



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 4 of 2007

JAPHETH GIKANDI NGURU.....1ST APPELLANT

FRANCIS GACHOKI KAMUMO.....2ND APPELLANT

VERSUS

JAMES NJENGA.....1ST RESPONDENT

MARY MUTHONI JOHN.....2ND RESPONDENT

JOHN MUNENE KIBUI.....3RD APPELLANT

(Being an Appeal from the Judgment of J.N. ONYIEGO Senior Resident Magistrate, Kerugoya in SRMCC No. 136 of 2002 dated 14th June 2007)

J U D G M E N T

The appellants who were the defendants in Kerugoya Senior Resident Magistrate's Civil Case No. 136/2002 have appealed against the judgment delivered by Mr. Onyiego J.N. (SRM then) on 15/12/2006 in favour of the respondents. They filed the following grounds of appeal and prayers:-

- 1. The learned trial Magistrate erred in law and fact by entertaining a matter and pronouncing Judgment while the plaintiff's lacked locus standi.***
- 2. The learned trial Magistrate erred in law and fact by entering judgment for the plaintiffs while they had not proved their case on a balance of probabilities.***
- 3. The learned trial Magistrate erred in law and fact by entering against the weight of the evidence.***
- 4. The whole judgment aforementioned be quashed and/or set aside.***
- 5. The respondents be held liable to pay the appellants Shs.65,800.00.***
- 6. The respondents be condemned to pay the costs of this appeal and in the lower court.***

The appellants with leave of the Court filed a supplementary record to include some exhibits. The judgment appealed against is Kerugoya SRMCC No.136/2002 and not No. 126/2006. What appears on the Memorandum of appeal is an error. Both counsels agreed to dispose of the appeal by written submissions.

In his submissions Mr. Njage for the appellants told the court that the Respondents were in court in a representative capacity and yet they had no authority to represent others as this contravened the then Order VII Rule 4(1) of the Civil Procedure Rules. To him it was not clear what the capacity of Mwanda

Tea Buying Centre was. He referred the court to the case of **KAMAU & OTHERS [2008] EA 151**. Further he submitted that PEXB3 could not be interpreted to be a contract of sale as envisaged under the law of contract.

Finally there was no consent from the Land Control Board which was produced. He said the minutes produced could not be called a sale agreement. And that there was no production of the copy of official search or green card. To them the respondents did not prove their case.

Mr. Kahiga for the respondents submitted that the issue of locus standi was dealt with in the court below and the appellants did not appeal against the Ruling. He reiterated that the Respondents had the locus standi. He cited the case of **GEOFFREY NDIRANGU & OTHERS VS THE CHAIRMAN OF MARIAKANI JUA KALI ASSOCIATION & OTHERS [2005] KLR**.

He further submitted that the two parties entered into an agreement and the appellants received the payments (PEXB2a,2b&3). There was subdivision and a permanent structure put up. He raised issue with the exact judgment being appealed against i.e. whether it was No. 126/02 or 136/02 Kerugoya.

This being a 1st appeal this court is enjoined to re-consider the evidence re-evaluate it and make its own conclusions. The court should also bear in mind that it will not normally interfere a finding of fact by the trial court unless

(a) it was based on no evidence

(b) it was based on a misapprehension of the evidence

(c) the court was shown demonstrably to have acted on wrong principles in reaching the finding it did.

I am guided by the cases of

1. **SUMARIA & ANOTHER VS ALLIED INDUSTRIES LTD [2007] 2 KLR 1**
2. **GOUSTAR ENTERPRISES LTD VS OUMO [2006] 1 EA 77 (SCU)**
3. **NAMUSISI & OTHERS VS NTABAAZI [2006] 1 EA 247 (SCU)**

The case presented by the three respondents who called no witness was that they were the chairman, vice chairman and secretary respectively of Mwanda Tea Buying Centre whose membership is farmers. The said farmers identified a plot to buy in order to build a tea buying centre. The sellers of the plot were the appellants. A price of Shs.45,000/= was agreed on (PEXB1). The money was paid to them. (PEXB2a & 2b & 3).

The farmers embarked on construction and they completed it (PEXB4). The centre was officially opened (PEXB5). Processing of the title deed was to start after the Tea Extension Officer asked for it (PEXB6) but the appellants were unco-operative (PEXB7&8) as they demanded for extra money for processing the title deed. The claim was then filed by the respondents in Senior Resident Magistrate's Court Kerugoya.

Both appellants testified and called two witnesses DW3 & DW4. Their evidence is that both appellants agreed to give not sell the respondents a portion of their land to put up a Tea buying centre. They admit having been given Shs.45,000/= in appreciation. They incurred expenses totaling Shs.65,000/= for subdividing and transfer and processing of the title deeds. The farmers were to meet these expenses which they have not hence the statement. It was DW3's and DW4's evidence that money was collected by the farmers for purposes of paying for the processing of the title deed.

The respondents vide a plaint dated 13/5/2002 and filed on the same date were demanding for an order of specific performance compelling the appellants to transfer the suit land to Mwanda Tea Buying Centre. They alleged that vide a sale agreement the respondents had agreed to each excise a portion from LR Nos. INOI/KARIKO/2199 and INOI/KARIKO/2201 and transfer it to Mwanda Tea Buying Centre

for construction of premises for sales of green leaf. These are the orders that were granted by the learned trial Magistrate Hon. Mr. Onyiego.

The first ground is on the issue of locus standi. The same had been raised in the court below by way of preliminary objection and a Ruling dismissing it was delivered on 24/2/2003. That Ruling was not appealed against and the matter proceeded to full hearing. Can the appellant raise it up in this appeal?

The preliminary objection giving rise to the said ruling was substantive. It would have led to the dismissal or the sustaining of the suit then. The appellants had a right of appeal but did not seek leave to appeal against that Ruling. Their attempt to bring it up at the close of their case was dismissed by the learned trial Magistrate as he could not sit on an appeal over a ruling of the same court. And he rightly did so. The appellants did not deem it fit to challenge the ruling on the preliminary objection before proceeding with the main case. However this being a first appeal court whose duty is well defined in the authorities and in spirit of Article 159(1)(d) which enjoins this court to embrace the tenets of substantive justice, I would wish to address the issue of the locus standi.

The respondents in their plaint stated that they are the officials of Mwanda Tea Buying Centre. From the evidence this is a group of farmers who deliver tea to KTDA and because of their suffering they mooted a bright idea of buying a parcel of land to put up a tea buying centre for themselves. They are not a registered society but they have officials. And its these officials who are the respondents. They therefore filed the suit as officials of Mwanda Tea Buying Centre and not the 100 or so farmers.

KTDA is not the one that was buying the land and putting up the tea buying centre. The buying centre being a non legal entity could not be sued and could not sue hence the names of the respondents being used. They are the officials of the group. The appellants have challenged the truthfulness of the verifying affidavit because of want of written authority by the 2nd and 3rd respondents. The 2nd and 3rd respondents actively participated in the proceedings at every stage and even if they did not give their written authority the record confirms they were in agreement with what the 1st respondent was doing.

These are parties who really have an interest in this matter and even the evidence on record confirms that. They are just poor farmers coming together for a purpose and I want to believe that in the spirit of Article 22(2) and 159(1)(d) of the Constitution I should find that the respondents were properly before the court and I uphold the Ruling of the learned trial Magistrate, which was never challenged by the appellants.

From the evidence adduced and the documents produced, this is a matter that both counsels ought to have assisted the parties come to a settlement instead of having it prolonged. The evidence of both parties is that the farmers contributed money and both appellants were given Shs.45,000/= in respect of the plot in issue. The plot was clearly identified and each appellant gave out his portion. Thereafter the farmers put up a permanent building for that purpose. In spite of the short coming in some documents, it can clearly be seen that the intention of these parties was to sell and buy a portion of land. The appellants are also members of this group.

The only hitch that arose leading to non actualization of the deal was the failure by the respondents to pay the expenses leading to subdivision and processing of the titles. Otherwise the appellants have always been willing to transfer the land since they too are benefiting from the buying centre. The minutes produced as PEXB1 and DEXB1 clearly indicate that money was collected by the farmers for payment of the expenses but it was never paid to the appellants.

It would not be fair for the respondents to refuse to pay this sum. It is true the appellants did not raise a counter claim for the money for the expenses. However, considering the benefit this tea buying centre is to the community and both parties herein, it would only be in the interest of justice that the respondents pay for the expenses of subdivision and processing of the title. This is a matter that was decided on in the year 2006 and it is obvious that the charges have gone up. A modest sum of Shs.150,000/= would suffice.

My finding therefore is that the respondents proved their case on a balance of probabilities. I therefore confirm the judgment of the court below. I further enter judgment for the appellants in the sum of Shs.150,000/= with interest, being their expenses for subdivision and processing the title deed.

This sum should be paid within 45 days from today. Each party to bear his/her own costs of the appeal and in the court below. The result is that the appeal only succeeds to that extent.

Right of appeal explained.

DELIVERED, SIGNED AND DATED AT EMBU THIS 6TH DAY OF MAY 2013.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Mr. Kariithi for Kahiga for Respondents

Njue CC