



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

HCCA NO 75 OF 2016

REBECCA MUTHONI MUNGAI.....APPELLANT

VERSUS

JANE MAKENA YOGO.....RESPONDENT

(An appeal from the Judgment of the Chief Magistrate's Court at Thika

(J.W. Onchuru Ag. Principal Magistrate) dated 15th July 2015

in Civil Case No 474 of 2012

JUDGMENT

1 The respondent herein **Jane Makena Yogo** sued the appellant herein **Rebecca Muthoni Mungai** in the plaint dated 20th June 2012 seeking the following prayers:

(a) An order for permanent injunction towards the defendant, her servants, agents, employees and /or any other person(s) claiming through her from interfering with the plaintiff's quiet possession and occupation of Municipal Council Thika Kiosk No. 205(hereinafter also known as the kiosk) situated near Thika Police Station.

(b) Any further order compelling the defendant to facilitate immediate and unconditional transfer of the Municipal Council Thika Kiosk No. 205 at the Council Office in favour of the plaintiff.

(c) Costs of the suit and interest thereof.

2. The appellant filed her written statement of defence denying that she had sold the kiosk to the respondent.

3. The matter proceeded to hearing and in its judgment, the trial court held that the respondent had proved on a balance of probability that there was a business deal between her and the appellant and that money totaling KShs. 300,000 was paid to the appellant towards the purchase of the kiosk which the appellant had refused to transfer to the respondent. As a consequence thereof, the court entered judgment for the respondent against the appellant by granting the prayers in the plaint.

4. The appellant being aggrieved by the trial court's judgment and decree filed the present appeal citing the following grounds:-

(i) That the learned magistrate erred in fact in finding that the appellant and respondent had entered into a sale agreement for a kiosk and that the respondent had paid consideration which the evidence adduced does not support the finding on a balance of probabilities.

(ii) That the trial magistrate erred in fact and law by failing to note the contradictory nature of the evidence of the respondent and her witness in respect of the disputed purchase money.

(iii) That the trial magistrate erred in law by failing to take into consideration the fact that the date of the deposit was well before the dates alleged for either the oral or written agreements.

(iv) The trial magistrate erred in law and fact by stating that the appellant did not claim to have deposited money while her evidence clearly states otherwise.

(v) *That the learned Magistrate further erred in fact and law by reaching a conclusion that a total consideration of Kshs. 300,000 was paid while the respondent evidence and that of her witness alluded only for a sum of Kshs. 230,000/=*

(vi) *That the learned magistrate erred in law by failing to make a finding on a local status of the alleged written sale agreement to warrant an order of specific performance under the law of contracts act.*

(vii) *That the learned magistrate erred in law by ordering specific performance on a contract said to have been negotiated by a third party.*

5. Both counsel appearing for the parties herein agreed to dispose of the appeal by written submissions which they filed. M/s Mbiyu Kamau for the appellant submitted on Grounds 1 to 5 that the agreement entered between the respondent and the appellant showed future intent and was not a completed sale as it established that the appellant had intended to sell the kiosk but later on changed her mind.

6. On whether the consideration of Kshs. 300,000 or any part thereof was paid, counsel submitted that the respondent did not mention getting Kshs. 250,000 from her husband but only Kshs. 50,000 and that the deposit slip (EXB 2) showed that money was deposited on the 20th day of February 2010 and not 1st day of March 2010.

7. On grounds 6 and 7 counsel stated that the plaintiff prayed for specific performance of the contract of 7th August, 2010, and the trial court in its judgment granted the prayer for specific performance hence, it was counsel's submission that the alleged contract did not meet the requirements of the law.

8. M/s Muturi Njoroge for the respondent in their submissions opposed the above appeal. On the disputed existence of the contract for sale counsel submitted that the issue of the execution of a sale agreement remained uncontroverted and there was no sufficient reason availed as to why this court should set aside the trial court's decision.

9. Counsel further submitted urging the court to take judicial notice of the fact that in any bank transaction where money is deposited, the person depositing the money stays with the original deposit slip.

10. PW1 **Jane Makena** the respondent herein told the court that she knew the appellant as she (appellant) had leased her a kiosk in 2003 for use as a hotel. As of that time, she used to pay the appellant Kshs. 2,500/-. However, in 2006, the hotel was changed from general kiosk to cooler kiosk meaning that she could use it as a hotel.

11. In July 2010, the appellant's husband told her that they wanted to sell the hotel. Being interested in buying the same, she accompanied the appellant to Equity bank where she gave her Kshs 230,000/-. The appellant banked the said amount as evidenced by (PEXB.1). They did not reduce the said agreement into writing as the appellant kept telling her that her daughter-in- law was admitted in hospital.

12. Later, on 7/8/2010, they entered into an agreement (PEXB.2) after being pushed. She confirmed that in as much as she was in occupation of the kiosk, the licence (PEXB.3) was being paid in the appellant's name as the appellant had not transferred the kiosk to her name. She also clarified that the agreement was written by the appellant's husband. She further, confirmed that after she bought the kiosk from the appellant the latter never came to ask for rent from her. She testified that she last paid rent in January 2010.

13. In December 2010, while in hospital attending to her sick daughter, the appellant's husband called her saying that there were auctioneers at the hotel wanting to attach her goods. She rushed to the hotel only to discover that the appellant had not paid rent for one year. She showed them the sale agreement but the auctioneers insisted that she pays them their costs. In the end, she had to pay the auctioneers costs of Kshs. 20,000 after going to the police. Later she wrote a demand letter (PEXB. 4) to the appellant before instituting the instant suit.

14. In concluding her evidence, she insisted she bought the kiosk and prayed that the same be transferred from appellant's name to her name as she was still using the kiosk. She also produced a restraining order (PEXB 5) restraining the appellant from interfering with her peaceful occupation. On cross examination, she clarified that the agreement did not talk about money, it was written on 7/8/10 and the slip didn't show it's her who deposited the money.

15. PW2 **Elisha Yogo Ondiara** the respondent's husband confirmed that the appellant sold the respondent the kiosk in 2010 and the respondent had requested him for funds to purchase the same. On 1/3/2010, he proceeded to Co-operative Bank Thika Branch in the company of the respondent, appellant and appellant's husband. At the bank, he withdrew Kshs. 250,000 from Account No. 011607452340(EXB.6), which he gave the respondent leaving a balance of Kshs. 50,000/-. Apparently, it was agreed that the agreement was to be written after completing the payment.

16. **DW1 Rebecca Muthoni Mungai** the appellant herein denied ever selling the kiosk to the respondent and insisted that the respondent was just leasing the kiosk from her. That the respondent stopped paying rent and she sent a lawyer who summoned her but she did not honour the summons. Auctioneers were sent to the kiosk to collect the unpaid rents.

17. She denied that the appellant gave her Kshs., 300,000 for the purchase of the kiosk and insisted that the agreement the respondent produced was not hers. She admitted that initially she wanted to sell the kiosk but later on changed her mind. Apparently, she only gave the respondent stall documents so that she could be paying for the licence.

18. In reference to the agreement dated 7/8/2010, she insisted that they never agreed on any amount to be paid and that the agreement never stated that she had sold the kiosk and no witness attested to the sale agreement. On cross examination, she admitted that the signature on the sale agreement was hers though, she could not remember who told her to sign and by 7/8/2010 the respondent was her tenant. She also

admitted that she held an account with Equity Bank and that on 20/2/2010, she deposited Kshs. 230,000/=. She also admitted that she has not claimed for any unpaid rent nor for the respondent to be evicted.

19. This being a first appeal I have a duty to appreciate the entire evidence subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to see or hear the witnesses and I must give an allowance for that. See **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] E.A 123; Peters v Sunday Post Ltd [1958] EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Anor Civil Appeal No 345 of 2000: (Okubasu , Githinji & Waki JJA).**

I should also bear in mind that it is not open to this court to review the findings of the trial court just because it would have found differently had it been hearing the matter for the first time.

20. I have considered the pleadings, evidence on record, grounds of appeal and the submissions by both counsel. The appellant raised seven(7) grounds of appeal. I have however considered them and the issues I find falling for determination are:

i) Whether the appellant and the respondent entered into a sale agreement for the sale of the appellant's kiosk.

ii) Whether the appellant received money from the respondent towards the purchase of her kiosk.

i) Issue No. (i)

Whether the appellant and the respondent entered into a sale agreement for the sale of the appellant's kiosk

21 It is not in dispute that the respondent had initially leased the kiosk since 2003 from the appellant and had been in occupation of it since then. The respondent's evidence was that in 2010, she entered into a sale agreement with the defendant for the purchase of the kiosk and they did in fact negotiate and agree that the appellant would sell her the kiosk at Kshs. 300,000/-. On being cross examined the appellant did in fact admit that she signed the sale agreement though she disputed that the same did not refer to the kiosk nor have witnesses. The respondent's evidence established that indeed the sale agreement (PEXB.2) dated 7/8/2010 referred to the sale of the kiosk. The agreement refers to all water bills which had to be addressed to the respondent and not the appellant w.e.f 7th August 2010 which is the date of the sale agreement.

22 If indeed the appellant never sold the stall to the respondent, then the appellant should have produced receipts evidencing the fact that the respondent was still her tenant. In any case, the respondent explained that in as much as she was in occupation of the kiosk, the licence (PEXB3) was still in the name of the appellant as the appellant had not transferred the kiosk to her name. The appellant admitted to having signed the agreement (PEXB1) though she pretended not to have known her reason for signing. On a balance of probability, the respondent proved that the sale agreement entered into between her and the respondent in as much as reference was not made to the kiosk and no witnesses signed it, by implication, the same referred to the kiosk.

ii) Issue No. (ii).

Whether the appellant received money from the respondent towards the purchase of her kiosk.

23 **PW2 Elisha Yogo Ondiara** the respondent's husband told the court that he in the company of the respondent, appellant and her husband were at Co-op Bank Thika where he withdrew Kshs 250,000/- (EXB6) for this purpose.

24 On the other hand the respondent has confirmed being with the appellant at Equity Bank where the latter deposited Kshs 230,000/- of what she had paid her. A deposit slip confirming the deposit was produced (PEXB1). Despite denials of receipt of the money, the appellant did not explain the source of the Kshs 230,000/- nor what it was for.

25 In fact the evidence of the appellant was mere denials. It has been shown that she signed the agreement (EXB2). Further Kshs 230,000/- was deposited into her account. She received it but chose to say nothing about it to rebut what the respondent had claimed. Had the respondent been unlawfully using the kiosk without her authority the appellant would have filed a suit for her eviction. Her silence confirms that she had sold the kiosk. The appellant only paid Kshs 230,000/- out of the agreed Kshs 300,000/-. The balance of Kshs 70,000/- is owed to the respondent.

26 My finding is that the learned trial magistrate analyzed the evidence well and properly applied the law. He however overlooked the balance of Kshs 70,000/-. I therefore uphold the judgment of the trial court with a further order that the respondent pays the appellant the balance of Kshs 70,000/- plus interest at court rates from 7th August 2010. This must be complied with within 60 days from the date of delivery of this judgment which will pave way for the official transfer of the kiosk.

27 The result is that the appeal partially succeeds in terms of the orders made hereinabove. Each party to bear her own costs of the appeal and the lower court costs.

Signed and dated this 4th day of October 2018 at Nairobi.

.....

HEDWIG I. ONG'UDI

JUDGE