Sakuda v Pyrotechnics Company Limited (Civil Appeal 71 of 2021)
[2022] KEHC 10612 (KLR) (26 April 2022) (Judgment)

Neutral citation: [2022] KEHC 10612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL 71 OF 2021

SN MUTUKU, J

APRIL 26, 2022

BETWEEN

PETER OLE MOONKA SAKUDA ..... APPELLANT

AND

PYROTECHNICS COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgement of the Chief Magistrate Kajiado Law Courts delivered on October 27, 2021 by Hon Edwin Mulochi, Resident Magistrate)

JUDGMENT

The Appeal

1. The Appellant being aggrieved by the decision of the lower court (Hon Edwin Mulochi, RM) delivered on October 27, 2021, has preferred this Appeal. Through a Memorandum of Appeal dated February 1, 2022 and filed on the same date, the Appellant has raised the following grounds of appeal:

    i That the trial Magistrate was misinformed as to the true acreage of the suit property and the fact that the Respondent was only leasing 2.02 HA, of the total acreage of Kjd/ntashart/16379.

    ii Clause 2 (d) of the Lease Agreement was defective, ambiguous and incapable of being implemented legally. The said clause stipulated that the Appellant should maintain an all-round 250 meters boundary from the exterior perimeter of the suit property. The Appellant's land proprietorship rights were restricted only to the boundaries of Kjd/ntashart/16379

    iii The trial Magistrate was misinformed by relying on the two Deed plans; Kjd/ntashart/16379 dated January 21, 2011 and Kjd/ntashart/3887 dated August 23, 2018 to determine boundary measurements of Kjd/ntashart/16379.

    iv The trial Magistrate was misinformed in finding that one side of the boundary of the leased property (Leased Area) was less by 200 meteres when the alleged discrepancy in

measurements was on the exterior boundaries of the main plots Kjd/ntashart/537and Kjd/ntashart/3887.Boundary measurements of the leased area was not a factor in consideration but the total acreage of 5 acres plot.

v The trial Magistrate was misinformed that the capacity in which the Respondent could store his goods was reduced by half when they had only leased 5 acres out of the total 72.22 acres which remains unoccupied, save for the homestead which was preexisting before the execution of the agreement.

vi The trial magistrate was misinformed to finding that the Appellant was aware of the discrepancies and therefore acted with intent to defraud the Plaintiff. The Respondent's counsel was the sole author and witness of the lease agreement and therefore they owed the Appellant same and equal duty of care as the Respondent. The mistake of counsel should not be met against the client.

vii The learned trial magistrate erred in law and fact by dismissing the Defendant's counterclaim, therein, and awarding the Plaintiff costs.

2. The appeal was canvassed by way of written submissions.

Appellant's Submissions

3. The Appellant filed his submissions dated January 31, 2022. He has identified nine (9) issues for determination touching on the enforceability of Clause 2 (d) of the Lease Agreement; whether the trial magistrate erred in law and fact by considering Deed Plans for Kjd/ntashart/537 and Kjd/ntashart/3887 in determining boundary measurements for Kjd/ntashart/16379; whether the variation in measurements of the two Deed Plans affected the purpose and intention of the Lease Agreement so as to make it void ab initio; whether it was justifiable for the Respondent to claim that the storage capacity was reduced by half when they only leased 5 acres of land and left free 67 acres as safety zone; whether Clause 8 of the Lease Agreement was a fair and justifiable clause and whether the advocate for the Respondent owed the Appellant an equal duty of care as the Respondent during the negotiation and after the execution of the Lease Agreement and its subsequent registration.

4. The Appellant submitted on grounds 1 -2 to the effect that clause 2(d) of the Lease Agreement was ambiguous, defective and unenforceable; that the Appellant's proprietorship rights are limited to the boundaries of Kjd/ntashart/16379and not a single centimeter beyond its boundaries; that the Appellant does not have a legal right or capacity to dictate to his neighbors how they wish to use their land or what nuisance they should accommodate; that the failure of the Respondent to dispute the agreement was due to mistake of his counsel who failed to give proper advice during negotiation and execution of the lease agreement.

5. The Appellant submitted that there was also a mistake by his counsel in not giving him proper counsel during negotiations and execution. He cited the case of *Belinda Muras & 6 others v Amos Wainaina* [1978] KLR to the effect that mistakes of a counsel should not be visited upon the client. He also cited *Philip Chemwolo & another v Augustine Kubede* [1982-88] KLR 103 at 1040 where the court stated that "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merit."

6. The Appellant further cited the case of *Martha Wangari Karua v IEBC Nyeri* Civil Appeal No 1 of 2017 where the Court of Appeal stated that, "The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be..."

7. The Appellant argued further that the lease agreement was not specific on boundary sizes but the acreage to be leased and that the Appellant could not have comprehended unless with proper counsel given his literacy level.

8. On ground 3 the Appellant submitted that the two Deed Plans for Kjd/ntashart/537 and Kjd/ntashart/3887 dated January 21, 2011 and August 23, 2018 ought not to have been admitted as evidence used to determine measurements of Kjd/ntashart/16379 the leased property. That the former and latter Deed Plans are distinct titles with distinct acreage and boundary measurements and are registered to a common proprietor. That the Respondent had a chance to secure and produce Deed Plan for Kjd/ntashart/16379.

9. It is the Appellant's argument that the Deep Plans did not affect the purpose and intention of the lease agreement so as to make it null and void ab initio; that the Deed Plan was only essential after the demarcation of the 5 acres so leased, to determine the exact location within Kjd/ntashart/16379so as to distinguish it from the remaining 67 acres; that the same could only have occurred after parties had entered into legally binding agreement and that the Respondent and his advocate being persons with higher literacy level compared to the Appellant should have noted the Appellant's honest mistake and sought to procure a proper Deed Plan at the Land's Registry.

10. On the issue of measurements of exterior boundaries and the reserve area, the Appellant submitted that his proprietorship rights to Kjd/ntashart/16379are limited to the extent of its exterior boundaries; that the claim that one boundary of the leased area was less by 200 meters was baseless given that the boundary measurements of the leased area was not in consideration; that the letter by the surveyor dated August 14, 2019 attached as Respondent's exhibit should not be considered by this court as the surveyor was never called as a witness to produce the said letter as per section 35(1)(b) of the *Evidence Act*.

11. The Appellant argued that despite the ambiguity of clause 2(d) of the Lease Agreement he managed to get consents from his neighbours to allow the Respondent use the land for the intended purpose and that the said consents were filed by the Respondent as their exhibits.

12. The Appellant argued that due to his lower literacy level compared to the Respondent, the latter exercised undue influence over him during the negotiation of the contract, drawing and execution of the Lease Agreement. Further that the Respondent charged the Appellant with a criminal Offence No 302 of 2021 at Ngong Law Courts claiming that he obtained money from him by false pretense. He argued that this was meant to coerce the Appellant into signing a settlement agreement. He urged this court to come to his aid as he continues to suffer psychologically, physically and financially and that the 67 acres remains unleased.

Respondent's Submissions

13. The Respondent's submissions are dated February 4, 2022. Counsel for the Respondent submitted that the Appellant has raised, in this Appeal, issues that were never raised at trial; that the law is very clear that parties are bound by their pleadings.

14. The Respondent identified two issues for determination:

    (a) Whether the Appellant fraudulently misrepresented the quality of the suit property.

    (b) Whether the Appellant is in breach of the terms of the Lease Agreement.

15. The Respondent submitted that the Appellant offered to lease to him a portion of Land Title Number Kjd/ntashart/16379 measuring 5 acres for a period of 5 years at a fixed rent of Kshs 3,000,000; that this

land was to be located at the centre of the Appellant's land; that the Respondent made it clear to the Appellant that the leased land would be utilized in construction of magazines warehouses and building for the storage of explosives and other mining accessories and materials.

16. It was submitted that due to the stringent license requirements for the storage of explosives under the law (*Explosives Act* Cap 115), the Respondent insisted and the Appellant undertook to maintain an all-round unfenced exterior perimeter boundary of not less than 250 metres from each end bordering the suit property and further agreed not to allow any person the right to use or build around the said exterior perimeter boundary during the lease period. That the Appellant was aware that the plans for the warehouses had to be approved in advance by the relevant authorities to ascertain that the designated storage areas conform with the guidelines; that he agreed to obtain consents from the owners of the neighboring properties consenting to the use of the suit property for the storage of explosives.

17. It is argued that the Appellant, having understood the requirements, provided to the Respondent the copy of title, copy of postal search and copy of mutation form together with the field diagram and observation on site duly executed by the licensed surveyor and executed a Lease Agreement with the Respondent which was filed at the Land Registry on March 20, 2019; that in compliance with the terms of the leas the Respondent paid the Appellant Kshs Two Million as part of the rent of property.

18. It is argued that after the execution of the Lease and payment of the part rent, the Respondent discovered that the Appellant, with intent to defraud, misrepresented to the Respondent the true measurements of the piece of land leased; that the area was less by 200m on one end of the boundary thereby immensely affecting the business of the company by reducing the storage area and that the Appellant breached Clause 2 (d) of the Lease Agreement.

19. On the first issue, the Respondent argued that he entered into a Lease Agreement after relying on the Appellant's fraudulent misrepresentation regarding the dimensions of the land and its fitness for the purpose; that the same arises from Appellant's positive statements to the Respondent that the land was proper for the purposes of the storage of explosives. Further that this therefore automatically released the Respondent from honoring the contract such as the payments that were due to the Appellant.

20. On the second issue, the Respondent argued that Clause 2(d) was clear on what the Appellant was required to do; that soon thereafter the suit property was found to be less than the dimensions contemplated and hence unfit for the purposes of his business; that this fact was admitted by the Appellant in paragraph 2 of his defence.

21. The Respondent submitted that a party is bound by his pleadings and therefore the Appellant cannot he had to argue new issues at appeal stage that were never raised at the trial before the trial court. He relied on the case of *Joseph Mbuta Nziu vs Kenya Orient Insurance Company Ltd* [2015] eKLR on this point.

22. It is the Respondent's submission that in answer to prayer 3 of the memorandum of appeal the Appellant seeks to enforce performance of the contract yet he is in breach of the very same lease agreement. They referred the court to the case of *Booth Manufacturing Africa Limited vs Dumbeiya Muturi Harun T/A Nelson Harun & Co Advocates* [2013] eKLR where the court stated that "one party to a mutual contract cannot enforce performance of its obligations in his favour without giving or tendering performance of the obligations incumbent upon himself".

23. The Respondent submitted that the breach of the Clause 2 (d) is a matter of clear and convincing evidence since the exhibits on record speak for themselves. The Respondent seeks this court's order dismissing this appeal with costs.

Determination

24. This Honourable Court, sitting on first appeal, has a duty to re-examine, re-consider and re-evaluate all the evidence adduced in the lower court and arrive at its own independent conclusions, allowance being given that this court did not have the benefit of observing the witnesses as they testified (See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR)

25. In determining this matter, I adopt the issues identified by the Respondent as the issues that arise from this appeal, namely (i) whether there was fraudulent misrepresentation of the size and quality of the suit property, and secondly, (ii) whether there was breach of the terms of the Lease Agreement.

26. That the parties herein entered into a lease agreement dated March 19, 2019 (although the attached lease is dated March 19, 2018) is not in doubt. The terms of the lease agreement are clear as stated in the proceedings in the lower court and in this appeal. The main issue raised in respect of the lease agreement is clause 2(d). It reads as follows:

> " The Lessor agrees to maintain an all-round unfenced exterior perimeter boundary of not less than 250 meters from the property the subject matter of this lease (hereinafter known as "the reserved area") and further agrees not to allow any person the right to use or build on this area so reserved. For this reason the Lessor agrees to obtain consent from the owner of the neighbouring property which consent shall specify that said owner is agreeable to usage of the property leased as hereinbefore described."

27. This is the clause of the lease agreement that the Appellant submits as follows, that: "clause 2(d) of the Lease Agreement was ambiguous, defective and unenforceable; that the Appellant's proprietorship rights are limited to the boundaries of Kjd/ntashart/16379 and not a single centimeter beyond its boundaries; that the Appellant does not have a legal right or capacity to dictate to his neighbors how they wish to use their land or what nuisance they should accommodate; that the failure of the Respondent to dispute the agreement was due to mistake of his counsel who failed to give proper advice during negotiation and execution of the lease agreement."

28. It is clear to me that the Appellant has misapprehended this clause, either deliberately or due to lack of good counsel. This court does not have the benefit of the Appellant's pleadings because the statement of defence is not part of the Record of Appeal, an issue I will address in this appeal. However, from the judgment of the lower court, it is clear to me that the Appellant did not plead this issue in the lower court. It is for this reason that the Respondent is claiming that the Appellant is bound by his pleadings in the lower court and cannot argue issues not pleaded earlier in this appeal.

29. I agree with the Respondent that the Appellant cannot be allowed to plead new issues during the appeal. He had the opportunity to do so in the lower court but he did not plead the issues he is now bringing up.

30. The Appellant also pleads low literacy level and ignorance and blames the Respondent for not understanding the contents and meaning of the lease. My view on this matter is that the Appellant ought to have sought clarity of the lease agreement from his advocate or from the Respondent before executing the agreement. But he did not do so.

31. To my understanding the consent to be sought from his neighbours is in respect of the neighbours understanding and consenting to the fact that the suit property would be used for manufacture and storage of explosives and had nothing to do with the area leased out. The exterior unfenced area, to my

understanding, was to be located 250 metres from the suit property that was located at the centre of the land and the boundary of that land with the neighbouring lands and not on the neighbours' property.

32. The Appellant's stand is that the Respondent ought to have confirmed the size of the leased property and should not blame the Appellant for any shortcomings. I agree with the trial court in finding the Appellant to blame for the misrepresentation of the size of the leased land. He cannot blame the Respondent for his own actions nor can he blame his low level of education. He had legal counsel.

33. In *Sachin Shaba v Jagat Mahendra Kumar Shah & another* [2020] eKLR, the court, while citing *Black's Law Dictionary* (Eighth edition), defined fraudulent misrepresentation as: -

> " A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it".

34. It is my view that the Respondent entered into the lease agreement on the strength of the Appellants representation regarding the dimensions of the land which turned out to be a misrepresentation of the true facts. The Respondent in my view believed the land to be fit for the purpose of storage of explosives which turned out not to be the case. I agree with the Respondent that such misrepresentation releases the Respondents from honoring the contract.

35. Clause 2(d) of the lease agreement was not honoured by the Appellant. Instead he refers to it as ambiguous, a fact that he did not litigate in the lower court. It is trite that a party is bound by his pleadings. It is also trite that "one party to a mutual contract cannot enforce performance of its obligation in his favour without giving or tendering performance of the obligations incumbent upon himself" (see *Booth Extrusions (Rormally) Booth Manufacturing Africa Limited v Dumbeyia Muturi Harun T/A Nelson Harun & Co Advocates* [2013] eKLR).

36. I find no ambiguity in clause 2(d) of the lease agreement.

37. I have considered the issues raised in this appeal. I have also read the authorities cited and the reasoning of the trial magistrate contained in the judgment delivered on October 25, 2021. I agree with that reasoning. The Respondent is required under the law to prove on a balance of probabilities that indeed there was misrepresentation. The trial court found that the same was proved and that the Appellant fraudulently misrepresented the measurements of the suit property.

38. There is one last issue that was not argued by the parties but that has come to my attention. The Record of Appeal is incomplete. Order 42 (130 (4) of the *Civil Procedure Rules* is clear on what the Record of Appeal should contain. It provides as follows:

> Before allowing the appeal to go for hearing the judge shall be satisfied that the following are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say-
>
> (a) the memorandum of appeal;
>
> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
>
> (d) the transcript of any official shorthand, typist notes, electronic recordings, or palantypist notes made at the hearing;
>
> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f0 the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal

Provided that –

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraph (a), (b) and (f). (See *South Nyanza Sugar Co Ltd v Simeona A Opola* [2020] eKLR).

39. In the above case, the judge was of the view that failure to file a complete Record of Appeal is not a mere technicality that can be cured by the application of Article 259 (2) (d) of the *Constitution*. Such failure goes to the core of the matter and such an appeal that does not comply with the requirements of the law is rendered incompetent.

40. I have considered the record of the lower court, this appeal and the submissions of both parties as well as the cited authorities. I have subjected this matter to reconsideration and re-evaluation. I am satisfied that the Appellant does not have a competent appeal. He breached the lease agreement and cannot be heard to state that the Respondent is to blame for his failure to abide by the lease. I have no reason, whatsoever, to disturb the findings of the trail court. For this reason, this appeal must fail.

41. Consequently, this appeal is hereby dismissed with costs to the Respondent.

42. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH APRIL 2022.

S N MUTUKU

JUDGE