



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI

Civil Appeal 168 of 2002

NGUNGI HOLDINGS LIMITED.....APPELLANT

AND

JOSEPH KAMAU MWANGI.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Nairobi (Osiero, J.) dated 27<sup>th</sup> March, 2001*

*in*

*H.C.C.C. NO. 4073 OF 1991)*

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**JUDGMENT OF THE COURT**

This is an appeal by the unsuccessful plaintiff from the judgment of the superior court (*Osiero, J*) in which the learned judge dismissed the plaintiff's suit. As we have always said, this being a first appeal, it is in the form of a rehearing and for that matter it will be necessary to trace the dispute to the pleadings in the superior suit.

The appellant *NGUNGI HOLDINGS LIMITED*, (as the plaintiff in the superior court) sued the respondent *JOSEPH KAMAU MWANGI*, (as the defendant) seeking the following reliefs:-

- "a) An order for specific performance of the said agreement by way of an executed conveyance in favour of the plaintiff.*
- b) IN THE ALTERNATIVE, rescission of the said contract and repayment of the sum of Kshs.182,800/= paid thereunder with interest thereon from the respective dates of payment of the sums comprising the said amount to the dates of repayment in full.*
- c) Damages for breach of contract in lieu of or in addition to specific performance.*
- d) A declaration that the plaintiff is entitled to a lien on the said property for the said amount together with interest thereon and such damages and costs as are awarded to the plaintiff by the court.*
- e) Any further and other relief that this Court may deem fit to grant.*
- f) Costs and incidental to these proceedings."*

In order to appreciate the nature of this dispute, we set out pertinent paragraphs of the plaint filed in the superior court which stated as follows:-

**“3. By an agreement in writing dated the 14<sup>th</sup> day of December, 1987 made between the plaintiff and the defendant, the defendant agreed to sell and the plaintiff agreed to buy a parcel of land comprising or measuring approximately 1½ acres being a sub-division of parcel known as L.R. 11646/9 Ridgeways Nairobi identified and marked “A” in the sketch plan annexed to and forming part of the said agreement.**

**4. The agreed terms and conditions of said agreement were, inter alia, the following;**

**(a) under clause 3:**

**the purchase price was Kshs.540,000/= and the purchaser was to pay Kshs.54,000/= by way of deposit to Kimani Kairu & Company Advocates for the vendor as stakeholders on or before the execution of the agreement.**

**(b) under clause 4:**

**the balance of the purchase price in the sum of Kshs.486,000/= was to be paid to the said vendor Advocates on completion of the sale.**

**(c) under clause 5:**

**the purchaser was to be solely responsible for all costs of the sub-division.**

**(d) under clause 6:**

**the Law Society of Kenya Conditions of Sale (1982) were deemed to be incorporated in the agreement save as modified and amended by the said written agreement.**

**(e) under clause 7:**

**the completion date was to be the fourteenth day next following the date on which the following requirements would have been met:-**

**(i) Final approval is given by the Commissioner of Lands and/or other authorities to the sub-divisional scheme for the excision of the portion to be sold and the title or Deed plan is received by Messrs. Kimani Kairu & Company.**

**(ii) All consents and clearance certificates if any are received by Messrs. Kimani Kairu & Company Advocates.**

**(iii) If any of the property being sold thereby is required to be surrendered as part of the sub-division scheme for public purposes such surrender is duly registered.**

**5. Pursuant to the agreement, the plaintiff paid to Messrs Kimani Kairu & Company Advocates the sum of Kshs.54,000/= on 16<sup>th</sup> December, 1987 being the 10% deposit on the purchase price in accordance with clause 3 of the Agreement for sale. The plaintiff has on diverse dates further paid the sums of Kshs.46,000/= to the said advocates and Kshs.60,000/= to the defendant making in all an amount of Kshs.160,000/= paid to the defendant towards the purchase price under the said Agreement for Sale.**

**6. Pursuant to clause 5 of the Agreement for Sale, the plaintiff has made various payments and incurred costs and expenses towards the subdivision of the property all amounting to Kshs.22,800/=.**

**7. In breach of the said agreement, the defendant has refused to complete and/or perform his obligations under the said agreement. Further he has in flagrant breach of the agreement purported to sell the said property to one Donald Kiboro Mwaura.**

In response to the foregoing, the respondent filed a defence and a counter-claim which stated as follows:-

**“1. The Defendant admits the descriptive parts of the plaint save that his address for service henceforth for the purposes of this suit shall be care of Muthoga, Gaturu and Company Advocates Bruce House, 7<sup>th</sup> Floor, P.O. Box 47614, Nairobi.**

**2. The defendant admits that the contract referred to in paragraphs 3 and 4 of the plaint was entered into by and between the parties hereto but avers that he is a complete stranger to the payment of Shs.54,000/=, and 45,000/= to Messrs. Kimani Kairu and Company Advocates or at all and further denies ever having received a sum of Shs.60,000/= or a total sum of Shs.160,000/= from the plaintiff as alleged in paragraph 5 of the plaint and puts the plaintiff to strict proof thereof.**

**3. The defendant is a stranger of a payment of Shs.22,800/= to the surveyors as alleged in paragraph 6 of the plaint but is aware of a fee of Shs.13,000/= charged by the surveyors Messrs. Gatome and Associates for the survey of the whole plot with many more boundaries and puts the plaintiff to strict proof thereof.**

**4. The defendant categorically denies ever having failed to play his part of the contract as alleged in paragraph 7 of the plaint and puts the plaintiff to strict proof thereof.**

**5. The defendant categorically denies that the plaintiff fulfilled and/or performed all his obligations under the contract as alleged in paragraph 8 of the plaint, denies the same in its entirety and puts the plaintiff to strict proof thereof.**

**6. The defendant categorically denies the contents of paragraphs 5, 6, 7, 8 and 9 of the plaint and avers that it is actually the plaintiff who breached the contract and not the defendant since the defendant was ready able and willing to perform his part and he did perform but the plaintiff frustrated the contract by failure to perform and puts the plaintiff to strict proof thereof.**

**7. The defendant further avers that the plaintiff's suit against him is bad in that the same is incompetent and misconceived, frivolous and vexatious and is an abuse of the due process of the Court, merely meant to scandalize embarrass and/or ruin the defendant's name unreasonably and the same should be struck out from record.**

**8. The defendant further avers that the plaintiff's suit is bad in that the same does not disclose any or any reasonable cause of action against him and the plaintiff is completely non-suited in that being in breach of contract, he cannot sue for breach of contract when it is in fact him who is in breach, and the suit was unreasonably brought against the defendant and it is a vague allegation of liability which does not exist it is unreasonable and unmaintainable and should be struck out from the record.**

**9. The defendant denies that the plaintiff is entitled to any or any of the prayers or any one of them, contained in paragraph 9 of the plaint in that the same are incapable of being granted and/or enforced and he further denies owing the plaintiff any or any sums of moneys amounting to Kshs.182,800/= or at all and puts the plaintiff to strict proof thereof.**

**10. Save and except as hereinbefore specifically expressly admitted, the defendant categorically denies each and every allegation contained in the plaint as if the same were set out herein and traversed seriatim.**

#### COUNTER-CLAIM

**11. The defendant reiterates the contents of his defence above and by way of counter-claim avers that**

even after failing to perform its part of the contract; the plaintiff wrongfully registered a caveat unlawfully and/or wrongfully and illegally which caveat the plaintiff is still wrongfully maintaining while in fact he has got no registrable interest having already withdrawn and/or abandoned and breached the contract.

12. The defendant therefore counter-claim for damages for wrongful maintenance of the said caveat and an order for its removal against the title together with interest at Court rates.

**And the defendant claims damages.**

13. The defendant denies that there was any or any demand before action at all and avers that the plaintiff would accordingly not be entitled to costs.

14. The jurisdiction of this Court to hear and dismiss the suit with costs and give judgment for the defendant as prayed in the counter-claim is admitted.

**REASONS WHEREFORE;** the defendant prays:

**(a) That the plaintiff's suit against him be dismissed with costs;**

**(b) That judgment be entered for the defendant against the plaintiff for general damages for wrongful registration of the caveat against the title L.R. 11649/9 as prayed in paragraphs 11 and 12 of the counter-claim and an order for its removal together with interest at Court rates;**

**(c) Costs of this counter-claim together with interest at Court rates;**

**(d) Such further or other relief as this Honourable Court may deem fit and just to grant."**

The hearing of the suit in the superior court commenced on the 2<sup>nd</sup> March, 1999 before Osiemo, J. when **Johnson Dedan Murimi, (PW1)** gave evidence. Mr. Murimi introduced himself as an advocate of the High Court of Kenya who has been practicing as such since 1970. He gave the history of the dispute which started by the respondent, **Joseph Kamau Mwangi**, and his wife seeing him in connection with *High Court Civil Case No. 2270 of 1984* in which the parties were **Housing Finance Co. of Kenya Ltd.** and the **respondent**. That case related to a notice to show cause why the defendant (the respondent herein) should not be evicted from *land parcel No. 11646/9*. The respondent instructed Mr. Murimi to have the notice suspended to enable the respondent find a purchaser to their land. Later the respondent said that they had failed to get a purchaser and hence gave Mr. Murimi an option to purchase the land. It is as a result of this predicament that the firm of Mr. Murimi prepared a sale agreement between the respondent and the appellant company. Mr. Murimi was the Director and Shareholder in the appellant company. The other shareholder was Caroline Murimi. Both parties agreed that M/s Kimani Kairu and Company Advocates should act for them. Pursuant to the foregoing, the appellant paid to M/s Kimani Kairu & Company Advocates the sum of *Shs.54,000/=* on 16<sup>th</sup> December, 1987 being the 10% deposit for the purchase price in accordance with **clause 3** of the Sale Agreement. The appellant on diverse dates made a further payment of *Shs.60,000/=* to the respondent making in all a total of *Shs.160,000/=* towards the purchase price. Pursuant to **clause 5** of the Sale Agreement, the appellant made various payments and incurred costs and expenses towards the subdivision of the property amounting to *Shs.22,800/=*.

**James Gatome, (PW2)** was the surveyor who was instructed by Mr. Murimi to do the survey on the piece of land title and carry out the subdivision. Lastly there was the evidence of **Duncan Mwangi Gichangi, (PW3)** a valuation surveyor. He was instructed to inspect the property and advise on the sub-plots and give advice on the current market value. He carried out his instructions and arrived at *Shs.7.5 million* for the 3 sub-plots.

It is for the foregoing that the appellant company asked for specific performance of the agreement of 14<sup>th</sup> December, 1987 or in the alternative it requested for the repayment of *Shs.169,820/=* paid on behalf of the respondent together with interest. They also asked for damages for breach of contract equivalent to

the value of the said property.

On 27<sup>th</sup> September, 2000, the respondent, **Joseph Kamau Mwangi** took the witness stand to testify. It was his evidence that he was the owner of the property known as L.R. No. 11646/9 the subject matter in this dispute and that Mr. J.D. Murimi was his lawyer while the appellant company was Mr. Murimi's family holding. Mr. Murimi had acted for him in *Resident Magistrate's Court Civil Case No. 277 of 1980* and in *High Court Civil Case No. 2270 of 1984*. At one time, Housing Finance Company of Kenya sued him (*the respondent*) due to default in loan repayment. He intimated his inability to pay Housing Finance Co. of Kenya to Mr. Murimi and enquired if Mr. Murimi could purchase part of the suit land so that the respondent could save his property from being auctioned. It is as a result of this that he entered into a sale agreement of 14<sup>th</sup> December, 1987. According to the respondent, Mr. Murimi failed on his part of the bargain and hence the property was advertised for public auction. The respondent and his wife made efforts to save their property by borrowing money from other sources and so the property was saved from public auction. The respondent then sold part of the property to one, **Kiboro Mwaura** so as to pay off those from whom he had borrowed money to save his property from being sold by public auction. In conclusion, the respondent stated that it was the appellant company which breached the contract.

After the foregoing evidence, the advocates for both parties filed written submissions and the learned Judge reserved his judgment which he delivered on 27<sup>th</sup> May, 2001. The learned Judge considered all that was placed before him by way of evidence and submissions and came to the conclusion that the appellant was in breach of contract. He therefore dismissed the appellant's claim. The learned Judge in dismissing the appellant's claim concluded his judgment thus:-

***"I find that the breach of contract was by the plaintiff. The essence of the contract was to assist in repaying HFCK and NCC. By failure to honestly pursue the essence of the contract, in failing to act prudently and diligently, in failing to act expeditiously, the plaintiff breached the contract. He breached the contract by failing to pay Shs.540,000/= and in failing to use his abilities to help pay off HFCK. On the grounds stated above the suit is dismissed with costs to the defendant."***

It is that finding that provoked this appeal in which the appellant, through its advocates, set out the following grounds of appeal:-

***"1. THAT the learned Judge erred in law and fact in that he failed to distinguish between the appellant which is a limited liability company from its director and shareholder, PW1 and thereby held and/or wrongly imputed that:-***

(a) *There was a fiduciary relationship between the appellant and the respondent.*

(b) *That the appellant was in breach of the alleged fiduciary relationship.*

***2. THAT the learned Judge erred in law in his interpretation and application of the doctrine of fiduciary relationship in the matter governed by the contract.***

***3. THAT the learned Judge erred in law and fact in assuming, without any evidence that the appellant and/or its director and shareholder PW1 did obtain advantage over the Respondent by reason of the alleged fiduciary relationship.***

***4. THAT the learned Judge erred in his interpretation and application of the principles, which govern the equitable remedy of specific performance.***

***5. THAT the learned Judge erred in holding that the appellant misconducted itself and was as a consequence thereof not entitled to the exercise of his discretion of (sic) order specific performance.***

***6. THAT the learned Judge erred in law and fact in failing to grant the order of specific performance to the appellant whereas there was sufficient evidence to prove:-***

(i) the appellant had complied with the terms and conditions of the contract of sale with respect to payment of the deposit of sale price.

(ii) That it was ready, able and willing to pay the balance of the purchase price on or before completion date as specified in condition of the Sale Agreement.

(iii) That the respondent wrongfully and in breach of contract interfered with the completion of the contract.

(iv) That the appellant had performed all its obligations under the contract save for the payment of balance of purchase price which was only due and payable on the completion.

7. ***THAT*** the learned Judge erred in law and fact in making a finding of fact that the appellant had paid the sum of Kshs.160,000/= towards the purchase price on various dates and then contradicting himself by stating that no receipt was produced in evidence to prove payment against the weight of evidence.

8. ***THAT*** the learned Judge erred in law and fact; and misdirected himself in holding without any evidence that the order of specific performance would occasion hardship on the respondent and setting up the same as the ground for denying the appellant the order for specific performance.

9. ***THAT*** the learned Judge erred in law and fact in holding:-

(i) That “the essence of the contract (Sale Agreement) was to assist in repaying HFCK and NCC” whereas clause 7 of the Sale Agreement clearly stipulated the conditions of completion.

(ii) That “the plaintiff had failed to pay the purchase price to enable him (the Defendant) to pay off the HFCK and NCC as had been agreed” whereas there was no such stipulation or condition in the Sale Agreement.

(iii) That “the plaintiff advised him (Respondent) to sub-divide the suit property and sell a portion to pay off the NCC and HFCK” and that the appellant “offered to by (sic) it himself” and that the appellant “was acting for the defendant in court cases” whereas there was no evidence.

(iv) That “the appellant also knew that HFCK could not discharge the title unless they were paid off” and that “the appellant had a duty to see the sale transaction through “by paying off HFCK” and without considering that there were reciprocal obligations on the part of the respondent.

10. ***THAT*** the learned Judge erred in fact and in law in failing to consider the alternative reliefs sought by the appellant i.e. rescission of the contract and refund of Kshs.182,800/= paid for and on behalf of the respondent and damages for breach of contract.”

This is the appeal that came up for hearing on 16<sup>th</sup> September, 2008 when Mr. Jinaro Kibet appeared for the appellant while Mr. Paul Mwangi, appeared for the respondent. On that day (16<sup>th</sup> September, 2008) Mr. Kibet made his submissions but the appeal had to be adjourned to 12<sup>th</sup> February, 2009 when Mr. Mwangi made his submissions and Mr. Kibet made a reply thereto.

This being a first appeal, it is our duty to re-evaluate the evidence, assess it and make our own conclusions and as we do so, we must remember that we have neither seen nor heard the witnesses. It is for that reason that we set out the pleadings in full and the summary of evidence placed before the superior court. In ***SELLE AND ANOTHER V. ASSOCIATED MOTOR BOAT COMPANY LTD. AND OTHERS [1968] E.A. 123*** at p. 126 Sir Clement de Lestang V-P said:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial 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 though 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 if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (ABDUL HAMEED SAIF V. ALI MOHAMED SHOLAN (1955), 22 E.A.C.A. 270).”

The above has been adopted by this Court in numerous decisions e.g. WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A.1. and ARROW CAR LIMITED V. BIMOMO & 2 OTHERS [2004] 2KLR 101.

In his submissions, Mr. Kibet took issue with the manner the learned Judge started his judgment as he referred to the plaintiff as “*acting for defendant*” yet the plaintiff (appellant), was a limited liability company. In Mr. Kibet's view that was confusion which rendered the foundation of the judgment wrong. Mr. Kibet pointed out that the learned judge failed to distinguish the appellant as a limited liability company from its directors and or shareholders. He criticized the Judge's findings on fiduciary relationship between the respondent and Mr. Murimi since this was not pleaded. It was his contention that the issue before the superior court was whether there was a breach of contract and not misconduct of Mr. Murimi.

In conclusion, Mr. Kibet submitted that the judgment of the superior court was based on a misconception of the facts and application of wrong principles. To buttress his arguments, Mr. Kibet relied on various authorities in his list of authorities.

On his part, Mr. Mwangi started his submissions by referring to his list of authorities and in his view the transaction between the parties was that of a solicitor and client. He contended that the respondent saw Mr. Murimi as his advocate and that Mr. Murimi got the buyer who turned out to be a company in which he was a principal shareholder. Mr. Mwangi further submitted that Mr. Murimi took advantage of the respondent's position and hence the sale agreement was not a fair transaction. Mr. Mwangi traced the history of the relationship between the respondent and Mr. Murimi which in his view showed that Mr. Murimi was to help the respondent to secure his property which was in danger of being auctioned. He went on to submit that the respondent was misled into believing that his position was safe.

In conclusion, Mr. Mwangi submitted that the superior court sat as a court of equity which was asked for discretionary remedy of specific performance and that taking into account the circumstances of the case, the court found that the contract of sale was against public policy and therefore could not be upheld. He was of the view that since the learned Judge did not exercise his discretion wrongly, this appeal should be dismissed.

We hope that what we have set out so far gives a clear picture of what is before us in this appeal. We now know that *Mr. J.D. Murimi* had been the advocate for the respondent, prior to the sale agreement. Indeed, Mr. Murimi acted for the respondent in the Resident Magistrate's Court and then in the High Court. We think, it is because of that relationship that the learned Judge continued to refer to the appellant (***Ngungi Holdings Ltd.***) as acting for the respondent. The respondent knew all along that Mr. J.D. Murimi was his advocate. Hence when he saw a looming danger of his property being auctioned, he turned to Mr. J.D. Murimi and requested him to bail him out. Mr. J.D. Murimi agreed to bail him out and, as a way out, the Sale Agreement of 14<sup>th</sup> December, 1987 was entered into. The question to be answered is who acted for the respondent in this sale transaction? It was contended on behalf of the appellant that the firm of M/s Kimani Kairu & Co., Advocates was acting for the parties. But, unfortunately Mr. Kimani Kairu or anybody else from that firm was not called to give evidence so as to put the matter beyond doubt. Indeed, what emanated from that firm was that they neither knew nor acted for the respondent. In their letter dated 14<sup>th</sup> January, 1993 addressed to Gathenji & Co. Advocates, they state inter alia:-

“2. ***That we have never acted for Joseph Kamau Mwangi, the vendor, as alleged by you.***”

**3. That the said Shs.100,000/= was disbursed as follows:-**

**(a)** Shs.90,000/= to Kaplan & Stratton Advocates for onward transmission to Housing Finance Company of Kenya Limited (Mortgage Account No. 93855 in the name of Joseph Kamau Mwangi).

**(b)** Shs.6,800/= to Nairobi City Commission as rates for 1988, in respect of L.R. No. 116/46/9 Nairobi. (Original receipts thereof are with Murimi & Co., Advocates).

**(c)** Shs.3,200/= to our professional fees.

**We do not know Mr. Joseph Kamau Mwangi, have never met him and certainly did not act for him. We only dealt with Murimi & Co., Advocates; Kaplan & Stratton Advocates and Gatome & Associates.**

**Mr. J.D. Murimi Advocate will be able to confirm the above to you.”**

*(underlining supplied).*

In view of the foregoing, it cannot be denied that the respondent was not represented in the sale transaction. This is the point that Mr. Mwangi tried to emphasize in his submissions. For that reason, the respondent still looked upon Mr. J.D. Murimi as his advocate. However, when it came to the Sale Agreement, Mr. Murimi introduced a different entity as the purchaser. This is when Ngungi Holdings Ltd. came in as the purchaser.

Mr. Kibet took issue with the learned Judge’s reference to the appellant as the advocate when the appellant is a different entity from its directors and shareholders. Mr. Kibet was, of course, quite right in his submission.

In **SALOMON V. SALOMON & CO. LTD. [1897] AC 22**, it was established that a registered company is a legal person separate from its members. This principle is often referred to as the veil of incorporation. The veil may however be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or a device for enabling the directors to hide themselves from the eyes of equity.

And in **JONES & ANOTHER V. LIPMAN & ANOTHER [1962] 1 WLR 833** it was held that if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgment even against the person behind the said company.

It would appear that the learned Judge had the foregoing principles in mind when he lifted the veil of incorporation of the appellant and behind it found Mr. J.D. Murimi as the person behind the company. In the course of his judgment, the learned Judge makes the following observations:-

***“In this case, the plaintiff was acting for the defendant in court cases, which involved the suit premises due to non payment of rates and loan. The defendant was unable to pay and hence the matter ended up in court. He intimated to the plaintiff then acting for him that he was unable to meet the payment.***

***The plaintiff advised him to subdivide the suit property and sell a portion to payoff the NCC and HFCK. The defendant asked the plaintiff to look for a buyer but the plaintiff offered to buy it himself through his company NGUGI HOLDING CO. LTD. and drew a sale agreement to that effect.”***

It is for the foregoing reasons that the learned Judge was of the view that Mr. J.D. Murimi took advantage of his position as the respondent’s counsel and that instead of assisting him he let him down.

In **DEMERARA BAUXITE COMPANY LIMITED V. LOUISA HUBBARD AND OTHERS (1923) AC 673** the head note states:-

***“A transaction, such as the purchase of property under an option, where the vendor and purchaser are client and solicitor (or where a similar confidential relationship exists) and the vendor has not had independent advice, cannot be upheld unless it is proved affirmatively that the purchaser disclosed, without reservation, all the information in his possession, and that the transaction was a fair one in all the circumstances. To fulfill those conditions it must be shown that the solicitor advised his client as diligently, and that the transaction was as advantageous, as if the client had been dealing with a stranger. This principle is of wide application, and should not be regarded as a technical rule of English law. Although the relationship of solicitor and client, in a strict sense, has terminated, the same principle applies so long as the confidence naturally arising from that relationship is proved, or may be presumed, to continue.*”**

In this appeal, one of the issues raised was whether the sale transaction was between the appellant as a legal entity on one side and the respondent on the other or whether this was an advocate client relationship. We have already given a brief background to the relationship between the respondent and Mr. J.D. Murimi. It would appear that the respondent looked upon Mr. J.D. Murimi as his advocate. Even when he entered into a sale agreement with ***Ngungi Holdings Ltd.***, he saw Mr. J.D. Murimi as the purchaser. It is important to note that although the Sale Agreement and the evidence adduced on behalf of the appellant attempted to show that the firm of Kimani Kairu & Co., Advocates was acting for both parties this was denied by that firm in their letter of 14<sup>th</sup> January, 1993. The learned Judge considered all the evidence before him and came to the conclusion that the appellant’s claim had no merit. The learned Judge as stated by Mr. Mwangi in his submission was sitting as a court of equity since he was being asked to grant specific performance.

***“In EPHANTUS MWANGI & ANOTHER V. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278 at p. 292 Hancox, J.A (as he then was) said:-***

***“A Court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence of the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”***

The first holding in that case is also relevant namely that :-

***“The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.”***

Taking into account all the circumstances of this case, we are satisfied that the learned Judge cannot be faulted in his findings and conclusions. On our own re-evaluation of the evidence and perusal of the relevant documents produced in the superior court, we have come to the same conclusion as did the learned Judge that it was the appellant which was in breach of contract and that the respondent had looked upon Mr. J.D. Murimi as his advocate. We are satisfied that Mr. J.D. Murimi took advantage of the respondent’s predicament and to advance his intentions introduced the appellant company in order to hide behind the veil of incorporation.

For all the foregoing reasons we find no merit in this appeal and order that the same be and is hereby dismissed with costs to the respondent. These are the orders of this Court.

***Dated and delivered at NAIROBI this 27<sup>th</sup> day of March, 2009.***

***E.O. O’KUBASU***

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

**J. ALUOCH**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**