REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 69 of 2010

(Being an appeal from the Judgment of E.M. NYAGA Senior Resident Magistrate Kerugoya delivered on 6th July 2010 in Civil Case No. 51 of 2010)

DANIEL MUREITHI WACHIRA.....APPELLANT/APPLICANT

VERSUS

JANE CATHERINE K. KARANI.....…..…… RESPONDENT

J U D G M E N T

DANIEL MUREITHI WACHIRA the appellant herein was the defendant while JANE CATHERINE K. KARANI the respondent was the plaintiff in Kerugoya Senior Resident Magistrate's Civil Case No. 51/2010. The respondent was claiming for a refund of Shs.71,000/= plus incurred costs and agreed interest of 35%.

The claim was based on a breached agreement of sale of 0.05 hectares out of LR. NO. NGARIAMA/THIRIKWA/2541. The appellant filed an amended statement of defence dat3ed 17/3/2010 denying all the respondent's claim. After a full hearing the learned trial Magistrate entered judgment for the plaintiff as prayed.

The appellant was aggrieved by the said judgment and filed the present appeal raising the following grounds:-

1. ***The learned trial Magistrate erred in law and in fact in finding that the respondent had proved her case on a balance of probability when the evidence did not support the plaint at all.***
2. ***The learned trial Magistrate erred in law and in fact in relying on the respondent's evidence and that her witnesses when the evidence completely differed.***
3. ***The learned trial Magistrate erred in law and in fact in enforcing an un-enforceable agreement as it did not comply with the law of contract on issues touching land.***
4. ***The learned trial Magistrate erred in law and in fact in enforcing an agreement which had violated the Stamp Duty Act.***
5. ***The learned trial Magistrate erred in law and in fact in entering judgment in favour of the respondent as prayed without addressing every issue raised.***
6. ***The learned trial Magistrate erred in law and in fact in awarding special damages when they were not specifically pleaded and strictly proved.***
7. ***The learned Magistrate misdirected himself in law and in fact in awarding the respondent a decretal sum of Kshs.181,425/= which the respondent was not entitled to and which was in fact***

more than what ought to have been awarded arithmetically.

8. ***The learned trial Magistrate erred in law and in fact in not considering the appellant's case and the submissions put forward in support of the defence.***
9. ***The learned Magistrate erred in law and fact in not appreciating the evidence of the appellant.***

Both counsels agreed to dispose of the appeal by way of written submissions. They did file the said submissions. It is Ms. Fatuma's submission that the respondent did not prove her case. She stated that the respondent's evidence was in contradiction with her pleadings.

Secondly the sale agreement was unenforceable as it was in contravention with Section 3(3) of the Law of Contract as the said document was not attested by two witnesses. She also submitted that the learned trial Magistrate did not consider the evidence adduced by the appellant alongside the written submissions filed.

Finally she raises issue with the award of special damages of Shs.24,000/= which was not specifically pleaded. She further says the award of Shs.181,425/= as the decretal sum is wrong as the total should have been shs.109,409/=.

This being a first appeal this court is enjoined to reconsider and reevaluate the evidence adduced to enable it arrive at its own decision. I am guided in this by two cases viz:

1. ***GOUSTAR ENTERPRISES LTD VS OUMO [2006] 1 EA 77 (SCU)***

2. ***SUMARIA & ANOTHER VS ALLIED INDUSTRIES LTD [2007] 2 KLR 1***

3. ***NAMUSISI & ANOTHER VS NTABAAZI [2006] 1 EA 247 (SCU)***

I proceed to look at the evidence availed afresh. The respondent gave evidence and called two witnesses (PW2 and PW3). In brief she stated that in 2009 she gave the appellant Shs.71,000/= as part payment for the purchase of land. The land was in the name of Ngaruui. The purchase was joint and the land was to be registered in the name of the appellant who would in turn transfer it to her. On 17/11/2009 they entered into an agreement over the same. The defaulting party would pay interest of 35%. The agreement was witnessed by her husband.

On 19/11/2009 she brought in a surveyor (PW2) to subdivide the land. The appellant gave all the documents to the surveyor including the title deed. She claimed for the Shs.71,000/= + 24,000/= (survey). In cross examination she said the Shs.71,000/= had been paid to the appellant over time by instalments.

PW2 stated that on 17/11/2009 the respondent, her husband and appellant came to his office. They had a sale agreement and he was to subdivide the land into two. The 2 parties had all the necessary documents which they signed. He then applied for the consent for the sub-division. He was paid Shs.24,000/= by the respondent. Thereafter the appellant postponed the sub-division and finally he learnt that the transaction had been canceled. PW3 from the DO's office confirmed that the application for sub-division expired as the owner never turned up.

The appellant denied all that the respondent stated. He denied entering into any agreement to sell land with the respondent. He did not book any meeting with the board and he never went there. His identity card and photos were stolen from his office. He denied giving them to the respondent. In cross examination he denied knowledge of the sale agreement. He said he had reported the loss of his documents. He said he was not aware of how the respondent came to possess his PIN number and ID card copies.

It is clear from the pleadings that the respondent was not praying for specific performance but refund of her money. I have considered all the grounds raised herein and will reduce them into 3 broad issues to deal with; viz

1. ***Was the agreement dated 17/11/2009 enforceable?***
2. ***Did the respondent prove her case against the appellant on a balance of probabilities?***
3. ***Were all specified damages specifically pleaded and proved?***

Pleadings are a guidance to the court and they guide parties on the kind of case to expect. Evidence flows from the pleadings. The respondent's claim is premised on paragraph 4 of the plaint which states

"The plaintiff avers that on or about 17/11/2009 she entered into a sale agreement with the defendant whereby the defendant acknowledged Shs.71,000/= being the purchase price of 0.05 hectares out of LR. NO. NGARIAMA/THIRIKWA/ 2541."

The plaintiff's claim is therefore premised on an agreement produced as PEXB1. The said agreement is alleged to have been entered into by the appellant and respondent witnessed by Benson Muriithi Kiura the respondent's husband.

In the case of ***MACHAKOS DISTRICT CO-OPERATIVE UNION LTD VS PHILIP NZUKI KIILU Civil Appeal No. 112/1997.*** The Court of Appeal held as follows

(a) No suit can be brought upon a contract for disposition of interest in land unless

i. ***The contract upon which it is founded***

1. Is in writing

2. Is signed by the parties thereto and

3. Incorporates the terms which the parties have expressly agreed in the document and

ii. The signature of each party signing has been attested by a witness who was present when the contract was signed by such party.

(b) If there is no agreement enforceable no party is entitled to interest.

A look at the sale agreement produced as EXB1 the following anomalies are noted;

(a) The name of the vendor is not indicated

(b) The acreage is 0.10 hectares yet the appellant is to sub-divide the land and give the respondent 0.5 hectares which is even bigger than what is allegedly being bought.

(c) The terms and conditions appear to be affecting the appellant only. It is a one sided agreement.

(d) It is only attested by one witness who happens to be the respondent's husband which means the appellant's signature has not been attested.

From the above, my answer to issue No.1 is that the agreement is unenforceable under the Law of Contract. The contract having been found to be unenforceable then the only option was to have the money refunded. The refund could only be made if proved to have been made in the first instance.

I will therefore deal with issue No. 2 & 3 simultaneously. The evidence of the respondent was that she and the appellant were jointly buying this land from Ngaruui. She paid Shs.71,000/= The said Ngaruui did not adduce evidence to confirm this evidence of the respondent. She also said that as they bought the land jointly the same was to be transferred to the name of the appellant. Thereafter the appellant would transfer the land to her.

What was the purpose and benefit of the two transfers? If what she was saying was true, why could

the alleged Ngaruui not transfer the share of each into their names or even in their joint names. The respondent was ready to pay the survey expenses so what would have hindered a direct transfer?

The title deed in respect of this land L.R. NGARIAMA/THIRIKWA/2541 was issued on 3rd November 2009. When the alleged agreement showing payment of Shs.71,000/= was being entered into for a joint purchase was the appellant buying land from himself?

Both respondent and appellant knew each other well as they worked in one office. He denied signing any applications for sub-division. The respondent said she was the one who applied for the sub-division. On the other hand PW2 says it was him who applied for sub-division after the parties signed the forms. This appears odd because it is the vendor who applies for consent to sub-divide or transfer. The respondent had in cross examination explained how she had been giving this money to the appellant in instalments and which money added up to Shs.71,000/=. He started giving the appellant money on 28/7/2009. She could not recall the other dates she gave him money. There was however no evidence to support any of her allegations. This was her case. It was her duty to prove she had given the appellant Shs.71,000/=.

In her plaint she asked for a refund of Shs.71,000/= plus incurred costs. The law on special damages is that they must be pleaded with particularity as circumstances permit and must be proved. This has been the holding in a number of cased among them;-

1. ***PETER NJUGUNA JOSEPH & EARS VS ANNA MORAA Civil Appeal No. 23/1991 (UR)***

2. ***MARY MUKIRI VS NJOROGE KIAMA Civil Appeal No. 48/1996 (UR)***

3. ***COAST BUS SERVICE LTD VS SISCO MURUNGA NDANYI & 2 OTHERS Civil Appeal No. 192/92 (UR***

It is therefore clear that the alleged payments to PW2 were never pleaded with particularity and could therefore not be awarded. The respondent relied on an agreement that was unenforceable in law. She relied on it without any other independent evidence to claim for the refund of Shs.71,000/=. For issue No. 2 & 3 I do find that the learned trial Magistrate erred by entering judgment for the respondent when indeed she had not proved her case on a balance of probabilities .

I therefore allow the appeal. The judgment of the lower court is set aside. I substitute it with a judgment dismissing the plaintiff's case with costs.

Costs of the appeal to the appellant.

DELIVERED, SIGNED AND DATED AT EMBU THIS 2ND DAY OF MAY 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-
N/A for or by both parties
Njue CC