



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 27 OF 2017

FORMERLY MERU ELC CIVIL APPEAL CASE NO. 41 OF 2010

JOSPETER NYAMU.....APPELLANT

VERSUS

EDWARD MBAKA AGUSTINO.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment/Decree of Hon. Peter Ngari (SRM)

delivered on 7th April, 2010 at Chuka in PMCC 54 of 2006)

1. The Memorandum of Appeal in this appeal is framed in the following manner

MEMORANDUM OF APPEAL

The Appellant **JOSPETER NYAMU**, being dissatisfied with the Judgment delivered by the honourable Mr. Peter Ngare Gesora S.R.M. Chuka Law Courts on **7th April 2010** in Civil Suit No. 54 of 2006 hereby appeals against the whole of the said judgment on the following grounds:-

1. The learned magistrate failed to consider the fact that the Respondent had failed to perform part of the agreement in terms of the oral agreement between them.
2. The learned magistrate erred in fact by failing to take into account and to consider the evidence adduced by the Appellant and his witnesses.
3. The Learned Magistrate failed to appreciate the submissions of the appellant by finding in favour of the respondent herein.
4. The learned magistrate erred in law and fact by failing to consider that the Respondent had failed the required test of proving his case on a balance of probability.
5. In all the circumstances of the case, the findings of the learned magistrate are insupportable in law or on the basis of the evidence adduced.

2. The Memorandum of Appeal asks the courts for orders that:

- a. The Appeal be allowed
- b. The Judgment in favour of the respondent be set aside
- c. That further and better orders be made by the Learned Judge in the Superior court.
- d. The Appellant be awarded costs of this Appeal.

3. To put matters into perspective and to explain the rather unorthodox manner in which this Appeal has been canvassed, I find it necessary to reproduce in full a ruling which this court delivered in this matter on 13th July, 2017.

RULING

1. Parties were twice given a chance to show cause why this suit should not be dismissed for want of prosecution. A 2nd chance was given to the parties on **25th July, 2017**.

2. The court has realized that the appellant, an old man who represents himself, does not understand the court process. He also does not understand what he should do to show cause why an appeal should not be dismissed for want of prosecution.

3. In the interest of justice, I find that the age of the appellant and his failure to grasp what showing cause why the appeal should not be dismissed for want of prosecution constitutes enough cause to the satisfaction of the court that this appeal should not be dismissed.

4. I, also find it necessary in the interest of justice to allow the appellant to orally prosecute his appeal.

5. This is a 2010 appeal. It is necessary that it be heard and determined expeditiously. I direct that the appeal be heard on **17th October, 2017**.

6. I also order that notice be issued to the respondent to inform him that the appellant's side of the appeal will be orally heard on **17th October, 2017**.

7. It is so ordered.

4. The Appeal was canvassed orally on **8th November, 2017**.

5. The appellant, Jospeter Nyamu told the court that he had an understanding with the respondent, Edward Mbaka Augustino that he would give him land at Muiru and the respondent was to give him one acre of land at Kithangani. He would then give Kshs.3,000/= to the respondent who would take care of the apposite survey and other attendant charges.

6. The Appellant told the court that as he was around that time giving his brother a piece of land, he decided to transfer land to both of them at the same time. He told the court that the appellant refused to give him the one acre of land he was supposed to transfer to him at Kithangani. He also stated that the respondent refused to give him a sum of Kshs.55,000/= they had both agreed that he would pay him. He went on to say that the respondent only gave him a sum of Kshs.17,000/= in the form of a money order which was used to pay his son's school fees.

7. The Appellant went on to say that the respondent never gave him the balance of the money the parties had agreed he would pay him. He continued to say that the respondent instead of paying the balance of the money he owed him gave him a piece of paper indicating the amounts of money he had paid him and said that that document had no signatures acknowledging that he had indeed received the money from the respondent.

8. The respondent, through his advocate Mr. Mark Muriithi, opposed the appeal. He sought to debunk the grounds of Appeal proffered by the Appellant in the following manner:

a. On ground No. 1 Mr. Muriithi submitted that the suit in the lower court was not predicated upon performance of contract. He said that the principal prayers in the plaint consisted of restitution of the whole land back to the appellant's name. He opined that this ground was misplaced as the plaintiff's prayer in his plaint was not for performance of the contract.

b. Mr. Muriithi proffered to tackle ground's numbers 2, 3 and 5 together. He submitted that the judgment of the lower court demonstrated that the lower court had taken into account all the evidence given by the parties and the Hon. Magistrate had arrived at his decision having based it on the totality of the evidence proffered by the parties.

c. Regarding ground No. 4, Mr. Muriithi laconically stated that it was misplaced since the appellant was faulting the trial magistrate for not shifting the burden of proof to the respondent. He submitted that this would have been wrong since sections 107 and 108 of the Evidence Act placed the burden of proof upon the person who alleged a fact. Therefore, he asserted, the trial magistrate had proceeded in accordance with the law.

d. Lastly, as a response to the Appellant's oral evidence, Mr. Muriithi submitted that in his oral submissions, the appellant had departed from his averments in his plaint in the lower court as in the lower court he had averred that the respondent would transfer 1 acre of land to his son Henry Mwenda. This came out pellucidly during his cross examination on 23rd April, 2018. He submitted that by departing from the evidence he had given in the lower court, the appellant had tendered his Appeal weak and untenable. Mr. Muriithi urged the court to dismiss the appeal with costs.

9. What this court will determine is if or if not the Appellant has proved his grounds of Appeal. If the court finds that he has proved his grounds of Appeal, the appeal will be allowed. If the grounds are not proved, the appeal will be dismissed.

10. As the appellate court of the 1st instance, this court is entitled to look at the proceedings in the lower court and to arrive at its independent decision.

11. The Appellant in his oral submissions gave garbled evidence. At first he said that after the Respondent transferred 1 acre of land at Karingani, he himself, would give the respondent Kshs.3,000/=. Later on, he changed tack and said that it was the respondent who was supposed to give him Kshs.55,000/=

12. I find that the Appellant, in his oral submissions, departed from his evidence in the lower court regarding who should have been given 1 acre of land at Karingani by the respondent.

13. Having carefully perused the proceedings and the Judgment delivered in the lower court, I find that the learned magistrate properly analysed the evidence that had been proffered by the parties and made his decision after taking into account, the totality of the available evidence.

14. The upshot of what I have already said is that the Appellant has not proved any of his grounds of appeal.

15. In the circumstances, this Appeal is dismissed.

16. Costs will follow the event and are awarded to the respondent.

Delivered in open court at Chuka this 14th day of February, 2018 in the presence of:

CA: Ndegwa

Parties not in court

P.M. NJORGE

JUDGE