Sawe v Barclyas Bank of Kenya Limited & another (Civil Case 28 of 2019) [2024] KEHC 16125 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16125 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 28 OF 2019

JRA WANANDA, J

DECEMBER 20, 2024

BETWEEN

RICHARD KIPYEGO SAWE .... PLAINTIFF

AND

BARCLYAS BANK OF KENYA LIMITED .... 1ST DEFENDANT

CYRUS KIPLIMO KIPTANUI .... 2ND DEFENDANT

JUDGMENT

1. This is an old matter and it is unfortunate that it has taken this long to be concluded. The suit has had a long and chequered history. The suit was filed on 5/03/2014, initially as Eldoret High Court (Environment and Land Division) Case No. 70 of 2014. That was before the Environment and Land Court (ELC) was established as a fully-fledged Court. The suit was dismissed on 18/06/2018 for want of prosecution but was later reinstated vide the Ruling of Ombwayo J dated 25/04/2019. By the same Ruling, the suit was transferred to the High Court (Civil Division) where it was assigned the current case number, namely, Eldoret High Court Civil Case No. 24 of 2019. The suit has therefore been in Court for almost 11 years now, which is unacceptable. A commercial suit of this nature should not be held up in Court for such a long time. Be that as it may, the task of bringing the matter to an end now finds itself in my hands.

2. In the Plaint filed on 5/03/2014 through Messrs J.K. Kiplagat & Co. Advocates, the Plaintiff prayed for orders as follows:

   a. An injunction restraining the Defendants by themselves, servants and/or agents from disposing off, transferring and/or in any other way interfering with the Plaintiff's parcel of land LR No. Karuna/Sosiani/Block 1 (Arbabuch)/10 measuring approximately 22.257 Ha.

   b. Costs of the suit.

c. Interest on (a) and (b) above.

3. In the body of the Plaint, it was pleaded that the Plaintiff is the owner of the said parcel of land known as LR No. Karuna/Sosiani/Block 1 (Arbabuch)/10 (hereinafter referred to as "the suit property") situated within Uasin Gishu County. It was further pleaded that on or about 14/05/2012, the Defendants colluded and used unlawful means to take the Plaintiff's title deed for the suit property and other transfer documents in respect thereto to be used as security in borrowing a bank loan by the 2nd Defendant from the 1st Defendant amounting to a sum of Kshs 3,350,000/-. It was pleaded further that the 2nd Defendant has defaulted in paying the said loan, that the Defendants are in the process of selling and transferring the suit property, and that the Plaintiff has never at any one time agreed with the Defendants to surrender the title deed to be used as security for the loan. It was also pleaded that the suit property is the only family land in the Plaintiff's family of 3 wives, 15 children and 14 daughters, that the Defendants have colluded to defraud the Plaintiff of the suit property and that unless restrained, shall make the entire family suffer irreparable loss and damage. The Defendants were also accused of colluding to deprive the Plaintiff of his said only parcel of land without consent from the entire family.

4. In response, the 1st Defendant filed its Statement of Defence on 3/06/2014 through Messrs Otieno, Ragot & Co. Advocates, and which was, generally, a denial of all the matters alleged in the Plaint. On his part, the 2nd Defendant did not enter Appearance nor file a Defence.

5. The case then proceeded to full trial before me in which the Plaintiff called 3 witnesses and the 1st Defendant called 1 witness. Besides not entering Appearance nor filing a Defence, the 2nd Defendant also did not participate in the trial. All the Plaintiff's witnesses testified on 14/02/2023 while, after several adjournments, the 1st Defendant's said witness eventually testified on 13/12/2023.

Plaintiff's case

6. PW1 was the Plaintiff, Richard Kipyegon Sawe. He testified in the Keiyo language which was then translated to the English language. Led in his evidence-in-chief by his Counsel, Mr. Kiplagat, he stated that he has no knowledge of the current whereabouts of the 2nd Defendant and that the 2nd Defendant borrowed his title deed for the suit property because he (2nd Defendant) had sold another person's maize and wanted to use the title deed as security because that other person was harassing him. He testified that for this reason, he handed over to the title deed to the 2nd Defendant 9 years ago, that the 2nd Defendant had told him that he had been sued/arrested because of the sale of maize and that he (2nd Defendant) had sold somebody's maize. He stated that he got curious when the 2nd Defendant took long to return the title deed and therefore hired a Lawyer to follow-up and who conducted and obtained a Search Report which revealed the existence of the Charge the subject of this suit. He then adopted his Witness Statement and produced a copy of the Search Report as his only exhibit. He denied any knowledge of the loan and also denied that he was given any money for giving out the title to the 2nd Defendant. He then stated that the 2nd Defendant is his brother's son whom he had believed was genuine and that this was the first time that he had given out the title.

7. Under cross-examination by Ms. Onyango Advocate, he conceded that the allegation that he gave the title deed to the 2nd Defendant in connection to sale of maize by the 2nd Defendant was not captured in his Witness Statement. He also confirmed that the Search Report indicates that the 1st Defendant's Charge on the title deed was registered on 14/05/2012. He also conceded that in his Witness Statement, he stated that he had signed some documents unknowingly. When shown the Letter of Offer for the loan and the Letter of Guarantee, he stated that he could not see them clearly due to his poor eyesight but stated that it is not him who signed them. He stated that when he signed some documents, he was

not accompanied by anyone else and there were no Advocates involved. He however conceded he had nothing before Court to indicate that he was forced to so sign. According to him, his family was not aware of the transaction, that he has 3 wives and 29 children and that all the 3 wives are still alive but that he would not be calling any of them as a witness. He also conceded that he has not produced anything to prove his marital status. When the Court asked him his age, he responded that he is 93 years old.

8. In re-examination, he stated that he lives in the same suit property with his family, that he never signed any document before an Advocate and that he does not even know any Advocate by the name "Kiplagat" referred to in the documents. He stated that he signed because the 2nd Defendant told him that the case was in Court, that he signed after he gave out the title, that he was duped by the 2nd Defendant, not forced, and that the 2nd Defendant even knelt down to plead with him to release the title. According to him, he only discovered that the 2nd Defendant had taken the title to the bank when he hired a Lawyer who carried out investigations.

9. PW2 was one Reverend John Kipsang Kibyegon. He adopted his Witness Statement and stated that the Plaintiff is his father and that their family lives on the suit property. He testified that he learnt that the title was at the 1st Defendant bank when their father called the entire family sometime in 2013-2014 and informed them that the 2nd Defendant had borrowed the title deed and that it had taken too long to be returned. He confirmed that the 2nd Defendant is his cousin but that they tried looking for him but never found him and that he is evasive. He stated further that it is at this point that they hired a Lawyer, who conducted a Search and discovered that the title deed was used to take a loan from the 1st Defendant bank sometime around 1992. In cross-examination, he insisted that they were not consulted as a family before the loan was taken.

10. PW3 was one Thomas Kipchumba Kibyegon, who also testified that he, too, is a son of the Plaintiff. He adopted his Witness Statement and stated that he is a retired teacher, and that all their family lives on the suit property. He, too, confirmed that the 2nd Defendant is his cousin and that he duped their father to give him the title deed for the suit property, that he (PW3) leant about it around 2013 when their father called the family for a meeting and disclosed that fact to them. He stated that their father told them that the 2nd Defendant told him that he had been sued and needed the title deed to bail himself out.

1st Defendant's case

11. DWI was one Samuel Njuguna who described himself as a Legal Officer at Absa Bank (the successor to the 1st Defendant). He was led in his evidence-in-chief, this time by Ms. Anuro Advocate. He, too, adopted his Witness Statement and produced a bundle of documents which were then marked as exhibits, including a Letter of Offer, Letter of Guarantee, Application for Consent of the Moiben/Ainabkoi Land Control Board, the Charge instrument and the Land Control Board Consent itself.

12. Under cross-examination by Ms. Cherop Advocate, he testified that a look at the documents indicate that the signatures thereon were witnessed by bank officials but that he was himself not one of such bank officials and that he did no so witness. He confirmed that no spousal consent was obtained in this case, and stated that although it is indicated that the signatures were appended in the presence of an Advocate, such Advocate is not being called as a witness. He testified that although the bank, in practice, always conducts Valuations of securities, he was not certain whether in this case, valuation of the suit property was conducted. According to him, the loan has not been repaid, and that statutory notices were sent to the Plaintiff as Chargor although there were no copies thereof in Court. He stated that he does not know who presented the title deed to the bank and conceded that he has no proof that the Plaintiff attended before the Land Control Board.

Submissions

13. Upon close of the trial, it was agreed, and directed, that the parties would file written Submissions. Pursuant thereto, the 1st Defendant filed its Submissions on 13/12/2024. On the part of the Plaintiff however, up to the time of concluding this Judgment, I had not come across any Submissions filed for or on behalf of the Plaintiff, not even in the Judiciary Case Tracking System (CTS) portal. As regards the 2nd Defendant, as aforesaid, he never participated in the case.

1st Defendant's Submissions

14. Counsel for the 1st Defendant pointed out that although the Plaintiff alleges that he handed over the title deed to the 2nd Defendant to assist him in a Court case, particulars of such case have not been disclosed. She also referred to the Plaintiff's Witness Statement in which the Plaintiff had stated that he is an illiterate man and was conned by the Defendants "to sign some papers without knowing the contents or consequences". According to Counsel, this was an acknowledgment by the Plaintiff that he indeed signed the documents and which, although he feigned eye-sight challenges, he confirmed during the trial. Regarding PW2 and PW3, Counsel submitted that the two were not privy to the transactions giving rise to the loan and were also not present when the documents were being executed. According to Counsel therefore, the two could not speak on the authenticity or lack thereof, of the signatures on the documents and that their evidence is based on what they were told by the Plaintiff and thus hearsay.

15. She referred to Section 107 and 108 of the *Evidence Act* and submitted that it is the Plaintiff who bears the burden of proof in the case. She cited several authorities and submitted that it was also the Plaintiff who bore the burden of proving his allegation that the signatures on the documents filed in Court are forgeries and that it is a settled fact that for a signature to be deemed and certified as forged, a document examiner's Report must be produced in that regard. She also submitted that the Plaintiff had also not produced any documents previously executed and containing his alleged correct signature and/or thumb-print for comparison. She cited Section 112 of the *Evidence Act* and submitted that the Plaintiff's correct thumb-print and/or signature is squarely within the Plaintiff's own knowledge. She also cited several authorities. According to Counsel, had the Plaintiff adduced evidence that his signature was forged or his title taken through collusion between the Defendants then the burden of proof would have shifted to the 1st Defendant to show that indeed it is the Plaintiff who signed the documents, that it is at that time that the Advocate before whom the Plaintiff appeared would have needed to be called as a witness to rebut what the Plaintiff would have said, as opposed to the presumption presented by the Plaintiff that the Advocate ought to have automatically been called as one of the Defendant's witnesses.

16. Regarding the issue of the Plaintiff's family's consent not being sought, Counsel observed that in cross-examination, the Plaintiff confirmed that he had not produced anything to prove the fact of marriage, that none of the alleged 3 wives appeared in Court to testify, that not a single birth certificate for the alleged 29 children was produced and that these claims therefore, like all the other claims by the Plaintiff stands unproven. She contended that the bank cannot be invited to disprove facts which have not been proved and cited Sections 3(2), (3) and (4) of the *Evidence Act*. Regarding the requirement for spousal consent before a matrimonial property may be charged, she submitted that the Charge instrument was registered under the provisions of the Registered *Land Act* (repealed), that such requirement same was not explicitly set out in any law until enactment of the *Land Act* 2012 which came into effect on 2/05/2012 and that in any event, Section 78(1)(b) of the Act provides in clear and unequivocal terms that the requirement for spousal consent does not apply in situations where the same was not required in the repealed laws. She also cited Section 162 of the Act on savings and transitional provisions to the

Act and several authorities thereon. In conclusion Counsel prayed that the suit be dismissed with costs to the 1st Defendant.

Determination

17. The issues that arise for determination in this case are evidently the following:

    i. Whether the 1st Defendant lawfully obtained the title to the suit property owned by the Plaintiff and lawfully registered it as security (Charge) for the loan the subject of this suit.

    ii. Whether therefore the Charge registered against the title is valid.

18. It is not in dispute that the Plaintiff is the registered owner of the suit property known as L.R. No. Karuna/Sosiani/Block/1(Arbabuch)/10. The Plaintiff's case is that he filed this suit in the year 2014 when he learnt that the title to the suit property had been charged as security or collateral for a loan of Kshs 3,350,000/- advanced to the by 2nd Defendant by the 1st Defendant bank. In his evidence-in-chief, the Plaintiff stated that, although he voluntarily handed over the title deed to the 2nd Defendant who is his nephew, he never handed it over for the purposes of the 2nd Defendant charging it as security for a loan and that he only released it to the 2nd Defendant to assist him in a Court case which the 2nd Defendant was facing as a result of selling maize belonging to some people.

19. What I note however is that although the Plaintiff claims that he released the title for the purposes of assisting the 2nd Defendant in a Court case, he does not explain what exact nature of assistance was to be achieved through the title deed. There is no disclosure whether it was a criminal case or a civil case, and the particulars of the alleged Court case has also not been given. The only logical conclusion that can be deduced is that either the title would be used to stand as collateral for bail or bond in a criminal case or as security to be held by the 1st Defendant's creditors upon a promise by the 2nd Defendant to settle a debt. The third possibility would be that the title would be offered as security for a loan and proceeds whereof would be then be used to pay off the 1st Defendant's creditors. As aforesaid, I am simply engaging in speculation as the Plaintiff did not make any disclosure on these issues. As the 2nd Defendant never participated in this case, there is no other source of obtaining answers to these questions. What would be expected however in all these circumstances is that the Plaintiff must have expected to sign some kind of documentation. Indeed, the Plaintiff confirmed that he did sign such documents after handing over the title deed to the 2nd Defendant but which allegedly, he cannot recall and/or did not understand.

20. Indeed, as aforesaid, on its part, the 1st Defendant produced in evidence a bundle of documents which were then marked as exhibits, and which included the Letter of Offer dated 30/04/2012, Letter of Guarantee dated 12/05/2012, Application for Consent of the Land Control Board and the Charge Instrument registered on 14/05/2012. All these documents bear a signature claimed to that of the Plaintiff and appended by him. Also produced is the Consent of the Land Control Board dated 8/03/2012.

21. Although the Plaintiff claims that he was duped by the 2nd Defendant into signing documents and handing over the title deed because is illiterate, I am unable to accept this allegation. In my view, it is an afterthought. The Plaintiff is an adult and it has not been alleged that at the time of handing over the title deed to the 2nd Defendant and signing the documentation, he was not of sound mind, sober or fully in charge of his mental faculties. At the time of testifying, he stated that he was 93 years old which means that he was about 80 years at the time that he handed over the title deed and signed the documents. He was a husband of 3 wives and was a father to 29 children in total and owned the huge tract of land the subject hereof measuring more than 22 Hectares (approximately 55 acres). Yes, he may

have been illiterate but in view of the other aspects of his life set out above, he was clearly well-exposed and a community elder. A title deed of a 55-acre parcel of land is not a mere of piece of paper that a respected and well-exposed community leader such as the Plaintiff would simply so casually merely just hand over to a third party and also proceed to blindly sign documents in respect thereof without seeking assurances of its safety or without knowing the purpose for which the title is going to be used for. Considering his status and position in the community, I refuse to believe that the Plaintiff was thar careless or naïve. No wonder he was visibly at pains during the trial to convince the Court that he signed the documents not knowing what they contained. If it is true that he had no knowledge of what he was signing, he did not say what then, in his understanding, he thought he was signing. It is also telling that in carrying out the transaction with the 2nd Defendant, he deliberately and actively maintained top secrecy about it. He ensured with great success that no one in his family knew about it, not any of his 3 wives and not any of his 29 children. If he did not wish to confide in his family members, he also does not state why he did not at least consult some of his trusted friends. These actions do not signify the conduct of an innocent, naïve or unsophisticated peasant being taken advantage of but rather a well calculated and deliberately secretive plan. I say because he does not disclose why he went to such great lengths to hide the act and keep his entire family in the dark. The fact that he handed over the title deed to the 2nd Defendant and signed documents in great secrecy betrays the cries of innocence by the Plaintiff. I am not convinced that the Plaintiff handed over the title deed without receiving some kind of consideration from the 2nd Defendant as I am also not convinced that the Plaintiff did not in fact share in the proceeds of the loan with the 2nd Defendant or receive part of it. For the above reasons, I am not persuaded by the Plaintiff's story that he handed the over the title deed and signed documents without knowing that it was to serve as security for the bank loan.

22. I may also mention that the Plaintiff did not impress me as an honest or credible litigant. I say so because first, his concession that he is actually the one who gave out the title deed to the 2nd Defendant only came out for the first time during his evidence-in-chief. I have looked at his Plaint, his Witness Statement and even his Application for interlocutory injunction and observe with curiosity that nowhere in all these pleadings did the Plaintiff expressly disclose that he is actually the one who willingly and voluntarily gave out the title deed. In fact, a reading of the said pleadings leaves one with the false impression that the Defendants obtained the title deed fraudulently and even without the Plaintiff's knowledge, perhaps even by stealing it from him or by use of force. This, it appears, is what was in fact the Plaintiff's intention. My take is that he knowingly intended to mislead the Court, at least at the stage of applying for the interlocutory injunction. The withholding of the said information, in my view, amounted to deliberate non-disclosure of material facts Since there was no disclosure made by the Plaintiff as aforesaid, the further allegations also made by him for the first time in his evidence-in - chief that he was duped by the 2nd Defendant because he was old and illiterate or that he gave out the title deed to the 2nd Defendant to assist him in a Court case were also never disclosed in the pleadings and could not therefore have been procedurally introduced at the evidence-in-chief stage. They were clear afterthoughts meant to irregularly bolster or strengthen the Plaintiff's case.

23. Regarding the requirement for spousal consent before a Charge is registered, Section 79(3) of the *Land Act* provides as follows:

> " A charge of a matrimonial home, shall be valid if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons."

24. On its part, Section 28(a) of the *Land Registration Act*, No. 3 of 2012 stipulates that:

> "Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –
>
> a. Spousal rights over matrimonial property."

25. The phrase "Matrimonial home" is then defined in the *Land Act*, 2012 to mean "any property that is owned or leased by one or both spouses and occupied by the spouses as their family home."

26. Although the sons of the Plaintiff (PW1 and PW3) claim that the Plaintiff's family was not consulted before the Charge was registered, in law there is no requirement that the whole family need to be so consulted. Only the consent of a spouse is required. It is true, as submitted by the Counsel for the 1st Defendant bank that the requirement that consent of the spouse be provided before matrimonial property may be charged was not explicitly set out in our laws until the enactment of the *Land Act* of 2012 which came into effect on 2/05/2012. Prior to this statute therefore, there was no law that required spousal consent before a Charge could be created, and spousal rights were also not expressly recognised as overriding interests. The Court of Appeal addressed this point in the case of Stella Mokeira Matara vs Thaddeus Mose Mangenya & Another, Court of Appeal at Kisumu [2016] eKLR. In this case however, the Search Report produced in evidence indicates that the Charge was registered on 14/05/2012, thus 12 days after the *Land Act* of 2012 had come into effect on 2/05/2012. Since the Plaintiff's and his sons' testimony that the family, including the Plaintiff's 3 wives, all reside on the suit property as "matrimonial home" was not controverted, I find that under these circumstances, the Charge was subject to the *Land Act* of 2012 and that Spousal consent was therefore required. On this point therefore, I disagree with the 1st Defendant's Counsel.

27. However, although as aforesaid, the Plaintiff testified that he has 3 wives, it is strange that in this case, it is not a spouse or the spouses of the Plaintiff who have come out to complain about their consents not being sought or obtained but rather, it is the Plaintiff himself who is exploiting that technicality to seek to avoid the liability. This, I find to be an abuse of the judicial process and an act of bad faith. The Plaintiff cannot be allowed to take advantage of his own breach of the law of failing to provide the spousal consent and use it to benefit or escape his lawful obligations. None of his alleged 3 wives has been joined as a co-Plaintiff and none even testified as a witness.

28. Regarding the Plaintiff's allegation that his signature claimed to have been appended on the various documents was forged, as aforesaid, I have already found that the allegation cannot stand since he concedes that indeed, he did sign some documents, save that allegedly, he did not understand the contents thereof. In any event, the Plaintiff had the liberty to hire a document examiner to assess the signatures and file a Report to confirm to the Court that the signature was indeed a forgery. Despite bearing the burden of proving his said allegations, the Plaintiff did not take this option. How then is the Court supposed to verify that the signature was a forgery in the absence of any expert opinion on the issue? The Plaintiff does not even allege that he lodged a complaint with the police for investigations.

29. Regarding burden of proof, Section 107, 108 and 109 of the *Evidence Act* provide as follows:

> " 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

30. I also cite the Court of Appeal decision in the case of Kinyanjui Kamau v George Kamau [2015] eKLR, in which it held as follows:

> " It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged".

31. A party alleging fraud must therefore, besides specifically pleading the particulars of fraud, also and specifically lead evidence to prove such allegations. This was also the holding in the other Court of Appeal case of Vijay Morjaria v Nansign Madhusihn Darbar & Another [2000] eKLR, where the following was stated:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".

32. As regards the standard of proof, the Court of Appeal in the case of Kinyanjui Kamau v George Kamau (supra), guided as follows:

> " It is trite law that any allegations of fraud must be pleaded and strictly proved. (See Ndolo v Ndolo [2008] 2 KLR (G & F) 742 wherein the court stated that: -
>
> > "........We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases ...."

33. In view of the foregoing, except in few specified circumstances, which this case is not, the general rule is that the burden of proof always lies on the Plaintiff. It is therefore the Plaintiff who will fail in this case if the Court is left in a position where it is unable to conclusively resolve which of the conflicting sets of facts presented is the true position. For that reason, I find that the Plaintiff has failed to demonstrate that he did not voluntarily consent to or authorize the registration of the Charge against the title deed to the suit property.

34. In the end, and although the 1st Defendant may not have sufficiently also handled the process leading to the registration of the Charge in a very diligent manner, particularly the failure to ensure spousal consent was obtained, weighing the matter holistically, I rule against the Plaintiff and find that the Charge was valid.

Final Orders

35. The upshot of my findings above is that this suit is dismissed with costs to the 1st Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF DECEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Kiplagat for the Plaintiff

Mr. Ndolo h/b for Ms. Onyango for the Defendant

Court Assistant: Brian Kimathi