



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL APPEAL NO. 78 OF 2006**

**GATOBU M'IBUUTU KARATHO ..... APPELLANT**

**VERSUS**

**CHRISTOPHER MURIITHI KUBAI ..... RESPONDENT**

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

The Appellant was the defendant at the lower court. The Respondent had sued the Appellant seeking an order of specific performance of contract in the alternative Judgment be entered in favour of the Respondent for Kshs.150,000/= being refund of purchase price with liquidated damages with costs and interest . That after the trial court entered judgment for the Respondent for the refund of Kshs.150,000/- being the purchase price and liquidated damages at Kshs.300,000/- as per parties agreement with costs and interest.

The appellant being aggrieved by the lower court's judgment filed this appeal setting out 4 grounds of appeal being as follows:-

1. The learned magistrate erred in law and in fact in failing to find that it is the respondent who had breached the agreement entered into between the appellant and the respondent for the Respondent failed to pay the surveyors to fix the boundary and also the balance of purchase price to the appellant.
2. The Learned Magistrate erred in law and in fact by awarding liquidated damages of kshs.300,00/=-, despite the fact that that it's the Respondent who had breached the agreement.
3. The Learned Magistrate erred in law and in fact in arriving at a decision contract to law and evidence on record.
4. The learned Magistrate erred in law and in fact in failing to find that the respondent has not proved his case on a balance of probabilities.

When the appeal came up for hearing both counsel agreed to have the appeal determined by way of written submissions and thereafter highlight on the same. The appellant's counsel filed her submissions on 27<sup>th</sup> March, 2013 whereas the counsel for the Respondent filed his on the same day. That when the appeal came up for highlighting both counsel opted not to highlight on their submissions and requested for a date of judgment.

The court have very carefully considered the written submissions and authorities by both counsel. It has also considered the pleadings, proceedings and annexures thereto. The court shall consider the grounds of appeal submitted by the appellant and opposing position of both counsel.

The appellant in his ground of appeal No. 1 averred that the learned trial magistrate erred in law and in fact in failing to find that it was the Respondent who had breached the agreement for failing to pay the surveyor to fix the boundary and also balance of the purchase price.

The Respondent in his plaint averred that he paid the full purchase price. The defendant in his statement of defence did not deny having been paid the purchase price in full. The Respondent in his evidence produced exhibits P1, Exhibit P2, Exhibit P3 confirming payment of the purchase price which documents the appellant executed acknowledging receipt of purchase price. The appellant agreed he was party to exhibits P1, P2 and P3 which are clear that the total purchase price was paid. I find that the trial court did not make an error in holding and finding that the full purchase price was paid and acknowledged to the appellant.

The initial agreement between the appellant and the Respondent was produced as Exhibit P1. The parties to an agreement in writing are bound by its terms and conditions and cannot rely on oral agreement if the agreement in writing is in existence. A perusal of agreement for sale of land dated 4<sup>th</sup> January, 2006 Exhibit P1 reveal that there was no clause requiring the Respondent to pay surveyor's fees for subdivision of the land. The Appellant did not even in his defence raise that issue. The trial court could not therefore be expected to deal with an issue that was not raised in the parties pleadings. I therefore after evaluating and re-analyzing the evidence find no merits in ground No. 1 of the appeal and the same is dismissed.

The appellant in ground No. 2 of the appeal faults the trial court for awarding the Respondent damages of Kshs.300,000/- despite that it's the Respondent who had breached the agreement. The Respondent in his evidence denied being in breach of the contract. He testified that he honoured his part of the contract however the Appellant failed/refused and neglected to transfer the land to him. He also failed to put the Respondent into the possession. That they went to lands office and found the land belonged to a third party. The Appellant averred that he did apply to transfer the land to the Respondent but he refused to pay for the transfer. He claimed that he filled the forms but did not produce any before court. He also admitted that he did not have any documents to prove LR No. 25011 KIENGU/KANJOO belongs to him.

The Appellant's counsel referred this court to several cases in her submissions. In the case of **M'Nyeri M'Rimunya V Humbrey Twinga & Hillary Kaara HCCC NO. 113 OF 2011** in which the plaintiff was seeking to enforce a clause in agreement for sale of land which Hon Lady Justice Lesiit noted it stated;

**“Any party in default of the agreement shall pay the innocent party the purchase price being agreed damages for breach of the contract”**

The authority can be distinguished in the ground of appeal before me because the ground is dealing with whether there was breach of contract or not but not whether the agreed liquidated damages were unreasonable, unconscious and extravagant.

In case of **Guaranty Discount company Ltd V Oliver Lawrence Ward (1961) EALR 285** the court stated:-

**“Under Section 74 *ibid*, if a contract is broken, where a sum is expressed to be payable on such breach, whether it would be deemed liquidated damages or penalty, the result which follows is the same: in either case the court will award reasonable compensation not exceeding the amount named.”**

The Respondent counsel on his part relied on a number of authorities also. In the case of **of Nakana Trading Co. Ltd V Coffee Marketing Board 1990 – 1994 EA 448**, the High court in Kampala on the issue whether there was a breach of contract court stated:-

**“In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the**

**terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous. Support for the proposition can be found in Sarkar on Evidence at 849 where the author said.”**

Further the court went on to state:-

‘The general rule with regard to damages in breach of contract were set out in the often quoted case of **Hudley’s paxendale [1854] 9 Exch 341** where the court said:-

**“where two parties have made a contract which one of them had broken the damages which the other party ought to receive in receipt of such breach of contract should be such as may fairly and reasonably be considered either naturally that is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.”**

The counsel further relied on the case of **National Bank of Kenya Ltd V PipePlastic Samkolit (K) Ltd and another (2002) EA 503** where court of Appeal of Kenya stated:-

**“This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain.”**

Having considered the evidence adduced before the trial court and the above mentioned authorities and the fact that the Appellant is only challenging the trial court’s finding that the Appellant was in breach of the contract and the liquidated sum being unchallenged in any way, I find no merit in the Appellant’s ground of appeal No. 2 and the same is dismissed.

I will combine Appellant’s ground of Appeal No. 3 and 4 of which deal with the evaluation of evidence by the trial court. The Appellant gave evidence and called no witness. He did not produce any exhibit whereas the Respondent gave evidence and produced exhibits in support of his case. I have gone through the trial court’s judgment. He evaluated and analyzed the whole evidence and gave reasons for his decision. I have equally re-evaluated the evidence and analyzed the same. I did not find any error in law and fact in the trial court’s decision. The trial court’s Judgment is not contrary to the law and is not based on misapprehension the evidence. The court correctly found that the Respondent proved his case on balance of probabilities and made right decision. I therefore find no merits in appellants ground of appeal No’s 3 and 4 and same are dismissed.

The upshot is that the Appellant’s appeal is without merits and is dismissed with costs to the Respondent.

**DATED AT MERU THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2014**

**J. A. MAKAU**

**JUDGE**

Delivered in open court in presence of:

M/S Ungu for Appellant

Mr. B. G. Kariuki for Respondent

J. A. MAKAU

JUDGE