



REPUBLIC OF KENYA



KENYA LAW
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Ngige v Kibaiyu (Civil Appeal 492 of 2014)
[2019] KEHC 12486 (KLR) (Civ) (13 December 2019) (Judgment)

Neutral citation: [2019] KEHC 12486 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 492 OF 2014

JK SERGON, J

DECEMBER 13, 2019

BETWEEN

ESTHER NJERI NGIGE PLAINTIFF

AND

TABITHA WANGARI KIBAIYU DEFENDANT

(Being an Appeal from the Judgment of the Honourable Magistrate E. Wambo delivered on the 8th October, 2014 at Githunguri in Githunguri CMCC No. 9 of 2014)

JUDGMENT

1. Esther Njeri Ngige, the Appellant herein, filed an action before the Githunguri Principal Magistrate's court against Tabitha Wangari Kibaiyu, the Respondent herein, seeking for a refund of ksh. 46,000/= . The aforesaid amount is said to have been paid to the Respondent to purchase two plots in Ruai.
2. The Respondent filed a defence admitting having received a sum of ksh 40,000/= but averred that a sum of 6,000/= was paid directly to Ruai Squatters Welfare Society as survey fees.
3. The appellant prosecuted the suit exparte when the Respondent failed to attend court. Hon E.O Wambo, learned Resident Magistrate heard the case and dismissed it vide a ruling delivered on 8TH October, 2004.
4. The Appellant being aggrieved, preferred this appeal and put forward the following grounds:
 - i. The learned trial Magistrate erred in fact and law by the way he weighed the evidence before him.
 - ii. The learned trial Magistrate erred in law and fact by attributing liability to a party who was not enjoined in the case despite there being no pleadings filed by the said party.



- iii. The learned trial Magistrate misdirected himself on the crucial issue of the person who received the money subject matter of the case.
 - iv. The learned trial Magistrate erred in law by regarding the receipts before the court as definite identification of the recipient of the money whereas the evidence before him was that the receipts were furnished by the defendant well after she received the money.
 - v. The learned trial Magistrate erred in law by questioning the plaintiff's evidence and finding that she had not proved her case yet her evidence was not controverted in any way.
5. When this appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. At the time of writing this judgment, the Appellant was the only party who filed her submissions. I have re-evaluated the case that was before the trial court and considered the Appellant's written submissions. Though the appellant put forward a total of five (5) grounds of appeal those grounds revolve around the singular question as to whether the learned Resident Magistrate properly considered the weight and analysed the evidence before dismissing the suit.
 6. It is the submission of the appellant that the learned Resident Magistrate made an error on the finding on the issue of who received the money and attributing liability to a person who was not a party to the suit.
 7. The Appellant told the trial court that the Respondent had told her that there was land being sold in Ruai prompting her to pay her in the first instance a sum of ksh, 40,000/= . She also said she made the second payment of ksh. 6,000/= to her. The appellant further averred that the Respondent failed to give her receipts forcing her to report the matter to the Chief, Gatamaiyu Location.
 8. The appellant produced in evidence as an exhibit a letter the chief wrote to the Respondent summoning her to the chief's office. The appellant stated that the Respondent appeared before the chief and gave two receipts acknowledging receiving sh. 46,000/= from her.
 9. The Appellant also produced those receipts as exhibits in evidence. The appellant told the trial Magistrate that she needed to be refunded her money since there were no plots. Those receipts are shown to have been issued by Ruai Squatters Welfare Society.

PARA 10.

The learned Resident Magistrate upon considering the appellant's evidence came to the conclusion that the appellant's claim as against the Respondent failed because the receipt produced only establishes that money was paid to Ruai Squatters Welfare Society which was not a party to the suit.

11. The learned Resident Magistrate further went ahead to state that in the circumstances the Appellant's claim against the defendant would have been based on fraud and misrepresentation to purchase land which was not in existence.
12. Having re-evaluated the evidence and having examined the manner the learned Resident Magistrate weighed evidence, I am persuaded that the Trial magistrate fell into error.
13. In the defence put forward by the Respondent, it is clearly admitted by the Respondent that she received a sum of ksh. 40,000 from the Appellant. It is also apparent that the Respondent only brought receipts after having been pressured by the Chief Gatamaiyu Location whose assistance was sought by the appellant.
14. The Respondent did not testify to controvert the Appellant's evidence which appeared consistent and credible. It is only the Respondent who knew Ruai Squatters Welfare Society. There is no evidence to



show whether or not the aforesaid body is a body corporate. The Appellant never dealt directly with the aforesaid body.

15. The Appellant, on a balance of probabilities was able to show that she gave the Respondent a sum of ksh. 46,000/= who in turn issued her with two receipts. There is also uncontroverted evidence that the Respondent had agreed to refund the money when she appeared before the chief Gatamaiyu Location. It is clear from the record that the learned Resident Magistrate gave weight to the Respondent's statement of defence yet the Respondent did not testify to buttress her defence.
16. In the absence of any evidence, such defences are regarded in law as mere allegations.
17. In the end, the appeal is found to be meritorious, it is allowed. The order dismissing the Appellant's suit is set aside and is substituted with an order entering Judgment as prayed in the plaint dated 27th January, 2015.
18. The Appellant to have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH OF DECEMBER, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

