REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 11 OF 2017

MONICA WAMBUI KANGANGI…… 1ST APPELLANT

ELIZABETH MUTHONI WAMBU…….. 2ND APPELLANT

KAMINA KABUTU KIRANGU…… 3RD APPELLANT

VERSUS

GEORGE MAINA MUGO…… RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 20TH SEPTEMBER 2012 BY HON D.M. OCHENJA – S.P.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL SUIT NO. 57 OF 2010)

JUDGMENT

This appeal was originally filed in the High Court on 12th October 2012 but was transferred to this Court on 19th September 2017 by **L. GITARI J.** on account of jurisdiction.

The Respondent **GEORGE MAINA MUGO** acting in person had moved to **the SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA in CIVIL SIUT No. 57 of 2010** seeking from the Appellants a refund of Ksh. 750,000 plus interest at 30% per annum following a land sale agreement that had turned sour. It was the Respondent's case that by an agreement dated 24th November 2009, he entered into an agreement for the purchase of plot NO. 50 Kagumo from the Appellants at a consideration of Ksh. 750,000 which was acknowledged. It was a term of the agreement that should any of the parties be in breach, the innocent party would be entitled to 30% per annum on the purchase price. That the Appellants breached the agreement thus necessitating the suit.

The record shows that the firm of **NDANA & CO. ADVOCATES** entered appearance for the 3rd Appellant but ended up filing a defence on behalf of all the three Appellants. The Appellants denied having entered into any such agreement or having received the purchase price and put the Respondent to strict proof thereof. Instead, they averred that the Respondent was their tenant in the said plot and pays monthly rent having entered into a tenant/landlord agreement.

The suit was partly heard by **HON. H.N. NDUNGU (SENIOR PRINCIPAL MAGISTRATE)** before **HON. D.M. OCHENJA (SENIOR PRINCIPAL MAGISTRATE**) took over and delivered a judgment on 20th September 2012 directing the Appellants to refund the Respondent Ksh. 750,000 plus interest of 30% per annum from the date of breach of the agreement i.e. November 2009 until payment in full. The trial Court also ordered the Appellants to meet the costs of the suit.

That judgment provoked this appeal in which the following six (6) grounds are raised:

> ***1. That the learned magistrate erred in law and fact in making judgment against the weight of evidence.***
>
> ***2. That the learned magistrate erred in law and in fact in failing to fairly and carefully analyze the evidence adduced before him thereby arriving at an erroneous judgment.***
>
> ***3. That the learned magistrate erred in law and in fact in disregarding the contradictions and inconsistencies in the evidence adduced by the Respondent and his witnesses.***
>
> ***4. That the learned magistrate erred in law and in fact in making an opinion regarding the agreement dated 24th November 2009 which was not founded on facts adduced before him.***
>
> ***5. That the learned magistrate erred in law and in fact in relying on extraneous hypothesis which was not raised by the Respondent in impeaching the evidence of DW4.***

The Appellants therefore sought orders allowing the appeal and setting aside the judgment and substituting it with an order dismissing the Respondent's suit with costs.

When the appeal came up for hearing before **HON. L. GITARI** J. on 30th March 2017, it was directed that the appeal be canvassed by way of written submissions which would then be highlighted on 22nd June 2017. The appeal was subsequently transferred to this Court and although I was informed on 6th December 2017 that the Respondent had been served with the Appellant's submissions by substituted service as directed by **HON. R. LIMO J.** on 11th October 2016, there was no appearance by the Respondent and neither did he file any submissions. This appeal is therefore being determined without any in-put by the Respondent.

This being a first appeal, my duty is to re-examine and evaluate the evidence adduced in the trial Court in order to make a finding on whether or not to let that judgment stand. I must however take into account that this Court not having the opportunity of hearing or seeing the parties as they testified and therefore, I should make allowance for that. In addition, this Court will not normally interfere with a finding of fact by the trial Court unless the same is founded on wrong principles or law – ***SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER 1968 E.A 123.***

The Respondent called two witnesses in support of his case. these were **ERIC MACHARIA THUMBI (**PW2) and **DAVID KINYUA MWAI** (PW3) who is a clerk at the offices of **NGIGI GICHOYA ADVOCATES.**

The Respondent's case was that on 24th November 2009, he and the Appellants signed an agreement for the purchase of a property known as plot No. 50 KAGUMO (the suit plot) at a consideration of Ksh. 950,000 of which he paid Ksh. 750,000 leaving a balance of Ksh. 200,000 to be paid after transfer. The sale agreement was drawn by **NGIGI GICHOYA ADVOCATE**. However, when he asked the Appellants to transfer the suit plot, they told him to wait until March because one of the parties **MONICA WAMBUI** (the 1st Appellant herein) was un-well and so they requested him instead to pay rent of Ksh. 3,600 for the whole year which he did. In March 2010, the Appellants informed him of their desire to revoke the agreement and so he filed this case. His witness **ERIC MACHARIA THUMBI** (PW2) confirmed that he not only gave the Respondent a loan of Ksh. 20,000 for purposes of buying the suit plot, but was also present at the offices of **NGIGI GICHOYA ADVOCATE** and witnessed the Respondent paying the Ksh. 750,000 to the Appellants.

DAVID KINYUA MWAI (PW3) a clerk at the offices of **NGIGI GICHOYA ADVOCATE** told the Court that he drafted the agreement dated 24th November2009 and witnessed the Appellants receive the Ksh. 750,000 which they shared with each getting Ksh. 250,000 before they signed the agreement.

KAMINA KABUTU (the 3rd Appellant) testified as DW1 and told the Court that the suit plot is jointly owned by himself, **JAKAN KOMU** and **ELIUD WANGU** both of whom are deceased. He stated that there is a bar, shop and kitchen on the suit plot which the Respondent has rented since 2002 at a rent of Ksh. 3,000. He however denied that the suit plot was sold to the Respondent through the agreement dated 24th November 2009. He denied having gone to the offices of **NGIGI GICHOYA ADVOCATE** to execute any sale agreement adding that he only went there because one **ALICE NGIMA** owed him Ksh. 20,000 which was to be paid at the advocate's office and that is why he went there to sign some papers. He added that if he had been paid any money, it could have been banked in his account at Bingwa Sacco.

The 1st Appellant testified as DW2 and said the suit plot is registered in her husband's names but in 2009, it was registered in the Appellants names. She however denied having received any money on 24th November 2009 for the sale of the suit plot.

Similar evidence was given by **ELIZABETH MUTHONI** the 2nd Appellant who testified as DW3. She said that she was at the offices of **NGIGI GICHOYA ADVOCATE** on 24th November 2009 but was never paid any money and if she had, she would have deposited it in her account at Bingwa Sacco. She said that the suit plot is still registered in the names of her deceased husband **ELIUD WAMBU** and no succession has been done.

SAMUEL NGIGI GICHOYA an advocate of this Court testified that on 24th November 2009, he returned to his chambers from Court and found several documents on his desk including the agreement dated 24th November 2009 already executed by the parties although not in his presence. According to the agreement, the Appellant as vendor had acknowledged receipt of Ksh. 750,000 for the purchase of the suit plot by the Respondent and the balance of Ksh. 200,000 was to be paid after transfer. He however did not witness the parties execute the sale agreement nor the receipt of the Ksh. 750,000.

Later on 24th July 2010, he was summoned by the Officer Commanding Kerugoya Police Station who was enquiring about the sale agreement. He also told the Court that he had previously filed a Civil Suit No. 55 of 2010 at Kerugoya in which the 1st Appellant had sued one **ALICE NGIMA** on account of rent for the suit plot. That matter was settled. He added further that the Appellant had been to his office and saw his clerk **DAVID KINYUA** (PW3) for the purposes of executing a retainer agreement and it was then that the said clerk told them to sign some documents. **Mr. NGIGI GICHOYA's** evidence therefore was that he did not prepare the sale agreement.

It is not in doubt that the sale agreement dated 24th November 2009 was duly executed by the parties. It is self explanatory that and although **Mr. NGIGI GICHOYA ADVOCATE** did not witness its execution, he nonetheless signed it after his clerk had drawn it. Counsel for the Appellants **Mr. MAGEE WA MAGEE** has submitted that they signed it as a result of mis-representation as to its nature and character and therefore the plea of "***non est factum"*** is applicable. Counsel also takes issues with the trial magistrate for disregarding the evidence of **Mr. NGIGI GICHOYA ADVOCATE** and instead relying on that of his clerk **DAVID KINYUA**. That is really, what is being raised in grounds No. 5 and 6 of the memorandum of appeal.

It is clear that Mr. **NGIGI GICHOYA ADVOCATE** was really not privy to what transpired in his office on 24th November 2009 when the sale agreement was signed by the parties herein. Only the parties and **Mr. NGIGI GICHOYA'S** clerk **DAVID KINYUA** were present. This case is really about what transpired on that day and the trial magistrate who saw and heard the parties was in the best position to judge who spoke the truth and who did not. I do not see what extraneous hypothesis the trial magistrate relied upon as raised in ground No. 6 of the memorandum of appeal. This is what the trial magistrate said about the veracity of the witnesses' evidence:

"Mr. NGIGI has never taken any legal action against his clerk because he believes the agreement was done properly and it is actually the defendants who are lying to this Honourable Court. The allegations or assertions by the defendants that they never executed any agreement with the plaintiff and that they

never received any money from him are just mere denials" Emphasis added

This was a finding of fact by the trial magistrate that as between the Appellants and the Respondent, it was the Appellants who were ***"lying"*** to the Court. The trial Court therefore believed the Respondent and not the Appellants. Ordinarily, an appellate Court will not interfere with the findings of fact by the trial Court unless such findings are based on no evidence at all or on a misapprehension of it or where the trial Court is shown demonstrably to have acted on wrong principles in arriving at such findings – see ***PETERS VS SUNDAY POST LTD 1958 E.A 424*** and also ***KIRUGA VS KIRUGA & ANOTHER 1988 K.L.R 348***. In the circumstances of this case, I see no reason whatsoever to persuade me to depart from the trial magistrate's findings that the Appellants were "***lying"*** to the Court when they denied receipt of the Ksh. 750,000.

In an attempt to assail the Respondent's evidence that he infact paid Ksh. 750,000 to the Appellants for the suit plot, **Mr. MAGEE WA MAGEE** has submitted as I have already mentioned above, that the Appellants did not know they were signing a sale agreement. Counsel cited the case of ***MARVCO COLOUR RESEARCH LTD VS HARRIV 1982 2 SCR 774*** which was quoted in ***HEMED KASSIM HEMID VS FATUMA SHEIKH ADDALLA 2014 e K.L.R*** as follows:

> ***"Where a document was executed as a result of misrepresentation as to its nature and character and not merely its content, the defendant was entitled to raise the plea of non est factum on the basis that his mind at the time of execution of the document did not follow his hand"***

It is of course correct that in an agreement, there must be a meeting of the minds between the parties. The Appellants herein cannot claim that they did not understand the contents of the agreement dated 24th November 2009 because it was read to them in Kikuyu language by **DAVID KINYUA (**PW3). This is what he said in cross-examination:

> ***"All the parties came together. We were talking in Kikuyu language although the agreement is in English. I explained to them the agreement in Kikuyu language….. It is not true these people thought that they were entering into a tenancy agreement"***

And in an attempt to assail the claim that they had received Ksh. 750,000, the 2nd and 3rd Appellants told the trial Court that if they had, it would have been reflected in their accounts at Bingwa Sacco statements of which were availed. However, that alone could not rebut the Respondent's evidence which the trial magistrate believed for the simple reason that that the Appellants need not have banked the money in those accounts and further, those accounts may not necessarily be the only accounts held by the Appellants. Ground 5 and 6 of the appeal therefore fail.

Ground 1, 2, 3, and 4 can be considered together. They relate to the trial magistrate's failure to carefully analyze the evidence, failure to find that the Respondent did not prove his case on a balance of probabilities, disregarding contradictions and making a judgment against the weight of the evidence.

From my perusal of the trial magistrate's judgment, I have no doubt that he was alive to the fact that the Respondent was required to prove his case on the balance of probabilities. He said this in his judgment:

> "***The defendants breached the sale agreement. There is evidence that payment of Ksh. 750,000 was received and it is only fair and just that the defendants refunds (sic) the purchase price. From the circumstances of this case, I find that the plaintiff have (sic) proved his case on a balance of probability".***

It was therefore clear to the trial magistrate where the burden of proof lay and he was satisfied from the evidence that the Respondent had surmounted that burden.

The trial magistrate clearly analyzed the evidence before him before arriving at the decision that he did. It is submitted by counsel for the Appellants that the trial magistrate relied on his own opinion and also that the Respondent's evidence was contradictory and inconsistent. No such contradiction or inconsistencies

have been mentioned. The Respondent's evidence and that of his witnesses was cogent and the trial magistrate found it reliable. I see no reason to depart from that finding.

Counsel for the Appellants had made heavy weather of the fact that the trial magistrate preferred the evidence of the Respondent and his witnesses including **DAVID KINYUA** (PW3) rather than that of **NGIGI GICHOYA** an advocate of this Court and **DAVID KINYUA's** employer. Counsel has submitted on this as follows:

> ***"The learned magistrate disregarded the evidence adduced by DW4 who is an advocate of the High Court. We humbly submit that it is utterly absurd to disregard evidence adduced by an officer of the Court without any cogent reason"***

Counsel then cites ***ABRAHAM LINCOLN*** when he stated that ***"a lawyer's word is his bond***". Counsel submitted therefore as follows:

> ***"That unless the contrary is proved, the Court had an obligation to take counsel's word as the gospel truth***"

While I have no doubt that a lawyer's word ought to be his bond, I do not subscribe to the assertion by **Mr. MAGEE** that his word must be taken "***as the gospel truth".*** In my experience on the bench, I have come across lawyers, doctors, police officers etc who, upon being sworn in the witness box, proceed to lie through their teeth! That is not un-usual. Suffice it to say that in a Court of law, what carries the day is the credibility of a witness and not his class. It is not un-usual for professionals to give false testimony just as it is for any other witness. Their testimony cannot always be the ***"gospel truth"***. Having said so, what is at the core of this dispute is whether or not the Respondent paid the Appellants the Ksh. 750,000 for the suit plot. And although that payment was made in the office of **NGIGI GICHOYA** advocate, he admitted that he was not in the office at that time. All that he did was to sign the agreement but he was not there when the parties signed it. Although the trial magistrate dismissed **Mr. NGIGI GICHOYA's** evidence with "***the contempt that he deserves***", nothing really turned on **Mr. NGIGI GICHOYA's** testimony in so far as the events that occurred in his office on 24th November 2009 when the Ksh. 750,000 exchanged hands ***"was concerned***". All he did was sign the agreement. This is what he said when cross-examined by **Ms THUNGU** advocate then acting for the Respondent:

> ***"I cannot confirm whether the agreement was prepared in my office. I signed the agreement dated 29.11.2009. I also affixed my official stamp on the agreement. I read the agreement. I didn't ask the clerk whether the parts (sic) were correct"***

Earlier on in his evidence in chief, **Mr. NGIGI GICHOYA** said:

> "***On 24.11.2009 in the afternoon I came from the Kerugoya Law Courts and went to my office ….. I found several documents on my desk. One of the documents was a sale agreement dated 24.1.2009 (sic). The same had been executed by parties though not in my presence. The agreement was in respect to plot No. 50 Kagumo".***

Clearly, **Mr. NGIGI GICHOYA** could not have known what transpired in his office on 24th November 2009 before he arrived from Court. In that regard, and if I may borrow endorsing **Mr. MAGEE WA MAGEE's** words, what **Mr. NGIGI GICHOYA** said about endorsing the agreement with his stamp may be said to be the ***"gospel truth".*** What was key in this dispute, however, was what transpired when the parties were signing the agreement and which happened in the absence of **Mr. NGIGI GICHOYA** which is when the Ksh. 750,000 was paid. On that account, the trial magistrate believed the Respondent rather than the Appellants. On the evidence on record, he cannot be faulted.

The only issue I need to consider is whether the Respondent was entitled to the interest of 30% per annum for breach of the sale agreement as ordered by the magistrate.

The trial magistrate having found that the Appellants did indeed receive the Ksh. 750,000 from the

Respondent, it was of course proper to make an order for the refund of that sum. However, it is clear that although the Appellants executed the sale agreement with respect to the suit plot, it was infact the property of the deceased husbands of the 1st and 2nd Appellants together with the 3rd Appellant. The 1st and 2nd Appellants made it clear that succession had not been done and so what the Appellants did amounted to inter-meddling with the Estate of deceased persons. The 1st and 2nd Appellants had no capacity to transfer the suit plot. The sale agreement dated 24th November 2009 was therefore null and void and the Respondent could only be entitled to the Ksh. 750,000 as a debt but not the interest of 30% per annum for breach of the sale agreement. A contract or agreement that is null and void cannot be breached – ***SULEIMAN RAHEMTULLA OMAR & ANOTHER VS MUSA HERSI FAHIYE & OTHERS C.A CIVIL APPEAL No. 245 of 2011 (2014 e K.L.R***). By ordering the Appellants to also pay to the Respondent the 30% interest on account of breach of agreement, the trial magistrate was in effect enforcing an illegal agreement which is not allowed – see ***MISTRY AMAR SINGH VS KULUBYA 1963 E.A 408.***

While policy consideration would bar a claimant from enforcing an illegal contract, the said consideration should not allow a defendant who has benefited from such a contract to keep what he has received from such a contract. The Respondent was therefore only entitled to a refund of the Ksh. 750,000 and not the 30% interest per annum from breach of the agreement.

This appeal is therefore without merits. It is dismissed but the trial magistrate's judgment is varied only to the extent that judgment be entered for the Respondent for the sum of Ksh. 750,000. The Respondent shall also be entitled to costs of the suit and interest at Court rates.

It is so ordered.

B.N. OLAO

JUDGE

14TH MARCH, 2018

Judgment dated, delivered and signed in open Court at Kerugoya this 14th day of March 2018

Ms Kimotho for Mr. Magee for the Appellants present

Respondent absent

Right of appeal explained.

B.N. OLAO

JUDGE

14TH MARCH, 2018