



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 30 OF 2013

CRYSTAL VALUERS LIMITED.....APPELLANT

- V E R S U S -

JAMES KINIYA GACHIRI.....RESPONDENT

(Being an appeal from the judgement of Hon. Mr. W.F. Andayi (SPM)

at Milimani Commercial Court in CMCC No. 4604 of 2011

delivered on 27th December, 2012)

JUDGEMENT

1. Crystal Valuers Limited, the appellant herein filed a suit against James Kiniya Gachiri, the respondent herein for Kenya shilling 60,000/=. Its alleged via the appellant's plaint dated 30th September 2011 that the amount was for work done and services rendered by the appellant to the respondent. The respondent filed its defence dated 9th November, 2011 denying the appellant's claims.

2. The matter was heard on various dates and in the end Hon. W. F. Andayi, the learned Senior Principal magistrate found the claim against the respondent to be baseless. The trial court found that the appellant had not established its case against the respondent on a balance of probabilities and proceeded to dismiss the suit.

3. The brief summary of the facts leading to the filing of this case appear to be short and straight forward.

It is alleged by the appellant that he was instructed by K-rep bank vide a letter dated 13th July 2011 to conduct a valuation in respect of the property title no. Nairobi/Block/75/1036 in the name of Peter Gatheca Gachini to secure advances to James Kiniya Gachiri (the respondent) and Elizabeth Metumi Njuguna. The appellant charged a fee of ksh.60,000/= and forwarded its fee note to the respondent. The respondent then issued cheque no. 001547 to settle the fee note. When the appellant presented the cheque, it was dishonoured and the appellant incurred ksh.1,000/= as bank charges for the dishonoured cheque, therefore the total of ksh.61,000/= is owing to him by the respondent. The learned trial magistrate found the appellant's case against the respondent baseless. It is stated that the appellant had not established its case against the respondent on a balance of probabilities.

4. On appeal, the appellant put forward the following grounds in its memorandum:

1. The learned magistrate erred in law and in fact for not considering the law involved in the matter and misdirected himself thereby arriving at the wrong decision.

2. The learned magistrate erred in fact and in law in failing to appreciate the practice of valuation of properties for the purposes of obtaining a bank loan. The banks charge the amount due on account of a potential borrower to the borrower's account. This is the custom of usage which the court ought to have taken judicial notice on.

3. The learned magistrate erred in law and in fact in failing to consider that K-rep bank was an agent of the defendant and therefore the plaintiff's claim against the defendant was valid.

4. The learned magistrate erred in law and in fact in failing to appreciate the evidence adduced by the plaintiff's witness and absolutely not rebutted by the defendant who called no witness.

5. The learned magistrate erred in law and in fact in failing to consider and appreciate the circumstances under which the cheque was given and the clear evidence by the plaintiff's witness which was not controverted.

6. The judgement by the magistrate is totally misdirected in view of the evidence adduced by the plaintiff's witness.

7. The learned magistrate erred in failing to award the plaintiff even the nominal sum of kshs.1000 which was incurred by the plaintiff as a direct consequence of the defendant's action.

8. The learned magistrate erred in dismissing the plaintiff's suit with costs to the defendant.

5. When the appeal came up for hearing, learned counsels appearing in the matter made oral highlights. I have re-evaluated the case that was before the trial court.

6. Though the appellant put forward eight grounds of appeal, the same may be summarised to one main ground namely, whether or not the trial magistrate erred in principle in dismissing the appellant's suit.

7. The appellant gave evidence through its managing director, Timothy Njihia (PW1) who stated that before the bank instructed him to carry out the valuation, he was known to the respondent who orally shared with him his intentions of a valuation to be carried on the property of Peter Gathecha Gachiri (the respondent's father). It's the respondent who took the appellant to carry out the valuation on the said property. However, the instructions to carry out the valuation came from the bank (K-rep bank). But the respondent then took the appellant to show him the land for valuation.

The issue to determine is who is to bear the costs for valuation of the said property"

8. The letter of instruction came from K-rep bank, received by the appellant on 19th July, 2011. The letter was all inclusive on the property and the nature of valuation the bank wanted done by the appellant in respect of a charge over the stated property for a financial security for the borrowers the (respondent) the letter of instruction further stated inter alia that:

“..... please discuss your valuation fees with the customer and forward to us the fee note for settlement.”

9. This means that the fee note from the appellant for the valuation was to be settled by K-rep bank and not the respondent.

10. The terms of the letter are clear and unambiguous for clear Interpretation. If there was a different agreement involving the appellant and the respondent concerning who was to settle the valuation fees, the appellant did not tender that to court to help establish its case on a balance of probabilities. The appellant can enforce the payment from the relevant party namely K-rep bank, which was not enjoined in this suit.

11. On the basis of the above background, I find that the trial magistrate's decision to dismiss the appellant's suit was well founded in principle and as such cannot be faulted.

12. The appeal is found to be without merit. It is dismissed in its Entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 16th day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent



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