



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, J.J.A)

CIVIL APPEAL NO. 326 OF 2012

BETWEEN

PETER KINYANJUI.....APPELLANT

AND

VIRGINIA WAITHIRA MWANGI.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Sitati, J.) dated 17th February, 2011

in

High Court Civil Appeal No. 50 of 2009)

JUDGMENT OF THE COURT

The amount of money the subject matter of this dispute may appear insignificant, Kshs.47,500, but the appellant, acting in person, has pursued it with the determination and gusto of the Biblical Nehemiah, who, despite discouragement from others, rebuilt the walls of Jerusalem.

The appellant instituted the action for the first time in the subordinate court in Thika in 1993, claiming the aforesaid Kshs. 47,500, costs and interest for breach of contract. Despite losing the case and several applications in the subordinate court, he has, with resilience, climbed to this Court through the High Court seeking justice. With some exaggeration, he told us that he has spent Kshs. 6,000,000 to date to recover the Kshs. 47,500.

It is common factor that the appellant helped the respondent to acquire a parcel of land known as **Plot. No. 556/97, Makongeni, Thika** and thereafter offered to supervise the construction of a house on it. At some point, the two disagreed on the quality of work and use of building materials, following which the respondent replaced the appellant with another mason. It has been the appellant's case that in the course of supervising the construction, he spent his money to purchase some building materials, which the respondent was to refund. He demanded a total of Kshs. 67,500. According to the respondent, at that point, the appellant began to threaten her. One day, the appellant in the company of three others confronted her and forced her to sign before an advocate an agreement in which she admitted indebtedness to the appellant in the sum of Kshs.67,500 and agreed to pay the first installment of Kshs. 20,000 and subsequently Kshs. 6,000 per month until payment in full. The respondent confirmed making the first payment to the advocate but changed her mind maintaining that she did not owe the appellant any money and that she executed the agreement under threat and coercion. Instead she insisted that the appellant was unlawfully holding her documents of title.

As a result of this, the appellant instituted the aforesaid action against the respondent to recover the money owed. The respondent counter-claimed for a refund of Kshs. 20,000 she had paid, pursuant to the agreement in question and the surrender of documents of title that were in the appellant's possession.

The trial magistrate, Mrs. Owino, R.M noted that other than the suit before her, the appellant had also filed SPMCC No.84 of 1993; and that in addition, he had been charged with a criminal case in CR. Case No.1852 of 2000.

On the substance of the appellant's claim, the trial magistrate found no evidence to prove either that the appellant purchased building materials or was engaged to supervise the respondent's house for a fee; that the appellant took advantage of the respondent and started to threaten her as a result of which the former was arrested, charged, tried, convicted and sentenced on four counts; that in SPMCC No.84 of

1993 the appellant sued the respondent for his fees in the sum of Kshs. 65,000, contradicting the claim before that court. To the learned magistrate all these lent credence to the claim that the appellant exerted undue influence on the respondent to sign the agreement in question. In the result, she found no merit in the main suit which she dismissed with costs, but entered judgment in the respondent's counterclaim.

The appellant's appeal to the High Court challenging this decision was dismissed, principally because the learned Judge (Sitati, J) found, like the magistrate, that the appellant had failed to provide evidence of how much of his own money he had spent to buy building materials used to construct the respondent's house up to the stage they disagreed. In addition, the learned Judge rejected the first appeal on the ground that the suit before the magistrate was *res judicata* an earlier suit, RMCC No. 84 of 1993, where the parties were the same ones litigating in the suit before the magistrate, on the very same issue of a debt of Kshs.76,000, allegedly used by the appellant in the construction and supervision of the respondent's house, less Kshs. 20,000 subsequently paid by the latter. In the judgment in RMCC No. 84 of 1993, the trial court dismissed the appellant's suit on the same grounds that the appellant had failed to prove, by the production of receipts that he had indeed spent his money in the construction or any agreement that he had been retained by the respondent to supervise the building.

On the other hand, the Judge reversed, with costs the decision of the trial magistrate on the counterclaim holding that it had been brought way after the 6 years period permitted for such actions. She also found no evidence of undue influence.

Although both the main suit and the counterclaim suffered the same fate, the appellant was more aggrieved. He brings this second appeal on nine grounds. We summarize those grounds in accordance with his written submissions as follows;

That both the lower court and superior court were misguided and came to the wrong conclusion that the agreement was signed under duress; that the Judge failed to appreciate that the respondent had partly paid the debt; that the respondent had made proposals to settle the balance by monthly installments; that the Judge failed to apply the principle of conflict of interest of an advocate who drew the agreement for both parties and subsequently represented one of the parties to the dispute.

On her part, the respondent replied that the appellant has raised issues of fact rather than points of law. She maintained that the only issue of law raised by the appellant was that of legal representation of the respondent by the advocate who drew up the agreement (M/s Wambui Ngugi & Co. Advocates). In response to this, learned counsel for the respondent, Mr. Mwaniki conceded that the firm of the advocate in question did file a defence on behalf of the respondent and thereafter M/S Gathoga Wairegi & Co. Advocates filed a notice of change of advocates. Counsel submitted that the learned Judge correctly found that in Civil Suit No.84 of 1993, the appellant had made a claim for Kshs. 76,000 being money spent by him towards construction of the respondent's premises which was dismissed for lack of evidence. However, the court allowed the respondent's counter-claim observing that none of the parties had appealed against the said judgement and correctly concluded that Civil Suit No.68 of 1993 which was the genesis of this appeal was *res judicata*.

On second appeal, this Court by **section 72** of the Civil Procedure Act concerns itself only with issues of law. Out of the nine grounds proffered in the appeal, only two issues deserve our comments as raising issues of law.

The simple answer to the first concern, whether it amounted to conflict of interest for the advocate (Wambui Ngugi & Co. Advocates) who drew the agreement to subsequently represent one of the parties in the dispute, is that, apart from filing a defence, the firm took no further or other action in the matter. Indeed, even the defence the law firm had filed was subsequently amended by the advocates who took over the conduct of the case from her. The other ground is whether the learned Judge erred in dismissing the suit as being *res judicata*.

We are satisfied that the parties in RMCC No. 84 of 1993 and in CMCC No. 68 of 1993 are the same. The subject matter in both suits is the same, that is, money allegedly owed to the appellant for supervising the construction of the respondent's house on **Plot. No. 556/97, Makongeni, Thika** or for providing building materials. Although both RMCC No. 84 of 1993 and CMCC No. 68 of 1993 bear the same year (1993), suggesting that they were filed in 1993 and in the same court (Thika Chief Magistrate Court) the judgment in RMCC No. 84 of 1993 was rendered first on 13th September, 1994, while that in CMCC No. 68 of 1993 came several years later on 26th January, 2009. The trial magistrate in RMCC No. 84 of 1993 indeed noted that CMCC No. 68 of 1993 was earlier in time when considering the cause of action in the two cases. The significance of this is that by the time the latter case was being decided, there was already a decision determining finally, and on merit the issues in controversy between the parties.

Section 7 of the Civil Procedure Act prohibits the court from trying any suit or issue:

“...in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties,litigating under the same title,

in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

In pursuing CMCC No. 68 of 1993 after a decision in RMCC No. 84 of 1993 had already been made, the appellant was engaged in an abuse of the court process and CMCC No. 68 of 1993 was therefore *res judicata*. The learned Judge properly so found.

Although not an issue of law, the appellant has argued that the learned Judge ignored the fact that he had a judgment in his favour made by a competent court of coordinate jurisdiction as the court from which the decision appealed from came.

We have perused the record and find no such a case. In RMCC No. 84 of 1993, the trial magistrate found no proof that the appellant was entitled to any fees for supervising the construction or for provision of building materials. The only other relevant judgment on record is that in which the appellant was convicted and sentenced on four criminal charges over the same question of supervision of the respondent's house. The appellant himself was not helpful in providing the details of the decision he alleged was made in his favour and which the learned Judge failed to consider.

We find no substance in the appeal. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 20th day of April, 2018.

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR