



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 33 OF 2018

STEPHEN MUTURI..... APPELLANT

VERSUS

JAPHET NOTI CHARO.....RESPONDENT

(Being an appeal from the Ruling of Hon. C. O. Nyawiri (SRM) delivered on 13th June, 2018 in Malindi CMCC No. 154 'A' of 2016)

Coram: Hon. Justice R. Nyakundi

Mwaure & Mwaure Waihiga Advocates for the Appellant

Richard O. Advocate for the Respondent

J U D G E M E N T

This appeal is against the Judgment of the trial Court delivered by **Hon. C. O. Nyawiri** on 13.6.2018 dismissing the appellant's claim with costs.

Background

The litigants herein had a dispute filed in Court by the appellant dated 12.5.2016 against the respondent based on a claim of land purchase on 19.9.2011 from **Tasneem Aziz Master** and **Hussein Musafar Rajah** as registered owners. The appellant in his Plaint averred that pursuant to the conclusion of the sale agreement he commenced making improvements to the suit property but the respondent to this appeal hired goons and hooligans to stop him from accessing the property. The respondent went further to demand Kshs.700,000/= from the appellant in order to grant leave of entry so as to develop the property. The appellant desirous of taking vacant possession grudgingly agreed to the respondent's demands of making payment to the respondent totaling Kshs.700,000/=. Unfortunately, the appellant was later to realize that the respondent claim was based on false misrepresentation on the fact of ownership to the parcel of land.

It was this claim for a refund of money the trial Court dismissed on the strength that the actions by the respondent were of criminal nature which ought to first to have been proved beyond reasonable doubt, before initiating a civil remedy.

The Appeal

The appellant appeal is premised on the grounds that the Learned trial Magistrate misapprehended the evidence when he ruled that the claim for refund of the money was not maintainable for lack of proof of the criminal case. On the issue above, the appellant asked this Court not to allow the respondent to benefit and enrich himself unjustly to the detriment of the appellant.

On the part of the respondent, Learned Counsel refuted the appeal on grounds that it is not clear whether the appeal is premised on the Ruling or Judgment of the trial Court. That therefore according to the respondent rendered the appeal to be defective in substance.

Determination

Having carefully considered the appeal, submissions by both Counsels, I am inclined to accept the appellant's version that he had entered into a legal contract for the purchase of land from **Tasneem Aziz Master** in his capacity as the administrator of **Hassan Hussain Bux and Trustee for Hussein Musafar Rajah** as registered tenants in common. I have scrutinized the evidence and found that the respondent interfered with the quiet and vacant possession of the property on account of false claims that he had some rights which were enforceable.

Indeed, the documentary evidence produced before the trial Court indicate that payments were made to the respondent proved on a balance of

probabilities to a sum of Kshs.600,000/= . This coupled with the fact that the transactions comfortably lead to a conclusion that they were not of a business related nature or purchase of the suit land but an act of extortion and false representation. On the part of the respondent the particulars of misrepresentation underpinning the refund or restitution of the money are as established by the trial Court. That the respondent falsely and or knowingly represented to the appellant that he had some interest to the land with a capacity to accept some ransom for that land.

That the respondent falsely and or knowingly inducing the appellant in the course of dealing with the land that some sums of money was due and payable before he could proceed with any improvements or development on the suit land. For the respondent to illegally engage in the activities described by the appellant, he was not legally capable of being paid any money in respect of the suit land initially referred as **LR NO. 4162 – Malindi**.

I find that the agreement for the sale of land was between the appellant and **Tasneem Aziz Master** as the Administrator and Trustee for **Hussein Musafar Rajar** was legal and enforceable. In that case, the appellant transferred money to the respondent for the purpose of securing the invasion of the legally purchased parcel of land. The claim by the respondent against the appellant was premised on the fact that the suit land belonged to his forefathers and no activity can be allowed to be undertaken unless there is payment of 'ridhaa'.

The test here is as stated in **Tinsley v Michigan {1994} 1 AC 340** the Court held that:

“A claimant such as the appellant who satisfies requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose.”

By the trial Court determining that the claim was unenforceable until and unless the respondent has been prosecuted for his criminal activities was a misapprehension of the Law. The claim should have been allowed since it would have the effect of returning the parties to their positions prior to the illegal extortions and the menacing demands by the respondent to prevent the appellant from taking vacant possession of the property.

While examining the nature of the evidence before the trial Court as particularized, its undisputable on a balance of probabilities that the respondent conduct was fraudulent to say the very least. The dictum of **Rowe J in Chin v Watson’s {1974} 12 JLR 143** stated thus:

“Fraudulent conduct must be distinctly proved and it is not allowable to leave it to be inferred from the facts.”

In the instant case, the Learned trial Magistrate noted that the respondent had falsely demanded and received a liquidated amount of Kshs.600,000/= in absence of any legal transactions subsisting with the appellant. In my view, fraud can be proved from circumstantial evidence which in this case is clear and most indisputable. The evidence by the appellant does reveal utterance made by the respondent from which the appellant concluded that the respondent represented himself as having some legal or beneficial interest to the immovable property purchased from the original sellers.

It was also established that the respondent was fraudulent in that he falsely and or knowingly in the course of dealing with the appellant claimed that the sums payable was due and that he had a right to receive the money. The very evidence of the appellant that the respondent had been paid the money outside the terms of the agreement of sale supports the allegation of fraud.

The particulars of fraudulent conduct induced the appellant to make various deposits to the respondent, when on receipt of the money he knew or ought to have known that he did not have the capacity to do so. On review of the evidence, the trial Magistrate wrongly proceeded to oust the claim by dismissing it as if the payment made by the appellant fell within the scope of prohibited acts or one done with an intention to commit a crime.

Thus, on the relevant aspects of the case at bar, the appellant was an innocent party who had bought land and paid the price for it. The sellers delivered the parcel of land to the appellant. In making the after payments there is no evidence that the appellant was guilty of any illegality under the statute or public policy. He became a victim of fraud or duress or undue influence exerted by the respondent who involved goons and hooligans to show that the appellant in entering the contract for the sale of land with **Tasneem Aziz Master** labored under a reasonable mistake of his own doing.

Evidence at first glance one can see the Learned trial Magistrate exercised absolute discretion wrongly. In interfering with his decision I have inspired by the persuasive authority in this regard in the case of **House v The King {1936} 55 CLR 499**:

“This case established that appealable errors committed in the exercise of a discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take account of a material consideration. However, it will not be enough that the appellate court would have exercised the discretion differently. Instead, the discretion must involve an error of law which has led to ‘an unreasonable or plainly unjust’ result, or has involved a ‘substantial wrong’, before the discretion will be taken to have been improperly exercised by the lower court.”

The result is that the Judgment handed down by the Learned trial Magistrate was not easily reconcilable with the evidence on record. For these reasons, I allow the appeal, set aside the dismissal order of the trial Court. In lieu of entry of Judgment for the appellant in the sum of Kshs.600,000/= together with interest at Court rates from the date of the fraudulent act until payment in full. The appellant will have the costs of the suit and the appeal.

It is so ordered.

DATED, SIGNED ON 19TH DAY OF AUGUST 2021 and DISPATCHED via email ON 19TH DAY OF AUGUST 2021

.....

R. NYAKUNDI

JUDGE

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