwise.

15. The Appellant submitted that the Respondent had confirmed in fact that he had not paid the entire purchase price even at the time of the suit hence the breach on his part was quite apparent. In conclusion, he Appellant implored upon this court to find in his favour and set aside the judgment of the lower court and enter judgement in his favour for the counter-claim.

#### **RESPONDENT'S CASE**

16. The Respondent submitted that the issues raised in appeal are after thoughts as the witness and documentary evidence proved that the Appellant had nothing to sell by the time the sale agreement was drafted.

17. He argued that the Appellant moved the court after 17 years under Notice of Motion dated 7<sup>th</sup> March 2019 (in court file but dismissed) applying to be allowed to put new evidence as the real owner of UNS Residential Plot 'A' Nyahururu Municipal. That the certificate of lease was issued in 2015 which is exactly 13 years after the sale agreement.

18. He asserted that he who seeks quit must come with clean hands. That the Appellant obtained consideration in the year 2002 and the obtained a lease after 13 years thus he was not in a position to pass any clean title to a serious buyer. Further, he averred that he had good reason to seek refund of his hard earned cash.

19. In conclusion, the Respondent submitted that the Appellant should not be allowed to arm twist the buyer and the appeal should be dismissed for reason that the Appellant is the maker of his misfortunes by failing to acquire lease in a record time before entering into any serious sale agreement.

### **ANALYSIS AND DETERMINATION**

20. The steering principle of this court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect. Moreover, an Appellant court can only interfere or reverse a decision made by the trial court if it is satisfied that the decision was not based on any evidence or it was based on a misapprehension of the evidence or was based on wrong legal principles.

21. In the case of *Peters vs Sunday Post Limited (1958) E.A.*, the court held as follows;-

***“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide”.***

22. *(See also Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123, ;Nairobi HCCC Appeal No. 213 of 2006, Oluoch Erick Gogo vs Universal Corporation Limited (2015) eKLR and; Sumaria & Another Vs Allied Industrial Limited (2007)2 KLR).*

23. The issue at hand in the instant case was and is one of breach of contract in this case a sale agreement between the purchaser, the Respondent herein and the seller, the Appellant for reasons that the purchaser was unable to take possession of the land because he found out that the land had been claimed by third parties. The question is purely on breach of contract and not on forgery or fraud as compounded by the Appellant.

24. The learned trial magistrate in her judgement made a finding that a closer look at the letter of allotment availed in court by the Appellant clearly showed that the name of the allottee had been tampered with. It was her finding that the first two names had been over written and superimposed on the original one. This court cannot verify the same from the evidence on record however I have considered the Appellant's appeal, grounds, supporting affidavits and annexures and the grounds for opposition by the Respondent. I have given equal consideration to the written submissions and the authorities cited by counsel for both parties.

25. I rely on the material evidence provided by PW2's testimony which I find credible. PW2, a works officer at Nyahururu Municipal Council confirmed that his findings indicated that the plot was allocate to Zachary Mururi and Grace Mururi who were allocated the plot on 1/7/1998 and not the Appellant. moreover, the letter of the allotment produced by the Appellant showed the acreage of the parcel of land as 0.060 hectares but on the Part Development Plan which was neither dated nor proved by the director of planning or commissioner of lands indicated the acreage as 0.15 hectares which places doubt in my mind as to whether the two documents were referring to the same piece of land. In my view, the evidence adduced by the Appellant was supposed to castigate any doubt as to his ownership of the piece of land, but this purpose was not served.

26. Furthermore, in the instant case, the Appellant alleged that the trial magistrate disregarded the evidence of DW2 and DW3. From a perusal of the trial records, DW2 testified that he was the secretary to the district allocation committee from 1995 up to 1997 and the land was indeed allocated to the Appellant. However, upon cross examination he confirmed he had no records to prove the same and he could not remember the dimensions or acreage of the suit property. DW3 produced a photocopy of a letter forwarded to the commissioner of lands recommending those who had been allocated including the Appellants but the same was objected by the Respondent's counsel on grounds that it was photocopy that was not certified as a true copy of the original and no explanations had been given as to why the original cannot be availed, a position which the trial court upheld in its ruling whereby the photocopy document was rejected by the court as exhibit. I am satisfied that the Appellant's assertion that the trial magistrate disregarded the evidence of DW2 and DW3 is therefore untrue.

27. Notably, Appellant herein admitted in cross examination that he had not accepted the offer in 30 days as stipulated on the letter of allotment and had therefore not acquired interest in the said piece of land that he was purporting to sell to the Respondent.

28. In *Mbau Saw Mills Ltd –vs- Attorney General & 2 Others (2014) eKLR*

***I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to***

transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.

29. In Bubaki Investment Co. Ltd –vs- National Land Commission & 2 Others (2015) eKLR;

*“Having held that the petitioner did not comply with the terms and conditions of the letter of allotment it follows that the petitioner could not and did not acquire any proprietary interest in the suit property notwithstanding the payment it made. The offer extended through the letter of allotment having lapsed by effluxion of time, there was no offer to accept at the time the petitioner made the payment. The petitioner ought to have sought and obtained a renewal of the offer and/or extension of the period within which to accept the offer. This was not done and thus there is no basis upon which the petitioner can be taken to have complied with the terms of the offer of 30<sup>th</sup> May 1997. The Commissioner of Lands in my view was entitled after the expiry of 30 days from the date of the letter of allotment and provided there was no acceptance of the offer from the petitioner to treat the allotment as having lapsed and could re-allocate the property to any other person.”*

30. Moreover, In Anson’s Law of Contract, 28<sup>th</sup> Edition at pg. 589 and 590 the law is stated to be that:-

*“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.*

31. The aforesaid failure was therefore a breach of a cardinal contractual obligation on the part of the Appellant. Parties to any agreement are bound by their agreements and each must keep his/her own part of the bargain. The Appellant in this case did not keep his end of the bargain as he had no interest or title in the land he purported to sell to the Respondent. I agree with the trial court’s finding that indeed the person who had breached the contract was the Appellant as he had no plot which he was selling the Respondent.

32. The present case has dragged on for long and the Respondent despite not being in possession of the said piece of land has not been compensated for the loss occasioned by the breach of contract by the Appellant. I agree with the finding of the trial court that the person who breached the contract was the Appellant as he had no plot to which he was selling the Respondent (**Refer to Page 55 Record of Appeal**).

33. In the upshot, I hold that the appeal lacks merit and thus court makes the following orders;

- i. The appeal be and is hereby dismissed.**
- ii. Costs to the respondents.**

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 1<sup>ST</sup> DAY OF JULY, 2021.

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**CHARLES KARIUKI**

**JUDGE**