Boniface Njiru t/a Njiru Boniface & Co. Advocates v Wainaina (Civil Appeal 229 of 2015) [2021] KECA 225 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 225 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 229 OF 2015

W KARANJA, F SICHALE & KI LAIBUTA, JJA

DECEMBER 3, 2021

BETWEEN

BONIFACE NJIRU T/A NJIRU BONIFACE & CO. ADVOCATES ... APPELLANT

AND

ISAAC MWANGI WAINAINA ..... RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Sergon, J) dated 30th July 2015) in Milimani HCCC NO. 202 OF 2013)

JUDGMENT

1. On 4th August 2015, Boniface Njiru t/a Njiru Boniface & Company Advocates filed this appeal against the ruling/orders of Sergon, J. dated 30th July 2015.

2. The appeal stems from a notice of motion application dated 14th January 2015, where the respondent, (the then plaintiff) had sought *inter alia,* the striking out of the appellant's defence filed on 15th August 2013 and judgment being entered in his favour for the sum of Kshs 6,500,000.00.

3. The matter was heard by Sergon, J. who in a ruling dated 30thJuly 2015, allowed the motion holding, in the main, that:

> "I I have keenly read the defences on record, while in their defences the defendants deny the plaintiff's claim, they have not contended that the plaintiff did not make full payment for the land and that the plaintiff has not to date been given possession of the land. The 1st defendant did not contend receiving payments from the plaintiff. Considering that he was acting for both parties in the transaction, he was meant to ensure that the property is transferred to the plaintiff such was not done and he in fact remitted money to the 2nd defendant, if at all, before the transfer was effected. The 2nd defendant although it contended that he did not receive payment from the 1st defendant, he expressed that he was

willing to pay the sum which was colossal to settle the issue between the 1st defendant and the plaintiff. That explanation does not add up and in fact it in my view illuminates foul play. Additionally, in the letter dated 17th January 2013 the 2nd defendant made an admission of failure to make good it's part of the deal. In the circumstances, I find merit in the application and it is allowed. Judgment is hereby entered in favour of the plaintiff against the defendants in terms of the prayers in the plaint. Costs to the plaintiff."

4. The appellant was aggrieved with the findings of the learned judge thus provoking the instant appeal vide Memorandum of Appeal dated 7th September 2015 raising 13 grounds of appeal. Subsequent thereafter, the appellant filed a notice of motion application dated 18th December 2019, seeking to amend the Memorandum of Appeal filed herein to add two further grounds of appeal and an order to include a supplementary record of appeal and decree issued by the High Court in respect of the judgment delivered in HCCC No. 202 of 2013. The application was allowed by the Court (Nambuye, J.A) on 9th October 2020.

5. Pursuant to the ruling of the Court dated 9th October 2020, the appellant added the following grounds of appeal to his initial Memorandum of Appeal dated 7th September 2019:

> "14. The Learned Judge erred in law in reviewing his judgment of 30th July 2015 correcting the errors in judgment and substituting it with a reviewed judgment of 6th October 2016 a year after the appeal was filed. The Learned Judge was functus officio after the filing of Appeal and had no power of review under Order 45 Rule 1 Civil Procedure Rules.
>
> 15.The Learned Judge erred in law in allowing the plaintiff/respondent to amend pleadings after judgment was entered on 30th July 2015 and appeal filed on 17th September 2015. The appellant has been extremely prejudiced by the conduct of the Learned Judge for reviewing judgment whilst this appeal was pending and thus shifted level playing ground."

6. The brief facts in this appeal are that sometimes on 27th November 2008, the respondent entered into a land sale agreement with Kenline Agencies Limited (the then 2nd defendant) in Nairobi High Court Civil Suit No. 202 of 2013 (hereinafter, the vendor) who agreed to sell to him a piece of land known as L.R No. 1160/773 situate at Karen. The agreed purchase price was Kshs 6,500,000.00 which amounts the respondent paid in full to the appellant who was the advocate handling the transaction on behalf of both parties. It was the respondent's contention that the said sale did not materialize having been breached by the vendor in spite of him having paid the purchase price in full. Consequently, the respondent sued the appellant and the vendor for a refund of the purchase price in the year 2013 thus culminating in the orders that were issued by Sergon, J. on 30th July 2015** thus provoking this appeal.

7. The appeal was urged by way of written submissions with oral highlights by the parties on 4th October 2021. Mr. Mbabu urged the appeal on behalf of the appellant while Mr. Obonyo appeared for the respondent.

8. With regards to grounds 1, 2 and 4 of appeal, it was submitted for the appellant that the Learned Judge confused his jurisdiction in instances of summary judgment and that of striking out pleadings and that the jurisdiction of entering judgment summarily and that of striking out a pleading were very different and distinct. In support of this proposition, the appellant relied on the decision of *Margaret Njeri Mbugua v Kirk Mweya Nyaga Civil Appeal No. 110 of 2012*.

   It was further submitted that the appellant had raised several triable issues in his pleadings which the learned judge failed to consider and further, the learned judge, though aware that the appellant was acting in the transaction as an advocate of the parties treated him as though he was the vendor and

entered judgment against him together with the vendor for the principal sum in spite of the fact that he had released the monies to the vendor.

9. It was further submitted that the judgment of the High Court having been given 30th July 2015 and the instant appeal having been filed on 17th September 2015, the High Court became *functus officio* and could not review or set aside its own judgment and that the subsequent ruling of the High Court rendered on 6th October 2017 whilst this Court was seized of the matter was without jurisdiction and ought to be set aside. Consequently, the appellant urged the Court to allow the appeal with costs.

10. On the other hand, it was submitted for the respondent that the issues raised were predominantly premised on documents and the issue narrows down "to where is the purchase price" and that is an issue between the appellant and the vendor (the 2nd defendant therein). He further submitted that the appellant and the 2nd defendant in the High Court were given the opportunity to disclose the custodian of the purchase price but both of them failed to do so to the Court.

11. With regard to the contention by the appellant that the High Court vide its ruling dated 6th October 2017, acted without jurisdiction, it was submitted that the trial court acted within its jurisdiction and by correcting the error on the face of the record as the court gave an interpretation of its earlier ruling of 30th July 2015 and that further, the appellant had not demonstrated how the interpretation interfered with the ruling of 30th July 2015.

12. Finally, it was submitted that the sale agreement dated 27th November 2013, was frustrated by the then 2nd defendant and that it was not denied that the respondent paid the purchase price in full which went through the hands of the appellant and that vide a letter dated 23rd January 2009, the appellant advised the respondent that he had obtained the transfer documents and that the fundamental question was who was in possession of the money since 2009. Consequently, the respondent urged the Court to dismiss the appeal with costs.

13. We have anxiously considered the record, the rival written submissions by the parties, the cited authorities and the law.

14. The appeal before us is a first appeal. Our mandate as a first appellate court is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123* wherein it was stated:

> "I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally".

15. An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

> "In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif – vs- Ali Mohamed Sholan (1955)22 EACA 270".

16. It is indeed not in dispute that vide a land sale agreement dated 17th November 2008, the respondent entered into agreement with the vendor, Kenline Agency Limited to purchase a parcel of land known

as LR 1160/773 at a purchase price of Kshs 6,500,000.00 It is also not in dispute that the appellant was the advocate who represented both parties in that transaction. It is also not in dispute that the said sale did not materialize having been breached by the vendor and despite the purchase price having been paid in full by the respondent. It is on account of the alleged breach that the respondent filed suit in the High Court against the appellant and the vendor.

17. It is also not in dispute that vide a notice of motion application dated 14th January 2015, the respondent had, *inter alia* sought an order to strike out the statement of defence filed by the appellant and judgment be entered against him and the vendor for the sum of Kshs 6,500,000.00 Sergon, J. . vide his ruling dated 30th July 2015, allowed the application.

18. Further, it is not also in dispute that vide a plaint dated 27th May 2013, the respondent had sought an order for the refund of the purchase price in the sum of Kshs 6,500,000.00 with interests at court rates with effect from 11th April 2006 until payment in full against the appellant and the vendor in the said transaction.

19. The respondent at paragraph 7 of his plaint pleaded as follows;

> "the plaintiff nevertheless went ahead to perform his part of the contract of sale regardless of refusal by the 1st defendant to prepare a sale agreement for the transaction as instructed, made payments of the purchase price to the 1st defendant a total sum of Kshs 6,500,000 vide bankers cheques for a sum of Kshs 5,500,000 by 20th November 2008 and thereafter on 11th April 2009 a further sum of Kshs 1,000,000 in the name of the 1st defendant who was to hold the entire sum or part of the same."(Emphasis supplied).

20. The appellant on the other hand in his statement of defence dated 15th August 2013, did not deny the averments as pleaded in paragraph 7 of the plaint save for stating at paragraph 3 of the defence that he would "request the trial court to strike out paragraphs 5, 6, 7, 8, 10, 11, 12, 14 and 16 of the plaint for offending the fair rules of pleading."

21. It is common ground that vide a letter dated 23rdJanuary 2009,the appellant wrote to the respondent advising as follows:

> "we wish to advise you that this matter is completed and subdivision certificates have been obtained [a copy of which is enclosed]. We request you to send us the balance cheque of Kenya shillings one million (Kshs 1,000,000) to enable us release the duly executed transfer documents forregistration.
>
> (Emphasis supplied).
>
> Please be advised that our fee for this transaction is Kenya shillings one hundred thousand (Kshs 100,000) which we shall be pleased to receive from you."

22. Further, on 11th April 2009, the appellant acknowledged receipt of Kshs 1,000,000.00 being final payment of the purchase price.

23. Again, the appellant vide his letter dated 16th August 2012, to the Advocates Complaints Commission in relation to a complaint that had been lodged against him by the respondent responded, *inter alia*:

> "we would like to point out that this is the first time the refund is being aired and we would like to know whether your letter now presents a change of position by the purchaser to take a refund of the purchase price. We confirm that if this is the position we are prepared to

demand from the vendor that the entire purchase price be re-deposited with us and even we will enforce the demand by suit or other means of necessary." (Emphasis added).

24. From the foregoing it is quite evident that there was ample evidence that indeed the appellant admitted receiving the entire purchase price amounting to Kshs 6,500, 000.00 in respect of the transaction though completion of the sale agreement did not come to fruition. Though the appellant had contended that the purchase price was forwarded to the vendor (the 2nd defendant) in the trial court, the 2nd defendant vide a replying affidavit sworn on 11th March 2015, denied having ever received the purchase price from the appellant.

25. The learned judge while considering the notice of motion dated 14th January 2015 where the respondent had sought judgment on admission against the defendants stated as follows:

> "I have keenly read the defences on record, while in their defences the defendants deny the plaintiff's claim, they have not contended that the plaintiff did not make full payment for the land and that the plaintiff has not to date been given possession of the land. The 1st defendant did not contend receiving payments from the plaintiff. Considering that he was acting for both parties in the transaction, he was meant to ensure that the property is transferred to the plaintiff such was not done and he in fact remitted money to the 2nd defendant, if at all before the transfer was effected. The 2nd defendant although it contended that he did not receive payment from the 1st defendant, he expressed that he was willing to pay the sum which was colossal to settle the issue between the 1st defendant and the plaintiff that explanation does not add up and in my view it illuminates foul play. Additionally, in the letter dated 17th January 2013 the 2nd defendant made an admission of failure to make good it's part of the deal. In the circumstances, I find merit in the application and it is allowed. Judgment is hereby entered in favour of the plaintiff against the defendants in terms pf the prayers in the plaint. Costs to the plaintiff."

26. In our view, the appellant having admitted receiving the entire purchase price amounting to Kshs 6,5000,000.00 from the respondent, it is our considered opinion that the learned judge was right in entering judgment on admission as against the appellant and we have no basis of inferring with the learned judge's finding on this issue. We have carefully looked at the impugned ruling, the contention by the appellant that the learned judge applied wrong principles and find these allegations to be without any basis. We have indeed looked at the appellant's defence dated 15th August 2013, and save for making general denials, the appellant remained generally evasive as regards the issue of the purchase price amounting to Kshs 6,500,000.00.

27. Whereas the appellant had contended that he had forwarded the same to the vendor (the 2nd defendant in the trial court), the vendor denied having ever received any purchase price from the appellant and to date the whereabouts of this money remains unknown.

28. It is not in dispute that the appellant vide a letter dated 23rd January 2009, informed the respondent that he had obtained transfer documents in respect of the transaction. There is however no evidence of transmission of money from the appellant to the vendor as contended by the appellant. What is undisputable is that indeed the purchase price passed through the appellant's hands.

29. In view of the foregoing, we find no reason to fault the learned judge for entering judgment on admission against the appellant. Judgment having been entered against the appellant on admission, he cannot then turn around and contend that he was not given a chance to be heard. Consequently, we find that this ground of appeal is without merit and the same must fail.

30. The learned judge was further faulted for reviewing his ruling/orders dated 30th July 2015 and substituting it with a reviewed judgment of 6th October 2016, a year after the appeal was filed as the court was *functus officio*.

31. First of all, we note that the ruling of 6th October 2016, still stands to date and has never been appealed against. Indeed, there is no notice of appeal against the same on record and in our considered opinion, the appellant cannot purport to appeal/challenge the same in the instant appeal. In any event, it has not been demonstrated to this Court that the appellant suffered any prejudice as a result of the subsequent ruling. Consequently, this ground of appeal must as well fail.

32. Taking into totality all the circumstances in this case, the appellant's appeal is devoid of merit. It is hereby dismissed in its entirety with costs to the respondent.

33. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR