



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 331 OF 2012

MUHUHU NGUNJIRI.....APPELLANT

- V E R S U S -

DAVID MWANGI ISAAC KARIUKI.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. T.W.C Wamae, at the chief Magistrates court at Milimani commercial court Nairobi delivered on the 22nd of June 2010 in CMCC 102 OF 2010)

JUDGEMENT

1) David Mwangi Isaack Kariuki, the respondent herein, filed a claim founded on breach of contract against Muhuhu Ngunjiri, the appellant herein.

2) The brief summary of the facts leading to the suit are that: the parties entered into a loan agreement where the appellant advanced the respondent a loan of Ksh 365,000/=payable within six months. The loan was secured by an assignment and transfer of the borrower's (the respondent) title and interest over land **Title No. Ngong/Ngong/8866** measuring 0.40 hectares. The loan agreement made it incumbent upon the lender(the appellant) that in case of default of payment by the respondent, to offset from the sale proceeds against the principal sum and refund the surplus to the respondent. The respondent defaulted and the appellant sold the land but never surrendered the surplus to the respondent necessitating the filing of the suit.

3) The appellant filed its defence dated 10th February, 2010 and denied the respondent's claim.

4) The suit was heard on various dates and in the end the Hon. T.W. C Wamae, the learned chief magistrate entered judgement for the respondent and against the appellant in the following terms:

<i>Sale price</i>	<i>Ksh 1,080,000/=</i>
<i>Less loan</i>	<i>Ksh 365, 000/=</i>
<i>Less advertisement cost</i>	<i>Ksh1,434/=</i>
<i>Total</i>	<i>Ksh 713,566/=</i>

5) Aggrieved by the award, the appellant preferred this appeal and put forward the following 5 grounds in his memorandum:

1. The learned Magistrate erred in law and in fact in finding the defendant had breached the contract.

2. The learned Magistrate erred in fact in failing to find that the plaintiff was the one in default of performing his obligations in the sale agreement.

3. The learned Magistrate erred in law in giving a money judgement not prayed in the plaint.

4. The learned magistrate erred in law and fact in giving judgement against the defendant.

5. The learned Magistrate erred in law and in fact in her interpretation of the terms of the sale agreement.

6. The aforementioned grounds may be summarises into two main grounds namely;

i. whether or not there was a breach of contract (grounds 1,2,4 and 5)

ii. whether or not the learned trial magistrate erred in giving a money judgement not prayed in the plaint(grounds 4 and 5)

7. When the appeal came up for hearing, learned counsels consented to have the appeal disposed of by written submissions . I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

8. The first ground of appeal is whether or not there was a breach of contract. The appellant submits that the respondent was in breach of a specific covenant of a loan agreement and should not be allowed to turn around and benefit from the said breach. The appellant further states that after the breach of the contract by the respondent, he exercised his option under the agreement of selling the land that was provided by the respondent as a collateral and he was therefore no longer bound by the terms of the loan agreement.

The respondent submits that he breached the loan agreement and the appellant was within the rights conferred to him by the agreement to dispose of the land which he gave as a collateral to recover his loan amount. The respondent further argued that the appellant was mandated to submit any excess amount after the sale, something he did not do forcing him to file this suit. The respondent further submits that parties to a contract are bound by the terms of the very contract they entered into.

9. The evidence tendered before the trial court is what this court has to re-examine and re- evaluate. David Mwangi Isaack Kariuki, the respondent and PW1 admitted not paying back the loan as per the loan agreement entered into on the 5th December 2007 as seen in PExh.2. The appellant was entitled to sale the land which was given as collateral to recover his money where there was a breach. Muhuhi Ngonjiri, the appellant and DW1 confirmed having advanced a loan of Ksh 365,000/- to the PW1 who defaulted and he therefore sold the land to recover the money. It is evident that there was breach of contract and the trial court finding cannot be faulted.

10. The second ground of appeal is whether the learned trial magistrate erred in giving a money judgement not prayed for in the plaint.

The appellant submits that the respondent was estopped from claiming any monies under the contract and the lower court erred in awarding monies. If the respondent had paid the loan within the stipulated time, the suit would not have been filed. The appellant states that the respondent having surrendered the land title deed as security for the loan, he estopped from any other claim on that land.

The respondent submits that he was entitled to a refund of the surplus after sale and deductions of the money he owed the appellant and that is the reason why he filed the suit.

11. The plaint as filed sought for 6 prayers (a-f). The prayers that led to the money judgement were prayers **a** and **b** which stated *inter alia* **that the appellant was to declare how much he sold the land he held in collateral for the loan and secondly, when the amount is known, then the surplus refund to be made to the respondent.** The appellant stated that the respondent owed him another loan the reason why he did not remit the surplus to him. This defence by the appellant does not arise out of the subject matter of the loan agreement between the parties, a claim which he can settle with the respondent in a separate suit. The appellant is bound by the terms of the loan agreement, the surplus from the sale ought to have been given back to the respondent.

12. I am in agreement with the decision of the trial magistrate who found that the appellant was in breach of the provision to forward the balance to the respondent. This ground of appeal therefore lacks merit

13. In the end, the appeal is found to be without merit and it is dismissed, with each party bearing its own costs.

Dated, Signed and Delivered in open court this 6th day of April, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent