REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Hon. D. K. Kemei – J)

CIVIL APPEAL NO.20 OF 2019

SAMMY NZULU.....APPELLANT

VERSUS

GREGORY KITHUKA KITHEMBE.....RESPONDENT

(*Being an appeal from the judgement of Hon. E. W. Wambugu (SRM) at the Kithimani Principal Magistrate's Court in ELC No.394 of 2016 delivered on 24.1.2019)*

BETWEEN

SAMMY NZULU.....PLAINTIFF

VERSUS

GREGORY KITHUKA KITHEMBE.....DEFENDANT

JUDGEMENT

1. By a Plaint dated 4th November 2016, the Appellant filed at ***Kithimani ELC Case No.394 of 2016*** against the Respondent for loss and damage in the sum of Kshs. 316,000/- plus costs and interest on account of rescission of a contract executed by the Appellant and Respondent on 4th February 2008 for the sale of Plot No.32 measuring 20 x 100 feet situated at Kiseuni Trading Centre for a consideration of Kshs. 20,000/.

2. The Respondent filed a statement of defence dated 16th December 2016. He denied any breach of contract by pleading that the sale was concluded well as each party performed his part of the contract. According to the Respondent, if indeed the size of the plot was confirmed to be smaller than it was during the time of sale, then the county authorities were to blame for downsizing it during the market town planning an act which was beyond his control. The Respondent pleaded that the Plot had already passed to the Appellant by the time the county authorities were conducting the said market planning and hence he was not liable and that the expenses particularized by the Appellant cannot be visited upon the Respondent.

3. In the judgement appealed against, the trial magistrate held that all the witnesses to the agreement corroborated the testimony of the Respondent and not the Appellant's and hence no breach of contract as alleged by the Appellant took place. The trial magistrate dismissed the suit with costs but stated that special damages apart from the costs of pursuing the criminal case were proved and would have been awarded had the suit succeeded.

4. Aggrieved by the trial court judgement, the Appellant appealed citing the following grounds in the Amended Memorandum of Appeal dated 8th April 2019:-

> ***(1) THAT the learned trial magistrate erred in law and in fact in making a finding that one Katiwa Nzulu, the Appellant's brother executed the sale agreement between the Appellant and Respondent on the Appellant's behalf a finding which was not supported by the Respondent's own testimony in court nor the sale agreement adduced by the Appellant which sale agreement***

was not controverted by the Respondent.

(2) <u>THAT</u> the learned trial magistrate erred in law and in fact in finding that the payment of Kshs. 20,000/- during the sale agreement by the Appellant was not corroborated by witnesses whereas there was ample evidence to that fact on record.

(3) <u>THAT</u> the learned trial magistrate erred in law and fact in finding that the Appellant's wife and daughter were not present at the time of the sale of the suit land merely because their names were not indicated on the sale agreement.

(4) <u>THAT</u> the learned trial magistrate erred in law and fact in finding that the Appellant's wife contradicted the Appellant on the issue of whether the suit plot was measured at the time of sale or not.

(5) <u>THAT</u> the learned trial magistrate erred in both in law and in fact in making a finding that evidence of the valuer was of no probative value while she still relied on the valuer's evidence in another part of the judgement.

(6) <u>THAT</u> the learned trial magistrate erred in law and fact in making a finding based on the testimony of PW4 that Plot No.32 was owned by the Appellant thereby failing to take cognizance that the Appellant's suit herein turned not on the Plot in question but on the physical location of the same on the ground.

(7) <u>THAT</u> the learned trial magistrate erred in fact and in law in relying on the evidence adduced by PW4 at paragraph 6 of the above but disregarded other material evidence by his witness to the effect that the plot initially shown, sold to and occupied by the appellant had later been successfully claimed by one Musyoka Waema forcing the appellant to vacate there from hence this suit.

(8) <u>THAT</u> the learned magistrate erred in fact and in law in relying on the evidence adduced by PW4 at paragraph 6 above but disregarded other material evidence by his witness to the effect that after Musyoka Waema claimed his plot from the appellant, the Appellant had reported a dispute against the Respondent which PW4 tried to mediate between the appellant and Respondent in vain.

(9) <u>THAT</u> the learned magistrate erred in fact and in law in relying on the evidence adduced by PW4 at paragraph 6 above but disregarded other material evidence by his witness to the effect that the appellant had upon vacating the first plot been pointed out to another plot by the Respondent that was not of the dimensions as the appellant had initially purchased from the Respondent and was not a standard size plot in Kiseuni market.

(10) <u>THAT</u> the learned magistrate erred in law and in fact in misdirecting herself on the nature and claim of the Plaintiff's suit.

(11) <u>THAT</u> the learned magistrate erred in fact and in law in relying on the evidence adduced by PW4 that there had been a survey carried out at Kiseuni market in the year 2012 as corroborating the Respondent's account thereby misdirecting herself on the cardinal principle that he who asserts must prove and disregarded the fact that no evidence whatsoever was adduced by the Respondent to prove how such survey was carried out and if the same had indeed affected individual plot owners at Kiseuni market and most specifically the appellant as claimed by the Respondent.

(12) THAT the learned magistrate erred in law and in fact in making a finding that was not based on evidence adduced that a road hived off part of the plots including the appellants which finding was based on pure conjecture was not based on any evidence adduced by the Respondent and therefore had no basis whatsoever. She thereby abdicated her role as an independent arbiter of the dispute and descended into the arena of a witness for the Respondent.

6. The Appellant has urged the court to set aside, vacate and/or vary in its entirety the judgement of the lower court delivered on 24.1.2019 and allow the Appellant's claim as contained in his plaint in the lower court dated 4.11.2016 and filed on even date. The Appellant prays for costs of the appeal and in the lower court.

7. On the first ground, it is submitted that the learned magistrate failed to make a finding that the sale agreements adduced by the Appellant and Respondent were materially different. According to counsel, the veracity of the sale agreement was not challenged by the Respondent and his witness. As regards grounds 2, 3 and 4 , it was submitted that the learned magistrate erred in finding that the Appellant did not prove payment of Kshs.20,000 and that the Appellant's daughter and wife were not present at the time of sale as their names were never indicated in the sale agreement. Reference was made to paragraphs 3 and 4 of the Plaint and paragraph 3 of the defence. It is submitted that parties are bound by their pleadings and hence the testimony of the Respondent and his witnesses departed from the Respondent's pleadings with the sole aim of defeating the Appellant's suit and subvert the course of justice. On the fifth ground, it is submitted that the learned magistrate erred in finding that the Valuer's report was based on hearsay. According to counsel, the approach by the learned magistrate was casual since the valuer gave evidence of what he had seen on the ground which he had visited before issuing the report which was produced as PEXH 4 in court. On the issue of site visit, it is submitted that the learned magistrate having found in her proceedings at page 102 of the record of appeal that the expert's testimony had put a clear picture of the two plots in contention, it was not open for the learned magistrate to find that the expert's testimony was mere hearsay. The learned magistrate relied on the report by noting that the plot had been reduced to 20 x 54 due to the road access when the report didn't have such evidence. Counsel reproduced page 18 line 15 of the record of appeal on plot sizes. It is submitted that the findings by the learned magistrate was not founded on the Appellant's testimony or Valuer's report. On grounds 6,7,8,9 and 10, it is submitted that the learned magistrate lost sight to the main issue whether the Appellant had initially bought a plot measuring 20 x 100 feet and whether the Respondent had pointed out to the Appellant a plot that measured not 20 x 100 feet but 20 x 54 feet and that the contract had been fundamentally breached by the Respondent. The learned magistrate ignored the contents of PW4's witness statement found at page 60 to 62 of the record of appeal which was adopted in court as evidence in chief. On the 11 th ground, it is submitted that no survey map was tendered in court to show that the two plots had been affected by the survey hence a wrong conclusion by the learned magistrate that the Respondent's testimony was given credence by that of PW4. Again, it was the Appellant's testimony in cross-examination that the roads in the market had been established in 1980s. On the 12th ground, it is submitted that there was no basis for the learned magistrate to

find that that roads had been hived off parts of the plots in the market including Appellant's plot. The survey map or plan was not produced in court to show which plots were affected. Counsel urged the court to allow the appeal as prayed with costs.

8. Respondent's counsel submitted that the success of the Appellant's case was dependent on the evidence of Waema Musyoka who was never availed as a witness in court. On the first ground of appeal, counsel made reference to evidence in pages 113 line 13 to page 114 line 12 of the record of appeal to submit that the learned magistrate delved into that evidence and made correct finding that the Appellant's evidence was not corroborated but Respondent's was corroborated by DW2 and DW4. As regards grounds 2, 3 and 4, it was submitted that the learned magistrate's findings were based on the sale agreement which indicated the payment was Kshs. 18,000/- and not Kshs. 20,000/. The Appellant's wife and daughter were not listed in the sale agreement. The learned magistrate's findings are captured in page 114 line 3 to 10 of the record of appeal. On the fourth ground of appeal, counsel submitted that according to the Appellant's evidence, they were present when the land was being measured but the Appellant's wife stated that the plot was not measured. To counsel, this is a contradiction. Counsel made reference to the evidence found at page 97 line 10 and page 100 line 11. On the fifth ground, counsel submitted that Valuer's report was based on hearsay hence a finding by the learned magistrate that the report is of no probative value. Reference is made to page 17 line 10, page18 line 26, 20 and 21 of the report. As regards grounds 6,7,8,9 and 10, counsel submitted that the grounds touch on PW4's evidence which is clear and consistent. It is submitted that the Appellant failed to call Musyoka Waema. On the 11th and 12th grounds, it is submitted that PW4 stated in re-examination at page 101 line 15 that in 2012 a survey was done and he was given a record. It is submitted that PW4's testimony corroborated the defence evidence that the plot was reduced after the survey was done by the government. The valuer had also mentioned road access feeding into the plots and reducing them into size.

Determination

9. I have considered the submissions filed in this appeal.

10. This being a first appeal I am guided by the principle in ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123***.I am therefore required to re-evaluate and subject the evidence before trial court to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same.

11. It is not disputed that Respondent sold a plot to the Appellant. It is also not disputed that a contract for the sale of the said plot was executed on or about the 4th day of February 2008. It is not disputed that the Respondent pointed out a plot to the Appellant in the presence of Appellant's wife and daughter. What is disputed is whether the plot pointed out to the Appellant was the wrong one that was owned by one Musyoka Waema and not the Respondent. I find the only issue that falls for determination is *whether the Appellant proved his case on a balance of probabilities before the trial court.*

12. On what amounts to proof on a balance of probabilities in ***Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR***, the Judges of Appeal held that:

> ***"Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-***
>
> > ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.***
>
> ***This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."***

13. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."***

14. Upon discharging the legal burden of proof, the burden is now shifted to the party sued to disprove the claims against him. The burden shifted is captured under sections 109 and 112 of the same Act:-

> "***Section 109***
>
> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.***
>
> ***Section 112***
>
> ***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."***

15. The above provisions were well expressed in the case of ***Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA***

334, where the Court of Appeal held that:

> ***"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

16. ***Kimaru, J*** in ***William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLR 526*** held that:

> ***"In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."***

17. The Appellant called five witnesses while the Respondent called four witnesses in support of their cases. According to the learned magistrate, all witnesses to the agreement between the Appellant and Respondent corroborated the testimony of the Respondent and not the Appellant. The sale agreements were produced as P exhibit 1(a) and (b) by the Appellant who testified as PW1.

18. According to PW1, Plot No.32 was shown to him in the presence of his daughter Dorcas (PW2) and wife Christine (PW3) who corroborated PW1's evidence through their witness statement and oral evidence. However, their presence was denied by the Respondent (DW1) who testified that the negotiations were done by DW1 and DW4 Stephen Katiwa. According to DW1, it was DW4 who entered into the negotiations on behalf of PW1 and gave out the purchase price. DW1 stated that he has never met PW1 since the agreement was taken to PW1 for signature by DW4. The learned magistrate found that the evidence of DW1 had been corroborated by the former market chairman Alfred Kyeni (DW2) and DW4 whose names appear in the agreement as witnesses. Again, the learned magistrate was of the view that PW2 and PW3 were not present during the transaction since their names do not appear in the agreement. It will be noted that PW2 stated that he was present when PW1 purchased the plot but didn't sign it yet she was 18 years old with capacity to sign the agreement. PW3 stated in his witness statement that the purchase price was paid by PW1 and the transaction reduced in writing and signed by PW1, DW1 and DW4 as witness in her presence while on the site but she didn't sign the agreement. I note that there are no reasons given by PW3 as to why she didn't sign the agreement despite her presence.

19. PW2 and PW3's evidence is disputed by DW2 who testified that he was present during the sale and that the sale agreement bears his name. It was DW2's testimony that on 4.2.2008 DW4 and DW1 came to his shop for assistance on the purchase of the plot. It was stated by DW2 that DW4 was purchasing the plot on behalf of PW1who was not present. The agreement shows PW1 was the purchaser but wasn't present and hence the agreement was taken to him for signature. From the evidence, I find that the learned magistrate correctly found that PW2 and PW3 were not present during the transaction. They might have seen the plot but not present during the execution of the agreement. Their names and signature do not appear in the agreement. I have no reason to disturb the finding by the trial magistrate.

20. As regards PW3's evidence contradicting PW1's evidence, it will be noted that PW1 stated that the plot was measured and confirmed to be 20 x 100 feet while PW3 stated that at the time of purchasing the plot, the measurement of the plot hadn't been confirmed. PW1 didn't state who undertook the measurement. PW5 stated that he viewed the plot No.30 and 32 and took their measurements but didn't state the date when he took the measurement. The plot number and measurements are not indicated in the sale agreements marked as P exhibit 1(a) and (b). Hence if the measurements are not indicated on the agreement then it is highly likely that the sizes of the plots might have been affected during the Local authority's development plans and that if the appellant had issues with it then he should have directed his queries to the said local authority.

21. As regards the plot No.32 being claimed by Musyoka Mwema, the learned magistrate was correct in finding that the evidence of PW5 the valuer was based on hearsay since it was based on what PW1 told him. PW5 was not present when the sale transaction took place or during the pointing out of the plot. He only visited the plot on an unknown date and took the plot's measurements which according to him, plot No. 30 measured 20 x 55 feet and not 20 x 100 feet which PW1 had intended to purchase. However, the Respondent testified that by the time the town planning was being conducted, possession of Plot No.32 had already passed to the Appellant. Again, PW1 testified that he could not recall when survey was done although the roads had been done in 1980s. According to PW4, the survey was done in 2012 and was given a record. According to DW4, the stones deposited on the plot have never been removed. From 2008 to 2015 there were no complaints about the plot. No complaints were raised in 2009 when stones were deposited on the plot by PW1. PW1 stated that Muema called him on 28.3.2016 asking PW1 to remove stones.

22. In my view, I find that the learned magistrate was correct in finding that no contract was breached by the Respondent. Musyoka Muema who claimed that Plot No.32 belongs to him was never called before the trial court or before the police to testify or write a witness statement. PW1 only states that he was told to remove the stones on the plot by Musyoka Muema. The Black's Law Dictionary, 9th Edition, Page 213, defines a breach of contract as;

> ***"a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both…"***

23. According to PW4, the documents received from DW2 show that Plot No.32 belongs to PW1. DW2 stated that Plot No.32 was purchased by DW4 on behalf of PW1. It was DW2's testimony that the plot at present could not measure 20 x 100 feet due to a road put up by the county council.

24. Based on the evidence adduced, it is my finding that the Appellant failed to prove his case to the required standard on a balance of probabilities that the Respondent had breached the contract. The Respondent sold to the Appellant Plot No.32 with measurement of 20 x 100 feet and not 20 x 54 feet alleged by the valuer (PW5) in the valuation report. In any case, the appellant and respondent did not survey the plot

in question and so the appellant took it on ‘as is where is basis’ and he cannot later turn around and blame the respondent for less land which incidentally was due to an access road. Further, the evidence of Pw4 and Dw2 seemed to have corroborated that of the respondent unlike the appellant’s evidence. Clearly, the appellant failed to prove his case against the respondent beyond the threshold of proof. The finding by the trial magistrate was sound and I see no reason to interfere with it.

25. In the result, I find that the appeal lacks merit. The same is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at **Machakos** this **20th** day of **September, 2021.**

D. K. Kemei

Judge