



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 90 OF 2010

SIMON KIMOTHO.....1ST APPELLANT

MURIU KAMATHI.....2ND APPELLANT

VERSUS

RUTH NJERI GITHIMBA.....RESPONDENT

(Appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Murang'a by Hon. Mr. A.K.Kaniaru delivered on 5th May, 2010 in P.M.C.C No.529 of 2004)

JUDGMENT

Simon Kimotho and **Muriu Kamathi**, the 1st and 2nd Appellants herein, filed a suit against **Ruth Njeri Githimba**, the Respondent and the late Githimba Macharia before the Muranga Principal Magistrate's court, vide Murang'a P.M.C.C.C. no.529 of 2004. In the trial court, the appellants claimed that they entered into a sale agreement with the Respondent and her deceased husband to purchase 0.1acre of land to be excised from Loc.2/Kangare/1315 at a price of Kshs.135,000. The Appellants claimed they paid to the vendors Kshs.123,100 leaving a balance of Kshs.11,900 to be paid once the process of subdivision of the suit land commenced. In the agreement, there was a default clause which stipulated that if there is a default on vendors' part, they would be liable to pay double the money received to the purchasers. On the other hand, if the purchasers default, they would lose half the money already paid to the vendors. It would appear the agreement did go well. The appellants were then forced to file a suit against the vendors claiming for a refund in terms of the sale agreement. It was alleged that the Respondent and her husband failed to have the portion of the land purchased by the Appellants transferred to them. By that time the vendors are alleged to have received a total of Kshs.130,700 on diverse dates between 3/2/1997 and 4/4/1999. In the Plaintiff filed before the trial court the appellants prayed judgment in the sum of Kshs.252,900 plus costs and interest against the Respondent and her late husband. The Respondent filed a defence to deny the appellants claim. No defence was filed by the late Githimba Macharia because he had passed on. In her defence, the Respondent deny ever receiving any money from the Appellants. The case proceeded for hearing and on 7th May 2010 Hon. A.K.Kaniaru dismissed the suit. Being aggrieved, the appellants preferred this appeal and put forward the following grounds:

1. That the learned Magistrate erred in law and in fact by dismissing the Appellants' suit despite the overwhelming evidence tendered in court which weighed heavily in the Appellants' favour.
2. That the learned Magistrate erred in law and in fact by dismissing the Appellants' suit on

mere technicality on points of law which ought to have been raised as a preliminary point before the matter proceeded for hearing.

3. That the learned Magistrate erred in law and in fact by dismissing the suit as he did when the Respondent had admitted in her Statement of Defence of having received part of the purchase price from the Appellants albeit on behalf of her late husband.
4. That the learned Magistrate erred in law and in fact in ignoring and failing to consider the fact that the suit as filed was not one for specific performance but for a refund of money paid and received which the Respondent had acknowledged receipt of.
5. That the learned Magistrate erred in law and in fact in failing to note in his judgment that the Appellants evidence was uncontroverted after the Respondent failed to call any evidence.
6. That the learned Judge erred in law and in fact in failing to note that the Appellants suit was as against the Respondent and her husband jointly and severally and therefore the death of one of the Defendants did not invalidate the Appellants' suit.
7. That the learned Magistrate erred in law and in fact by holding that the failure by the Appellants to file an application for substitution after the death of the 1st Defendant meant that the entire suit filed by the Appellants had abated.
8. That the learned Magistrate erred in law and in fact by failing to consider the evidence tendered by the Appellants and the supportive documents tendered in evidence which were not controverted.
9. That the learned Magistrate erred in law and in fact in failing to note that since the Appellants suit was not one for specific performance, section 6 of the Land Control Act could not apply more so after the sale was rescinded.
10. That the learned Magistrate erred in law and in fact in failing to find that the Respondent had failed to adduce evidence to show that she was not a party to the Sale Agreement dated 8th October, 1998.
11. That the learned Magistrate erred in law and in fact in disregarding the Appellants' evidence and their counsel's submissions and thus arrived at a wrong decision.

When the appeal came up for hearing learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have considered the rival written submissions. Though the appellants put forward a total of eleven (11) grounds, it would appear those grounds were reduced to three (3) when the parties filed their submissions.

The first ground argued is to the effect that the trial Magistrate erred when he held that the case was *res judicata*. The Respondent urged this court to agree with the decision of the trial court. There is no dispute that the parties litigated before the Kigumo Land Disputes Tribunal whose decision was later adopted as the decision of Muranga Senior Principal magistrate's court. The Appellants aver that the decision of the Kigumo Land Disputes Tribunal was nullified by the Provincial Land Disputes Appeals Committee hence the doctrine of *res judicata* does not apply. I agree with the Appellants that the learned Senior Principal Magistrate misapprehended the point when he concluded that the matter was *res judicata*. In the case before the tribunal, the issue in dispute was a claim over land. The Kigumo Tribunal Disputes Tribunal gave judgment in favour of the appellants which was later nullified by the Provincial Land Appeals Committee. The matter now before this court is in respect of a refund of money though based on the same agreement.

The second issue is in respect of representation. It is the appellant's submission that the trial Magistrate erred when he dismissed their suit on the basis that the 1st Respondent had purported to testify on his behalf and on his behalf of his co-plaintiff. With respect, I agree with the appellants. The record does not show that the 1st appellant indicated that he was testifying on behalf of his co-plaintiff. The learned

trial Magistrate further erred when he concluded that the evidence of the 1st Plaintiff would not prove the case of the 2nd Appellant, yet the evidence presented before him included an agreement jointly executed by the 1st and 2nd Appellants. Looking at the evidence presented, I think the evidence of the 1st Appellant sufficiently proved the Appellants' claim on a balance of probabilities. In any case, the advocate who prepared the sale agreement for the parties testified presented the agreement which clearly established the Appellants' case.

The third ground argued on appeal is to the effect that the trial Magistrate erred when he held that the death of the Respondent's husband, Githimba Macharia and for lack of appointment of a legal representative for his estate rendered the Appellants' case incapable of being enforced as against the Respondent. There is no dispute that Githimba Macharia passed away on 9th May 2004 and no letters of representation taken. He has therefore not been substituted. The suit filed before the trial court sought for judgment against the Respondent and her late husband jointly and severally. The appellants wanted to purchase a portion of land to be excised from a parcel of land jointly registered in the names of the Respondent and the deceased. The duo jointly signed the agreement. What I know is that the suit against the Respondent's deceased husband abated but not that against the Respondent. In the circumstances of this case the Respondent, if found liable will have to bear responsibility of having been sued jointly and severally. The failure to substitute the deceased did not make the appellants' claim lost. To this extent the learned Senior Principal Magistrate erred.

In the end, I am convinced the appeal has merit. I find that the appellants established their claim to the required standards on a balance of probabilities. The appeal is allowed. The order dismissing the suit is set aside and is substituted with an order entering judgment as prayed in terms of prayers (1) and (2) of the Plaint in favour of the Appellants and against the Respondent. The Appellants shall have costs of the appeal.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the absence of the parties but with Notice.



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