



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 187 OF 2014

JOSEPH KARIUKI NDEGWA

(Substituted for NDEGWA

MUGWERU-Deceased).....APPELLANT

-VERSUS-

STANLEY MWANGI NDEGWA.....RESPONDENT

(Being an appeal against the judgment and decree of Honourable L.W. Kabaria

(Ms.) (Resident Magistrate) delivered on 17th April, 2014 in CMCC NO. 6466 of 2004)

JUDGEMENT

1. At the onset, Ndegwa Mugweru (“the deceased”) lodged a suit before the Chief Magistrate’s Court at Milimani Commercial Courts vide the plaint dated 4th June, 2004 and amended on 27th April, 2012 and sought to be paid Kshs.130,750/ together with costs of the suit plus interest by the respondent and George Mwangi Ndegwa (“the 2nd defendant”).
2. Following the demise of the deceased on 28th November, 2008 the appellant; in his capacity as the personal representative to the estate of the deceased; sought for and was granted leave to substitute his name in place of the deceased.
3. The appellant pleaded in the amended plaint that the respondent and the 2nd defendant were at all material times the administrators to the estate of the late Ndegwa Karuga, proprietor of Plot No. 262 in Pumwani (Majengo) (“the subject property”) and that sometime between 2002 and 2003 the respondent received a total sum of Kshs.110,750/ from the appellant as part of the purchase price on the subject property pursuant to an undertaking entered into between the parties.
4. The appellant pleaded that the respondent has since failed to honour his obligations under the agreement and has also failed and/or neglected to refund the aforementioned sum of Kshs.110,750/ together with a sum of Kshs.20,000/ constituting penalty charges for breach of contract, to the tune of Kshs.130,750/.
5. The appellant subsequently withdrew the suit against the 2nd defendant, leaving the respondent as the sole defendant.
6. Upon entering appearance, the respondent put in his statement of defence to refute the appellant’s claim by denying the existence of any agreement between him and the deceased in respect to the subject property.
7. The respondent further denied having received the monies pleaded in the plaint or any monies for that matter as consideration for purchase of the subject property.

8. At the hearing, the appellant testified and summoned two (2) witnesses while the respondent gave evidence as the sole witness for the defence.

9. Upon close of the hearing and filing of written submissions by the parties, the trial court delivered judgment by dismissing the suit with costs.

10. Being dissatisfied with the aforementioned judgment, the appellant lodged this appeal and put forward the following grounds of appeal:

i. THAT the learned trial magistrate erred in law and fact by finding that it had not been established that the sale agreement was executed by the deceased on the one part and the respondent on the other part.

ii. THAT the learned trial magistrate erred in law and fact by finding that the appellant lacked a basis upon which he could seek a refund of the amount paid pursuant to the sale agreement despite finding that the respondent had received money under the said agreement.

iii. THAT the learned trial magistrate erred in law and fact by not finding that the appellant had failed to demonstrate that the sale agreement, the subject of the suit, was entered into between the deceased and the respondent.

iv. THAT the learned trial magistrate erred in law and fact by finding that the appellant had failed to establish his claim against the respondent.

11. This court gave directions that the appeal be canvassed by written submissions. At the time of writing this judgment, the respondent had not put in his submissions despite this court extending time for him to do so.

12. In his submissions dated 11th July, 2019 the appellant contends that he had brought evidence to show the existence of a sale agreement in respect to the subject property and which agreement was executed by the parties, yet the trial court did not wholly consider such evidence thereby arriving at an erroneous finding.

13. The appellant further contends that sufficient evidence was tendered before the trial court to demonstrate that the respondent and the 2nd defendant in the suit had received a total sum of Kshs.169,000/ from the deceased towards the purchase of the subject property, including an acknowledgment by the respondent and yet the trial court overlooked this evidence and instead chose to focus on the sale agreement, thereby arriving at a wrong finding.

14. I have considered the appellant's submissions. I have also considered the four (4) grounds of appeal constituted in the memorandum of appeal and which I will address under two (2) key limbs.

15. The **first** limb which covers grounds (i) and (iii) of the appeal has to do with whether the learned trial magistrate's finding on the existence of a sale agreement between the parties was proper.

16. Robert Mwangi Ndegwa who was PW1 stated that he was a son to the deceased and that the appellant was present at the time the respondent entered into the agreement with the deceased.

17. The witness stated that later on, the respondent refused to sell the subject property despite the earlier agreement.

18. In cross examination, it was the testimony of the witness that the deceased intended to purchase the subject property on his behalf and that is why his name appears on the purchaser section of the sale agreement.

19. George Mwangi Ndegwa who was previously the 2nd defendant in the suit testified in his capacity as PW2 that the agreement to sell the subject property was a family decision and that the deceased was the purchaser while he and the respondent were the sellers.

20. PW2 further testified that they subsequently entered into and executed the agreement dated 24th September, 2002. The sale agreement was produced as P. Exhibit 2 together with an allotment letter which was produced as P. Exhibit 1.

21. In cross examination, the witness stated that the subject property initially belonged to Kaingu Ndegwa who was the

late father to the witness and respondent, and that it is only upon obtaining a grant of letters of administration that they were able to proceed with the sale process.

22. The witness further stated that at the time of entering into the sale agreement, the subject property had not been subdivided but that he was selling his share of the subject property to the deceased on behalf of PW1.

23. The appellant followed as PW3 and gave evidence that the respondent and PW2 had agreed to sell the subject property to the deceased at a consideration of Kshs.600,000/ and that an agreement to that effect was drafted on 24th September, 2007 and signed by the relevant parties.

24. In cross examination, the appellant testified that no alteration was made to the signatories in the agreement entered into between the respondent and PW2 on the one part, and PW1 on the other part through the deceased, tendered as P. Exhibit 2.

25. For the defence, the respondent stated that the subject property was registered in the name of his late father and that he intended to sell the said property to PW1 and an agreement was drawn to that effect. The respondent indicated his willingness to complete the sale with PW1 and that he is awaiting transfer of the subject property from the name of his deceased father to the names of the administrators.

26. In cross examination, it was the testimony of the respondent that both he and PW2 were the sellers of the subject property and that they had agreed to sell it to PW1 for a consideration of Kshs.600,000/ and that they visited advocate P.G. Mburu who assisted them in preparing the sale agreement.

27. Upon taking the evidence, the learned trial magistrate held that though there is no dispute that a sale agreement was entered into for the sale of the subject property at a consideration of Kshs.600,000/, the respective sale agreements produced in court bore the name of PW1 (Robert Mwangi Ndegwa) as the purchaser and not the deceased.

28. The learned trial magistrate further held that the alterations of the signatory section made on P. Exhibit 2 which was the original sale agreement are not consistent with the copy of the sale agreement tendered as D. Exhibit 1, thereby casting doubt as to whether the changes to the signatures were done before or after execution of the sale agreement.

29. Upon re-evaluating the evidence, it is not in dispute that a sale agreement was entered into in respect of the subject property at a consideration of a sum of Kshs.600,000/. It is also not disputed that the sellers in that instance were the respondent and his brother, PW2.

30. The real issue lies in whether the deceased was at all a party to the agreement. I looked at P. Exhibit 2 which is the original sale agreement dated 24th September, 2007 and drawn by the firm of P.G. Mburu & Co. Advocates. The same indicates the respondent and PW2 as the sellers on the one part, and PW1 as the buyer on the other part.

31. The aforementioned agreement shows an alteration on the signature section, whereby the name of Paul Kingori Ndegwa was substituted with that of PW2 and it further shows an alteration of the name of PW1 by substituting it with the name of the deceased.

32. On re-evaluation, I compared P. Exhibit 2 above with D. Exhibit 1 which was deemed to be a Photostat copy of the original sale agreement and it is noted that the copy bears no alteration in terms of substitution of PW1 with the deceased.

33. In my view just like the learned trial magistrate rightly found, the copy should be a replica of the original and since in the present instance, it is not in dispute that D. Exhibit 1 is a photocopy of the original P. Exhibit 2, yet it does not bear any alteration of PW1 with the name of the deceased, I am persuaded that the original was altered at a later date.

34. After a careful examination of on record, both oral and documentary, it is apparent that PW1 was at all material

times the purchaser in the sale agreement. The appellant and his witnesses all testified to the fact that PW1 was the intended purchaser and no credible evidence was brought forward to prove otherwise.

35. In the premises, the learned trial magistrate's finding that there is no record of existence of a sale agreement specifically between the respondent and the deceased cannot be faulted. It is however noted that PW2 admitted to subsequently entering into a separate agreement with the deceased for sale of a portion of the subject property following its intended subdivision.

36. Grounds (ii) and (iv) of the appeal touches the question as to whether the learned trial magistrate's conclusion that the appellant had not proved his case was proper.

37. In this respect, PW1 gave evidence that he is not the one who made payments towards the subject property though he is indicated as the purchaser.

38. PW2 also gave evidence that upon subdivision of the subject property, the respondent decided not to sell his share and the deceased requested for a refund of the purchase price, by which time the respondent had received a total sum of Kshs.221,500/ from the deceased.

39. On his part, the appellant testified that following payment of the sum of Kshs.169,000/ by the deceased and subdivision of the subject property, the respondent refused to sell his portion of the same and that later on, PW2 agreed to sell his portion to the deceased.

40. The respondent indicated that the subject property was to be sold to PW1 and that he received payments from him and the deceased in the sum of Kshs.169,000/ but pointed out that the subject property was to be sold to PW1.

41. The respondent further gave evidence that had PW1 demanded a refund of the sums paid, he would have complied, though he indicated that he still had intentions of transferring his portion of the subject property to PW1 once the same is transferred to his name.

42. The learned trial magistrate reasoned that the mere financing of part of the purchase price by the deceased did not confer a right by the deceased to the subject property and consequently found that the appellant had failed to show that the deceased had entered into the sale agreement with the respondent so as to entitle him to a refund of the monies paid.

43. Upon re-evaluation of the oral and documentary evidence tendered, it is not controverted that the respondent and PW2 received part payment of the purchase price from the deceased. This position is confirmed by the handwritten acknowledgment note dated 31st March, 2003 produced as P. Exhibit 3(a) in which the aforesaid parties acknowledged receiving the sum of Kshs.169,000/ in that regard.

44. Having already determined that the sale agreement existed between the respondent, PW2 and PW1, it is clear that there was no privity of contract between the deceased and the respondent so as to form a basis for demanding a refund of the sums paid for breach of contract.

45. I therefore agree with the learned trial magistrate's finding that it is PW1 rather than the deceased; who would have had a proper claim against the respondent for a refund.

46. In the end, therefore, the appeal lacks merit, the same is ordered dismissed with costs to the respondent.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 17th day of July, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent