REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 10 OF 2018

MUSA MWANI ABULWA.....APPELLANT

VERSUS

SAMUEL ATONGO TALI.....RESPONDENT

(from the judgment and decree of T.K. Kwambai RM, in Butali SPMC

Civil Case No. 129 of 2016 delivered on 1/2/2/18)

JUDGMENT

1. The respondent herein had instituted suit against the appellant claiming refund of a total of Ksh. 265,000/= arising from a collapsed agreement of sale of land parcel No. South Kabras/Chesero/903. After a full trial, the trial magistrate entered judgment for the respondent with interest from the date of filing suit. The appellant being aggrieved by the said decision filed this appeal. The grounds of appeal are:-

> *(a) That the learned trial magistrate erred in law and in fact in finding that the respondent's suit was proved on a balance of probability contrary to the evidence on record.*
>
> *(b) That the learned trial magistrate erred in law and in fact in relying on an agreement that was illegal ab initio.*
>
> *(c) That the learned trial magistrate erred in law and in fact in failing to find that the respondent had not specifically proved the claim against the respondent.*
>
> *(d) That the learned trial magistrate erred in law and in fact in failing to put into consideration the confessions of the witnesses who were in court whose evidence was in favour of the appellant herein.*

2. The appeal was opposed by the respondent through the written submission of his advocates, **Momanyi Manyoni & Co. Advocates**. The appellant acted in person in the appeal. The appeal was canvassed by way of written submissions by both sides.

3. The case for the respondent was that sometimes in the year 2009, he entered into an agreement with the appellant for the appellant to sell him one acre of land from land parcel No. South Kabras/Chesero/903. That the respondent paid the money by instalments. By the 8th November, 2012 he had paid a sum of Ksh. 215,000/=. That on that day the appellant signed an acknowledgement of payment of Ksh. 215,000/=. On the same day the appellant was paid a further sum of Ksh. 50,000/= to pay to a lessee who had leased the land. Timina Khasoa PW2 and Mariko Shivikhwa PW3 were present on the 8/11/2012 when the acknowledgement was made and witnessed the acknowledgment agreement, P.Ex 1. The amount paid came to Ksh. 265,000/=. The appellant put the respondent into occupation of the land but thereafter kicked him out. The respondent reported the matter at Kabras Police Station. The appellant was arrested and charged in Butali Criminal Case No. 374 of 2014 with obtaining money by false pretence. He was convicted and fined Ksh. 50,000/=. The respondent sued to recover the sum of Ksh. 265,000/=. During the hearing the respondent produced a copy of judgment at the lower court as exhibit, P.Ex 2. He produced sale agreements and acknowledgment receipts of money paid as follows: 15/9/2009 – 90,000/= P.Ex 4, 22/3/2011 and 15/4/2011 – 20,000/= P.Ex 5, 19/4/2011 – 30,000/= P.Ex 6, 11/7/2011 – 20,000/= P.Ex 7.

4. The appellant filed a defence denying the respondent's claim but stated that he only received Ksh. 125,000/= and not Ksh. 265,000/=. In his evidence in court he stated that he was arrested by the police in June 2014 and charged with fraudulently obtaining Ksh. 125,000/= by falsely pretending that he would sell the respondent Plot No. N/Kabras/Chesero/943. He was tried and fined Ksh. 50,000/= in default to serve two years imprisonment. He filed an appeal at the High Court Kakamega that was still pending at the time of hearing of the civil case at the Magistrate's Court. He said that his father's land is S/Kabras/Chesero/903 and not 943. He denied in cross-examination that he signed acknowledgment agreement receipt of Ksh. 265,000/= as indicated in the acknowledgment note, P.Ex 1.

5. The learned trial magistrate found that the respondent had proved his case on a balance of probabilities. That the sale agreement, P.Ex 4 indicated that the appellant was selling land parcel S/Kabras/Chesero/943 which land did not exist. That PW3 said that he is the one who drafted the acknowledgment agreement, P. Ex1 wherein the appellant confirmed that he had received Ksh. 265,000/=. That the appellant's defence consisted of mere denials that she proceeded to dismiss.

6. The appellant submitted that the trial court was wrong in making a finding that the claim was proved. That the respondent's claim in Butali SRMC Cr. No. 374 of 2014 was that the appellant had received from him Ksh. 125,000/= on diverse dates between 15th September, 2009 and 10th March, 2010. That the respondent had conspired with the police in fabricating an agreement purporting that he had received a sum of Ksh. 125,000/= in sale of land parcel No. N/Kabras/Chesero/943. That there was no evidence how the sum of Ksh. 265,000/= was arrived at. That the respondent's witnesses PW2 and PW3 stated that they did not witness the appellant receiving any money from him. That there was thereby no reason for the trial court to find otherwise.

7. The advocates for the respondent on the other hand submitted that the trial court was right in finding that the case was proved on a balance of probability. That the respondent produced agreements that showed that the appellant received money from the respondent for sale of land. That the appellant did not adduce any evidence to contradict the agreements nor did he produce any evidence that the agreements were forged. That the appeal lacks merit and should be dismissed.

8. This being a first appeal, the duty of the court is to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that the appellate court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanour. In the case of **Ngigi Kuria & Another (suing as the legal representatives of the Estate of Joan Wambui Ngigi) –Vs- Thomas Ondili Oduol & Another [2019] eKLR** and **Julius Vana Muthangya –Vs- Katuuni Mbila Nzai [2009] eKLR,** the courts adopted the holding in **Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR**, where the court restated the duty of an appellate court as follows:-

> ***"As a first appellate court the duty of court is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd &Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect …. From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally."***

9. The standard of proof in civil cases is on a balance of probabilities. It is trite law that the burden of proof is on the party who alleges. This is captured in Sections 107, 108 and 109 of the Evidence Act that provides that:-

> ***"107.***
>
> ***(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. 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. 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."***

10. It was the evidence of the respondent that the appellant obtained a total of Ksh. 265,000/= from him on various dates promising to sell him an acre of land parcel S/Kabras/Chesero/94. The appellant did not keep to his part of the bargain hence the claim for refund of the money.

11. The respondent produced documents in proof of his claim. The original sale agreement, P.Ex 4, entered into on 15/9/2009 indicates that the appellant was initially selling the respondent ¾ of an acre and a sum of Ksh. 90,000/= was paid on that day leaving a balance of Ksh. 35,000/=. An agreement dated 22/3/2011 written in Kiswahili, P.Ex 5, indicates that the respondent added ¼ of an acre at the price of Ksh. 50,000/= to add to the ¾ of an acre earlier sold. It is then clear that the land sold was one acre. The agreements produced as P.Ex 5 – 7 were in payment for the ¼ acre.

12. The agreement of 8th November, 2012, P.Ex 1, shows that the appellant on that date acknowledged receipt of a total of Ksh. 215,000/=. The agreement further states in Kiswahili:-

> ***"Now Samuel has added me Ksh. 50,000/= for me to kick out the person who has leased."***

The said agreement was witnessed by the respondent's witnesses, PW2 and PW3. PW3 said that he is the one who drafted the agreement. In the premises, it is crystal clear that the appellant was paid a total of Ksh. 265,000/=.

13. Though the appellant in his evidence in court denied receiving any money from the respondent towards sale of land he in his written statement of defence admitted receiving a total of Ksh. 125,000/=. The respondents documents, P.Ex 1, P.Ex 5, P.Ex 6 and 7 indicates that the appellant received a total of Ksh. 160,000/=. P.Ex 4 shows that he acknowledged receiving a total of Ksh. 215,000/= by 8/11/2012. If the appellant only received a total of Ksh. 125,000/= for the ¾ parcel of land he has not explained why he was paid money over and above

the sum of Ksh. 125,000/=.

14. The judgment in Butali Criminal Case No. 374 of 2014 shows that the appellant was charged with receiving the sum of Ksh. 125,000/= for the period between September 2009 and March, 2010. The charges did not go beyond the sum of money paid after March, 2010. P.Ex 5 shows that a sum of Ksh. 15,000/= was paid on 22/3/2011 and Ksh. 5,000/= paid on 15/4/2011. P.Ex 6 shows that a sum of Ksh. 30,000/= was paid on 19/4/2011. P.Ex 7 shows that a sum of Ksh. 20,000/= was paid on 11/7/2011. Why the police did not prefer charges for the money paid after March, 2010 is for them to explain. The respondent did prove that there was money paid over and above the sum of Ksh. 125,000/=.

15. It is clear that the appellant added the respondent another parcel of land measuring ¼ an acre which the respondent paid for in full. The respondent in addition paid the appellant a further sum of Ksh. 50,000/= to be refunded to a lessee who had leased the land. The appellant did not give the respondent the one acre he sold to him. The appellant was in breach of the agreement of sale. The only option was for the appellant to refund the money. I am thereby in agreement with the trial magistrate that the respondent had proved his claim on a balance of probabilities. The defence raised by the appellant could not hold in face of the overwhelming evidence adduced by the respondent.

16. The upshot is that the appeal lacks merit. The same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 29th day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Respondent

Appellant - Absent

Respondent - Absent

Court Assistant - Polycap

30 days right of appeal.