



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL APPEAL NO 32 OF 2019**

**K.C.B BANK KENYA LIMITED.....APPELLANT**

**- V E R S U S -**

**THOMAS K. SAMBU T/A SOLAI AGENCIES.....1<sup>ST</sup> RESPONDENT**

**KIPKEMEI ARAP KORIR.....2<sup>ND</sup> RESPONDENT**

***(Being an from the Judgment and decree of Hon. B. R. KIPYEGON (SRM)***

***in Kericho CMCC No.323 of 2014 delivered on 6/6/2018)***

**J U D G M E N T**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Plaint in **CMCC. No.323 of 2014** seeking special damages of Kshs.237,937.50 being money paid to the Appellant in respect of Sale of Land Parcel **No.KERICHO/KUNYAK S.S./366** (hereafter referred to as the suit property).

2. The Respondents averred in the Plaint that the Appellant instructed the 1<sup>st</sup> Respondent to Sell the suit property by Public Auction and the 1<sup>st</sup> Respondent sold it to the 2<sup>nd</sup> Respondent but the Appellant failed to effect the transfer to the property to the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent refunded the 2<sup>nd</sup> Respondent the purchase price.

3. The Appellant filed a defence dated 6/10/2014 denying the Respondents' claim

4. The hearing of the case proceeded Ex-parte and the Trial Court entered Judgment in the sum of kshs.237,937.50. The Appellant has now appealed to this Court on the following grounds:-

***(i) THAT the decision is erroneous and has ended up compensating or enriching the Respondents twice vide possession of the Security Property as well as an order for refund of the Purchase Price.***

***(ii) THAT the finding of the Trial Court was based on irrelevant matters.***

***(iii) THAT the Trial Court failed to appreciate the law and precedent applicable in the case.***

***(iv) THAT the Respondents did not prove their case on evidence of probabilities.***

***(v) THAT the finding of the case was improper, unrealistic and inappropriate.***

***(vi) THAT all the issues were not adjudicated.***

***(vii) THAT the court ought to have made conditional orders and hence occasioned gross miscarriage of Justice***

5. The parties filed written submissions in the Appeal which I have duly considered. The Appellant submitted as follows:-

***(i) THAT the Trial Court relied on the testimony of a single witness (PW.1) who was the auctioneer.***

***(ii) THAT Special Damages must be specifically pleaded and proved.***

***(iii) THAT the Trial Magistrate's decision erroneously ended up compensating or enriching the Respondents twice vide possession of Security Property as well as an order of refund of the Purchase Price in that there was no evidence that the Auction money was forwarded to the Appellant.***

***(iv) THAT there was no justification in awarding 15% interest.***

6. The Respondents opposed the Appeal and submitted that the Appellant's submissions are not supported by evidence.

7. The Respondents also submitted that the 1<sup>st</sup> Respondent gave evidence which was not controverted and hence proved his case to the required standard.

8. The 1<sup>st</sup> duty of the 1<sup>st</sup> Appellate Court is to re-evaluate the evidence adduced before the Trial Court and to arrive at its own independent conclusion.

9. In the case of **Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR**, the court restated the duty of an appellate court as follows:

**“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) EA 123, my duty 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.....**

**.....From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally”**

10. The 1<sup>st</sup> Respondent testified in Court and his testimony was not challenged since the Appellant did not give evidence. The 1<sup>st</sup> Respondent's evidence that he remitted Kshs.105,000 to the Appellant was not been controverted.

11. The Appellant failed to appear in Court to challenge the testimony of PW.1 and he is now attempting to adduce evidence at Appeal stage.

12. It is not clear how the Respondents will be compensated twice when there is evidence that the Appellant still holds the suit property.

13. In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002**, Lesiit, J citing the case of **Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998** appreciated that:

**“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.**

14. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

15. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988**, Makhandia, J (as he then was) held that:

**“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.**

16. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

**“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.**

17. I therefore find that based on the only evidence on record, which evidence was not challenged even in cross-examination, it cannot be successfully contended that the Respondents failed to prove the said factual averments.

18. I find that the Trial Court was right in finding for the Respondents. The standard of proof in Civil Suits is on a balance of probabilities

and I find that the Respondents discharged the said standard.

19. I accordingly find that the Appeal lacks in merit and I dismiss it with costs to the Respondent.

**Dated, Signed and Delivered at Kericho this 2<sup>nd</sup> Day of October, 2020**

**A.N. ONGERI**

**JUDGE**