



REPUBLIC OF KENYA



KENYA LAW
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**Wanjiku v Kilangani (Civil Appeal 143 of 2018)
[2023] KECA 379 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 379 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 143 OF 2018
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MARCH 31, 2023**

BETWEEN

PAUL KARANU WANJIKU APPELLANT

AND

JAWA GEORGE KILANGANI RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 9th March 2018 in High Court Civil Appeal No. 108 of 2016)

JUDGMENT

1. The appellant's suit before the Magistrate's Court in which he sought judgment against the respondent for Kshs 550,000.00 and interest was dismissed by that court. His appeal against the judgment of the Magistrate's Court was also dismissed by High Court in the impugned judgment delivered on March 9, 2018. Aggrieved, the appellant lodged the present appeal hoping to have judgment entered in his favour as prayed in his plaint before the Magistrate's Court.
2. The basis of the appellant's claim before the Magistrate's Court was that by an agreement entered into with the respondent, he agreed to buy from the respondent who agreed to sell to him a parcel land measuring 40 X 80, being a portion Plot No MN/1/335/10 for the price of Kshs 450,000.00. He averred that he paid the purchase price in full, took possession of the property and delivered construction materials to site, but his endeavors to develop it were frustrated by the respondent's relatives; that the respondent also failed to process the title in his favour; that thereafter, the respondent agreed to refund to the appellant, the purchase price and expenses in the amount of Kshs 550,000.00 on or before March 6, 2014 and in default the amount would attract interest at the rate of 25% per annum until payment in full.
3. In his defence, the respondent admitted that he entered into an agreement for sale of the property with the appellant; that he gave total and exclusive possession of the property to the appellant but



the appellant failed to obtain the requisite consents or to pay the rates in order to obtain clearance certificate in order to complete the transfer; and that the appellant had failed to comply with the law of conveyance in addition to failing to deal with the criminals who stopped him from developing the property. He averred that he had no interest in the property and could not fathom why the appellant had sued him.

4. On the date scheduled for trial on March 30, 2016, the trial court being satisfied that the hearing date had been fixed by consent, proceeded with the trial in the absence of the respondent. The appellant testified that after entering in the agreement for sale with the respondent, he paid the purchase price, took possession of the property and erected a perimeter fence which was demolished by the respondent's family members; that when the respondent failed to place him in "quiet possession" he (the respondent) agreed to pay to him Kshs 550,000.00 made up of a refund of the purchase price of Kshs 450,000.00 and "the additional Kshs 100,000.00 as expenses." He produced before the trial court the sale agreement dated August 9, 2003, which he stated had an error and should read August 9, 2013. He also produced an acknowledgment of debt by the respondent dated December 17, 2013 which was in the following terms:

"I Jawa George Kilanganholder of identity card number 7242760 and mobile no 0710804265.

I agree to pay the sum of Kshs 550,000/=being refund of the sum received from Paul Karanu Wanjikuand the costs incurred over the sale of the above property. I will pay the said sum on or before March 6, 2014 and in default interest to accrue at 25% per annum and Mr Paul Karanu Wanjiku is at liberty to take legal action to attach any of my properties.

Thank you for your consideration."

5. As already stated, the respondent did not attend court for the trial. The case for the respondent was accordingly marked as closed without calling any evidence.
6. Having considered the evidence, the learned trial Magistrate dismissed the appellant's claim in a judgment delivered on July 12, 2016 principally on the ground that there were "glaring contradictions as to the property allegedly purchased and the date when the amount claimed was allegedly paid."
7. Aggrieved, the appellant appealed that judgment before the High Court on grounds that the trial court erred in holding that the appellant had not proved his case and that the variation of plot numbers was material to disentitle the appellant to his claim; that the trial magistrate failed to appreciate that the respondent did not, either in his statement of defence or his witness statement, dispute the appellant's claim; and that the trial court failed to consider the import of the acknowledgment of debt by the respondent. The respondent did not defend the appeal.
8. In the impugned judgment delivered by the High Court (Njoki Mwangi, J) on March 9, 2018, the learned Judge upheld the judgment of the trial court and dismissed the appellant's appeal. The Judge expressed that the variance in the description of the properties in the two agreements that the appellant produced was not clarified and concluded thus:

"Having analyzed the evidence adduced by the appellant and more so, bearing in mind the lack of clarity as to why the two agreements he produced before the court below gave descriptions of two different parcels of land, I find that the appellant failed to prove his case on the balance of probabilities. The appeal is hereby dismissed. There will be no orders as to costs of the appeal."



9. Still dissatisfied, the appellant lodged the present appeal in which he faults the Judge for failing to deal with all the grounds of appeal raised before her; placing a higher burden of proof on the appellant than that required by law; and ignoring admissions contained in the statement of defence, witness statement and in the acknowledgment of debt by the respondent.
10. During the hearing of the appeal before us, learned counsel Mr Mathew Nyabena appeared for the appellant. Despite notice of hearing having been served on the respondent, there was no appearance. Mr Nyabena submitted that it was incumbent upon the learned Judge of the High Court to consider all the grounds of appeal raised by the appellant but the Judge failed to do so; that the Judge failed to address the complaints that the misdescription of the property was immaterial to the claim for refund of the purchase price; that the Judge did not consider that the agreement was conceded in the statement of defence and in respondent's witness statement and also failed to consider that there was an acknowledgment of debt by the respondent.
11. Counsel submitted that all the appellant was required to prove, which he did on a balance of probabilities, was that he paid the purchase price, that the agreement failed and that he made demand; that considering that the claim was not for specific performance, any mix up in the plot numbers was immaterial.
12. It was submitted that in his defence and witness statement, the respondent admitted that the appellant purchased from him a portion of Plot No MN/1/335/10 for a price of Kshs 450,000 and it was therefore not open to the courts below to further probe admitted facts. Counsel concluded by urging that the courts below misdirected themselves in disregarding the respondent's own acknowledgment dated December 17, 2013; that the failure to mention the plot numbers in the acknowledgment was not of any consequence to the claim for the refund of the purchase price. It was urged that the result is that the respondent is unjustly enriched in that he gets to keep the property as well as the purchase price.
13. We have considered the appeal and the submissions. This being a second appeal, we can, under Section 72 of the *Civil Procedure Act* entertain the appeal if the impugned decision is contrary to law; or the decision failed to determine some material issue of law or a substantial error or defect in the procedure which may have produced error or defect in the decision of the case upon the merits.
14. Based on the pleadings, it was common ground that the parties entered into an agreement for sale for the sale and purchase of a parcel land measuring 40 X 80, being a portion Plot No MN/1/335/10 for the price of Kshs 450,000.00. In paragraph 3 of his defence, the respondent averred as follows:

“The defendant admits the contents of paragraph 3 of the plaint in as far as the sale agreement is concerned.”
15. The respondent pleaded further that pursuant to the agreement he “gave total and exclusive possession of the plot” to the appellant but the appellant failed to obtain the requisite consents from relevant offices to complete the transaction. Indeed, in his witness statement before the trial court, the respondent reiterated that:

“I agreed to sale (sic) and he agreed to purchase the plot at Kshs 450,000/=. The plaintiff paid by way of instalments which I acknowledge receipt.”
16. There was no contest whatsoever regarding the plot or description of the plot the parties were transacting on. The description or misdescription of the plot was not a matter raised by either party. It was raised by the trial court in its judgment. It is an established principle of law that issues for determination flow from the pleadings and the court may only pronounce judgment on issues arising



from the pleadings or such issues as the parties have framed for determination. The court itself is bound by the pleadings as are the parties. See *Galaxy Paints Company Limited v Falcon Guards Limited*, Civil Appeal No.219 of 1998 [2000] eKLR; *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. In the latter case, this Court expressed that “that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.” We hold that the trial court and the first appellate court erred in basing the respective judgments on the matter of alleged discrepancy in the reference to plot number, which is a matter that was not before them.

17. Consequently, the appeal succeeds. We set aside the judgment of the High Court delivered on March 9, 2018. We substitute therefor an order allowing the appellant’s appeal against the judgment of the magistrate’s court delivered on July 12, 2016. In the result, we enter judgment for the appellant against the respondent for Kshs 550,000.00 as prayed in the plaint dated July 21, 2015.
18. The appellant shall have the costs of this appeal, the costs of the proceedings in the High Court and of the trial court.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF MARCH 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

