

Makwato v Cherop

High Court, at Nairobi April 20, 1985

Porter J

Civil Case No 1376 of 1982

April 20, 1985, Porter J delivered the following Judgment.

In this matter plaintiff sues the defendant for special damages and general damages arising out of an alleged breach of an agreement for sale of land. Whilst drafting the issues in this matter it became plain that the agreement had become void as a result of the operation of the Land Control Act (cap 302) and the matter came down to one issue which was not agreed between the parties. It was accepted that under the act the plaintiff was entitled to repayment of sums paid against the purchase price of the land and it was accepted that a total of Kshs 36,000 had been paid by the plaintiff to the defendant between the August 30, 1979 and the December 7, 1979. What was in issue was whether the plaintiff paid Kshs 10,000 on the January 4, 1980 to the defendant.

The plaintiff said that he had gone to Kitale with his wife that day and the following morning he went with his wife, his father and a village elder to the defendant's farm and they arrived there at 9.00 am and found the defendant digging in the garden next to his house. They went to him and said that they had come with the money and he called his wife from the house. They spoke to him over a fence and the plaintiff asked his wife who had the money to hand it over to the defendant but as his hands were dirty he asked his wife to take the money. The money was counted on both sides and found to be correct. One of the exhibits in the case is a copy of the original contract for sale and it is true to say that on the occasions of payment which the defendant accepts he has signed an acknowledgment of receipt of money. However final payment which is in dispute of Kshs 14,000 has not been signed for either by the defendant although the formula of the receipt has in fact been written out as item No 3 on the back of the copy agreement with spaces left for signature to be put in and signed by the plaintiff and apparently by a witness.

What the plaintiff says about this is that he wrote out the formula whilst he was in the car with his wife when they went to the defendant to pay him the money ready for him to sign but his hands were dirty and so he did not want to sign and make the documents dirty and since he was in the habit of coming to their place in Nairobi and staying from time to time the defendant said that he would travel to Nairobi on his next visit and then sign the document. The plaintiff says that he asked that the wife of the defendant sign as she had in fact received the money but the defendant said that wives should not be involved and the plaintiff left it for the defendant to come to sign as he had promised.

In essence the plaintiff was corroborated by his wife and the elder who was also called as PW 3 and both of them witnessed the handing over of the money. The amount concerned was Kshs 10,000 according to the plaintiff.

There was a great deal of cross-examination of the plaintiff and his witness on the basis of things which were said to have happened before the chief. I do not think that any of those matters assist me at all. There is a discrepancy between the plaintiff and his wife as to when the 3rd payment was endorsed on the agreement. The plaintiff said that the endorsement was written on whilst they were in the car and before the money was paid. His wife said that she signed the agreement immediately after she handed over the money. The apparent discrepancy relates to the fact that the plaintiff was talking about the endorsement whereas the wife was talking about the signature of the endorsement. It is plain from the endorsement that the signature is in fact there. The elder said he did not sign the endorsement as a witness because although the plaintiff's wife had signed the defendant had not. The plaintiff's wife said that her husband the plaintiff had signed after handing over the money.

It is also clear and agreed between the parties that this agreement, that is the copy which was in the

possession of the plaintiff was the piece of paper which they were using to record payments made.

The defendant said that he knew nothing about this money. He could not remember where he was on that date but the last payment he received was on the December 7, 1979 of Kshs 6,000 and he did not receive the Kshs 10,000. He said that he would not have been in his shamba digging on the January 4, since it was the wrong time of the year and anyway he uses a contractor to plough. I did not think that this assists since it is obviously not a major digging of the whole shamba which the plaintiff is talking about. The defendant pointed out that his signature did not appear on endorsement No 3 on the plaintiff's copy of the agreement and whilst he accepts that he owes the plaintiff Kshs 36,000 he does not accept that he owes a further Kshs 10,000.

He was cross-examined as to whether he had a genuine intention to sell the plot and he pointed out that the purchaser the plaintiff was late in paying the amount due under the agreement, an allegation which was perfectly true.

I have seen the witness giving evidence. It seems to me that if the plaintiff did pay Kshs 10,000 to the defendant it was most unwise to do so without obtaining his signature for the payment. But it does appear to me that there was at least at one time a certain amount of trust between the plaintiff and the defendant. There was one occasion upon which the defendant obtained the payment of Kshs 6,000 by coming to the home of the plaintiff in Nairobi and signing for the Kshs 6,000 before he got it. He had to go back to Kitale to get the actual money from an Asian friend of the plaintiff there. In the normal case one would be very surprised that the plaintiff, a chief loans officer for KTDC did not insist on signatures in receipt. It would have been much easier for all the parties if the signature had been obtained. But the plaintiff has put forward circumstances which are not unreasonable in which it was not possible to obtain the signature of the defendant for payment of this money. It has to be remembered that he had come all the way from Nairobi to make this payment at the request of the defendant if his account is true. And so while wishing that the signature was there one has to look at other methods of proving that the money was paid. His wife corroborates what he says and any apparent discrepancy is either not a discrepancy as explained above or understandable in view of the delay of 5 years to the date of hearing. Further the payment was witnessed by an elder who also corroborated the plaintiff and in all the circumstances and having considered the evidence of all the witnesses including the defendant, it is my view that the plaintiff is telling the truth in this matter and that the sum of Kshs 10,000 was paid to the defendant by the plaintiff on the January 4, 1980.

In all those circumstances and in view of the various agreements to which learned counsel have come, I enter judgment for the plaintiff in the sum of Kshs 46,000 being the sum paid by the plaintiff to the defendant and for Kshs 625 legal fees to be shared equally between the parties and costs and interest.