



Fitzgerald v Muganda Wasulwa t/a Keysian Auctioneers (Civil Appeal 421 of 2018) [2024] KEHC 9390 (KLR) (Civ) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL 421 OF 2018**

DKN MAGARE, J

JULY 25, 2024

BETWEEN

MARYANNE FITZGERALD APPELLANT

AND

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable D.W. Mburu delivered on 10/8/2018 in Milimani CMCC No. 2151 of 2009. The appeal is materially on the grounds that the learned trial court erred in law and fact:
 - a. In finding that the Appellant had no locus standi to sue in the lower court suit.
 - b. By failing to find that the Appellant had capacity to sue for breach of fiduciary duty by the Respondent.
 - c. By finding that the Appellant had not proved irregularities in the process of sale of the suit motor vehicle.
2. The Appellant as such prayed for reliefs that the Judgment be set aside and replaced with an order allowing the suit with costs.

Pleadings

3. In the Complaint dated 8/4/2009 and amended on 6/5/2009, it was pleaded that on 5/11/2008, the Plaintiff instructed the defendant to carry out attachment and sale of a Judgment debtor's property. The Judgment-debtor was the Plaintiff's former husband and the right to execute had accrued pursuant



to the order issued on 27/8/2008 in Maintenance Cause No. 10 of 2008 Maryanne Fitzgerald v Wayne Long Edward.

4. The Plaintiff is the Appellant herein. She averred that the defendant, as her instructed auctioneer attached her former husband's motor vehicle Registration No. KAV 508Q Nissan Patrol and purported to have sold it at Ksh. 360,000/-. According to the Appellant, the alleged sale was fraudulent as there was no advertising and the sale was at an undervalue.
5. The Appellant therefore prayed for reliefs for the release of the suit motor vehicle to her as decree holder and the cancellation of the transfer and general damages.
6. The Respondent entered appearance and filed defence dated 13/11/2012 denying the averments in the plaint and inviting the Appellant to strict proof.

Evidence

7. During trial, the Appellant as Plaintiff relied on her witness statement and bundle of documents filed in court and testified that she obtained an order of Maintenance against Wayne Edward who was the owner of motor vehicle registration number KAV 508Q Nissan Patrol.
8. That the sale was at Kshs. 360,000/= which was undervalue as the correct value ought to have been Ksh. 3.8 million as placed by DT Dobie. In cross examination, it was her admitted case that she was not the registered owner of the motor vehicle. That the amount to be recovered was Kshs. 302,000/= per the warrant of attachment dated 7/11/2008. Further, that there was no proof of the sale by public auction.
9. PW2 was William Muiruri Gitata. He relied on his report dated 3/4/2007. It was his case that the motor vehicle was sold to Edward Wayne on 10/5/2006 and was valued at Kshs. 3,800,000 as at 3/4/2009. On cross examination, it was his case that he could not have done a report without seeing the motor vehicle. That the instructions to prepare the report were given to DT Dobie where he worked and he was not a valuer by profession. Further, that the valuation was based on the market price.
10. The Respondent also called one witness, Muganda Wasulwa. He relied on his witness statement dated 26/7/2013 and bundle of documents dated 13/12/2012. It was the stated case of the Respondent that the Appellant was the Decree-holder and one Edward Wayne was the Judgement-debtor. That he proclaimed the suit motor vehicle on 8/12/2008 and it was sold on 30/1/2009. The motor vehicle was assessed by Poly Tech Assessors.
11. The lower court considered the suit and rendered its judgment on 10/8/2018. In the judgment, the court dismissed the Plaintiff's suit. Aggrieved, the Appellant lodged the Memorandum of Appeal hence this appeal.

Submissions

12. The Appellant filed submissions dated 23/11/2023. It was submitted that the Appellant instructed the Respondent to execute the warrants of sale and the Respondent accepted and so there was agent/principal relationship with fiduciary duty on the part of the Respondent. They relied on *Erastus Maina Muraya v Kiplege Zochin Kihure* (2016) eKLR to canvass the point that agency was a fiduciary relationship.
13. Reliance was also placed on Section 109 of the *Evidence Act* to submit that the burden of proof lied on a person who wished the court to believe an alleged fact. I was urged to allow the appeal.
14. On the part of the Respondent, they filed submissions dated 22/1/2024. It was submitted that the Appellant had no locus standi as the Appellant was not the registered owner of the suit motor vehicle.



They submitted that the objection ought to have been filed by Edward Wayne the registered owner pursuant to Section 34 (1) of the *Civil Procedure Act*.

15. They also submitted that the evidentiary burden of proof was on the Appellant to discharge on the alleged fraudulent and undervalue sale and which she failed. They cited Sections 107 and 108 of the *Evidence Act*. I was urged to dismiss the Appeal.

Analysis

16. I have considered the appeal as well as submissions and authorities filed in court. The issue is whether the trial court erred in dismissing the Appellant's suit.

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

18. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

19. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the judges in their usual gusto, held by as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

20. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

21. Therefore, the trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial court are consistent with the evidence generally, this court should not interfere with the same.



22. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-
- “It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
23. On locus standi, it was the common position of the parties that the suit arose from execution proceedings between the auctioneer and his client. The client was the aggrieved Appellant pursuant to instructions to the Auctioneer/Respondent to attach and sale the property of one Edward Wayne in execution of a spousal maintenance order. The attachment eventually crystalized and motor vehicle registration number KAV 508 Q Nissan Patrol was sold at Kshs. 360,000/-.
24. All these were matters that were not disputed. The point of disagreement was based on the procedure prior to the sale and the sale value. The Appellant’s case was that there was no advertising for public auction and the sale was grossly undervalued.
25. In *Law Society of Kenya -Vs- Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that;-
- “Locus Standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of *Alfred Njau and Others .Vs.. City Council of Nairobi* (1982) KAR 229, the Court also held that;-
- “the term Locus Standi means a right to appear in court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
26. Clearly, the Appellant had sufficient legal interest in the motor vehicle. She had a decree against the owner of the motor vehicle. In my view, upon proclamation, the motor vehicle became a commodity in which the Appellant had a financial interest up to the value of the decree. It was thus not proper to hold that the Appellant had no locus standi to sue simply because she was not the registered owner of the motor vehicle. If locus standi were to be such constrictively construed, claimants on motor vehicles and other chattels being sold to avoid a decree of court would not have a chance in court to stop such sale and hold the goods intact for the purpose of assuring their interest, upon crystallization.
27. I am consequently unable to agree that the Appellant had no sufficient legal interest in the motor vehicle to warrant locus standi.
28. Be that as it may, I have to consider whether the Appellant proved her case. The Appellant’s case was on breach of due process of sale by public auction leading to an undervalue. There are also allegations of fraud on the part of the Respondent.
29. I understand the issue of liability is based on proof on a balance of probabilities. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), where he stated that:
- [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.



in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

30. Similarly, in *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

31. Therefore, it follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Respondent, depending on the circumstances of the case.

32. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

33. Similarly, Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

34. Furthermore in *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”



35. In this case, it was the Appellant to prove irregularities in the procedure, the undervalue and the fraudulent dealing on the part of the Respondent.
36. I have perused the pleadings and evidence produced in court. I note that the motor vehicle was sold on 7/2/2009 for Ksh. 360,000/=. There is a letter dated 3/4/2009 certifying that the present market value of the motor vehicle would be Kshs. 3,800,000/-. However, the claim for Kshs. 3,800,000/- as market value appears to be based on an opinion of the witness who testified that he was not a motor vehicle assessor. It is not a report detailing the reasoning behind the projected value and is thus of lesser evidentiary value to prove a fact. In any event, the Appellant amended her pleadings and deleted a claim for special loss of Kshs. 3,800,000/-.
37. I therefore find no basis to interfere with the finding of the lower court that the Appellant failed to discharge her burden of proof.
38. As to the allegations of fraud, the need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR where the court stated that –

‘It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.”

In *Armitage v Nurse* [28] Millett L.J. having cited this passage continued:

“In order to allege fraud it is not sufficient to sprinkle a pleading with words like “willfully” and “recklessly” (but not “fraudulently” or “dishonestly”). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.”

In *Paragon Finance plc v D B Thakerar & Co* the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil



standard of proof in fraud cases. It is more burdensome: (see also the cases of Mpungu & Sons Transporters Ltd –v- Attorney General & another. In Jennifer Nyambura Kamau v Humphrey Nandi, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities.’

39. Clearly, the Appellant did not specifically prove the manner in which the Respondent could have been fraudulent in the manner pleaded.
40. Therefore, I find no merit in the appeal.

Determination

41. In the circumstances, I make the following orders:
 - a. The Appeal is dismissed.
 - b. Costs of Ksh. 55,000/= to the Appellant.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JULY, 2024.

Judgment delivered Through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah

