REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 61 OF 2016

EPHANTUS NYAGA NGOROI.....APPELLANT

VERSUS

NDWIGA STEPHANO.....RESPONDENT

(Being an appeal against the judgment and decree of Hon. M.N. Gicheru (Chief Magistrate)

delivered on 9th May, 2016 in EMBU Civil Suit No. 45 OF 2007)

JUDGMENT

1. The appellant in the present instance instituted a suit against the respondent vide the plaint dated 2nd February, 2007 and sought for reliefs in the nature of a vesting order for one acre out of LR No. Kagaari/Kanja/878 and in the alternative, a refund of the total sum of Kshs. 556,000/ plus costs of the suit and interest thereon.

2. The appellant pleaded in his plaint that the respondent was at all material times the registered proprietor of the parcel of land known as LR No. Kagaari/Kanja/878 ("the suit property") measuring 1.62 hectares.

3. The appellant pleaded in his plaint that by way of the sale agreement dated 22nd October, 2003 ("the first agreement") the respondent agreed to sell to him one (1) acre out of the suit property for the consideration of Kshs.350,000/ and which amount was acknowledged by the respondent.

4. The appellant further pleaded that by way of a further agreement dated 4th February, 2005 ("the second agreement") he agreed to loan to the respondent a sum of Kshs.6,000/ purportedly intended to process or effect the transfer of the one (1) acre out of the suit property to the appellant.

5. It was the averment of the appellant in his plaint that despite his various requests, the respondent has neglected and/or failed to perform his obligations under the agreement and the appellant is claiming the sum of Kshs.200,000/ from the respondent pursuant to the first agreement.

6. Upon service of summons, the respondent entered appearance and put in his statement of defence dated 20th February, 2007 to deny the appellant's claim.

7. The record shows that the respondent had previously filed a suit against the appellant before the Senior Resident Magistrate's Court at Runyenjes, namely Civil Suit No.33A of 2006, vide the plaint dated 14th December, 2006 and amended on 20th June, 2007 and sought for an order from the court that legal action be taken against the appellant for forgery; an order for a permanent injunction restraining the appellant, his servants/agents/employees and/or anyone claiming through him from trespassing and/or in any manner interfering with the suit property; and costs of the suit.

8. In the amended plaint, the respondent pleaded that upon claiming the sale of one (1) acre of the suit property to himself, the respondent had threatened to move into that part of the suit property.

9. The respondent further pleaded in his amended plaint that the signature that is purported to be his own in the first agreement is a forgery on the part of the appellant.

10. On being served with summons in respect to the amended plaint, the appellant entered appearance and put in his statement of defence dated 14th December, 2006 to deny the respondent's claim.

11. The record shows that the respondent thereafter sought for an order for transfer of his suit from Runyenjes to Embu and sought for a further order for the consolidation of his Runyenjes Civil Suit No. 33A of 2006 with Embu Civil Suit No. 45 of 2007 filed by the appellant. By way of the order made on 3rd January, 2009 the transfer of Runyenjes Civil Suit No. 33A of 2006 and consolidation of the two (2) suits were both effected.

12. When the suit came up for hearing before the trial court, the appellant testified and called one (1) other witness whereas the respondent gave evidence and summoned two (2) additional witnesses to act for the defence case.

13. At the close of the hearing, the trial court vide its judgment delivered on 9th May, 2016 dismissed the appellant's suit with costs to the respondent.

14. The appellant has now moved this court by way of an appeal against the aforesaid judgment by putting forward the following grounds of appeal in his memorandum of appeal dated 7th November, 2016:

> ***(i) THAT the learned trial magistrate erred in law and fact in finding that the appellant was supposed to call the maker of the agreement whereas the said agreement was produced in court upon consent by both counsels and it formed part of the court record.***
>
> ***(ii) THAT the learned trial magistrate erred in law and fact by making a finding that the appellant was supposed to subject the agreements which he had produced in his exhibits to forensic analysis whereas the respondent did not object to the production of the same.***
>
> ***(iii) THAT the learned trial magistrate erred in law and fact by finding that it was the appellant's burden to prove the respondent's signature in the agreements.***
>
> ***(iv) THAT the learned trial magistrate erred in law and fact by finding that the agreement having been drawn by the advocate in Nairobi raised questions.***
>
> ***(v) THAT the learned trial magistrate erred in law and fact by finding that the appellant's case raised doubts.***
>
> ***(vi) THAT the learned trial magistrate erred in law and fact by failing to find that the appellant had proved his case on a balance of probabilities and therefore enter judgment in his favour.***
>
> ***(vii) THAT the learned trial magistrate erred in law and fact by disregarding the appellant's evidence and that of his witness.***

15. This court called upon the parties to put in written submissions on the appeal. In his submissions dated 22nd June, 2020 the appellant argued that since the documents he relied on at the trial were produced by consent of the parties without requiring their makers, the trial court fell into error by reasoning that the appellant ought to have summoned the maker of the agreements to testify. The appellant argued that he was not challenging the authenticity of the agreements and hence it was not necessary for him to call their makers as a witness; rather, the burden rested with the respondent by virtue of his questioning their authenticity.

16. The appellant referred this court to the provisions of **Sections 107 and 109** of the **Evidence Act** which prescribe that any party who pleads certain facts must bring forth evidence to support those facts for judgment to be entered in his or her favour. In this respect, the appellant is of the view that the trial court acted erroneously when it shifted the burden of proof to the appellant rather than to the respondent.

17. It was the contention of the appellant that he had brought sufficient evidence to prove that the first agreement being the sale agreement was drawn in Nairobi and yet the trial court arrived at the finding that the preparation of the first agreement was suspect.

18. It was also the contention of the appellant that the trial court disregarded his evidence to support his case against the respondent, notwithstanding the fact that the respondent did not adduce any evidence to prove that the signature appearing on the first agreement was a forgery and further did not object to the production of the said agreement.

19. The appellant submitted that the parties herein were bound by the terms of the first agreement by virtue of it being a contract and supported this submission by citing the case of **Total Kenya Ltd...Vs...Joseph Ojiem, Nairobi HCCC No.1243 of 1999** where the court held that:

> ***"Parties to a contract that they have entered into voluntarily are bound by its terms and conditions....."***

20. The appellant therefore urged this court to allow the appeal and to step in and disturb the finding of the trial court.

21. In retort, the respondent who filed written submissions on 4th September, 2020 supported the decision of the trial court and contended that the trial court's analysis of the case was proper since the authenticity of the first agreement was challenged at the trial and hence the appellant ought to have summoned its maker to put the doubts to rest but did not.

22. The respondent quoted the case of **Abdulrazak Khalifa Salim v Harun Rashid Khator (as administrator of the Estate of the Rashid Khator Salim, Deceased) & 2 others [2015] eKLR** in which the court pronounced that:

"Section 35 permits the admission of documents where their makers may not be called as witnesses without unreasonable delay in terms. However, admissibility is different from the weight to be given to the admitted document. As shown in section 36 of the Evidence Act, the weight to be given to evidence admitted under section 35 is diminished by certain factors:

> ***"36. (1) In estimating the weight, if any, to be attached to a statement rendered admissible by section 35, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.***
>
> ***(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by section 35 shall not be treated as corroboration of evidence given by the maker of the statement." "***

23. It was also the contention of the respondent that by failing to include in his record of appeal an extract of the decree appealed from, the entire appeal is rendered defective.

24. I have carefully considered the contending submissions on appeal alongside the authorities cited. I have equally re-evaluated the evidence placed before the trial court. It is clear that the appeal lies against the trial court's decision to dismiss the appellant's suit.

25. However, I note that the respondent through his submissions challenged the competency of the appeal in the absence of the certified copy of the decree as part of the record of appeal.

26. Upon my perusal of the record, I established that the appeal was admitted for hearing on 16th November, 2016 pursuant to the provisions of Section 79B of the Civil Procedure Act.

27. The provisions of **Order 42, Rule 13 (4) (f)** of the **Civil Procedure Rules** are clear that the decree or order being appealed against ought to form part of the record of appeal. Upon perusing the record of appeal filed by the appellant herein, I note that the decree is evidently missing from the record of appeal and it is apparent that the appellant did not seek to put in a supplementary record of appeal to include the decree.

28. Suffice it to say that it is apparent that the issue of competency of the appeal on the above ground was raised at the point of conclusion of the appeal and as I have already established, the appeal was admitted for hearing notwithstanding the absence of the decree. While I acknowledge the legal position on the failure to include the decree being appealed against, I am alive to the provisions of **Order 95** of the **Civil Procedure Rules** grant courts the power to exercise their discretion in enlarging the time required for the performance of any act.

29. Upon considering the foregoing, I am persuaded to apply the rules of substantive justice and the overriding principles in extending the time required for the appellant to comply with the rules of procedure. In any event, the respondent has not demonstrated any prejudice he has suffered as a result. In so finding, I am supported by the case of **Peter Obwogo O & 2 others v H O Suing as Next Friend of P O (Minor) & another [2017] eKLR** in which the Court of Appeal held thus:

> ***"The omission to include a certified decree can be cured by the filing of a supplementary record which act will not occasion any undue prejudice to the respondents. Any prejudice likely to be suffered can be compensated by an award of costs."***

30. Having therefore enlarged the time required as indicated above, I find on this issue that the omission can easily be cured through the appellant's filing of a supplementary record of appeal to include the certified decree.

31. I will now address the merits of the appeal which essentially surround the dismissal of the suit by the learned trial magistrate. I will address this under three (3) separate limbs.

32. The *first* limb touching on grounds (i), (ii), (iii), (iv) and (v) of the appeal concerns itself with the issue of authenticity of the first agreement which I earlier on indicated to be the sale agreement dated 2nd October, 2003.

33. In his evidence at the trial, the appellant stated that the first agreement was prepared by advocate Alex Karanja Ndungu following an oral agreement entered into between the parties herein in respect to the sale of one (1) acre out of the suit property. The appellant stated that upon drafting, the advocate handed the first agreement to both parties to confirm its contents, following which the advocate signed his part. The first agreement was marked MFI P1 and was subsequently produced by the appellant as P. Exh 1.

34. During cross-examination, the appellant stated that the signature of the respondent appearing on P. Exh 4 which is the second agreement for a friendly loan does not match the signature appearing on the first agreement.

35. On his part, the respondent who was DW1 denied appending his signature on the first agreement and further stated that his signatures appearing on the other exhibits produced by the appellant are not the same as his signature purported to have been appended on the first agreement.

36. In cross-examination, it was the evidence of the respondent that his signatures were forged and that he made a report to the chief of his area. The respondent further disowned his signature appearing on all the other documents produced by the appellant on the basis that they were equally forgeries.

37. Mark Nyaga Karani who was the assistant chief at the time also testified that both the appellant and the respondent visited the chief's office sometime in September, 2006 in relation to the dispute pertaining to sale of one (1) acre of the suit property and that upon visiting Nairobi to see the advocate whom the appellant claims prepared the first agreement, the witness did not find any agreement and that the advocate indicated that there was no such agreement.

38. Upon hearing the parties, the learned trial magistrate reasoned that by failing to call the advocate who had witnessed the execution of the first agreement and by failing to call any forensic evidence, the appellant had not discharged the burden of proof.

39. From the record, it is apparent that the respondent was not opposed to the production of the appellant's documents as exhibits, including the first agreement. It is also apparent that no expert witness was called to testify as to the signatures on the documents produced.

40. It is trite law that he who alleges must prove. In the present instance, I note that it is the respondent who alleged that the signatures appearing on the first agreement and subsequent documents were forged. By law, the burden then shifted to him to prove the allegations of falsehood by calling a forensic expert to shed light on the signatures. No forensic expert was called.

41. Notwithstanding the fact that the appellant did not summon the advocate Alex Karanja to give evidence, the mere fact that the authenticity of the signatures was brought to question by the respondent, it fell upon him to support his allegations with proof. In addition to **Section 107** of the **Evidence Act** which provides that the person who desires judgment on the existence of facts which he asserts must prove the existence of those facts, **Section 109** goes on to prescribe thus:

> ***"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."***

42. Drawing from the above, I respectfully disagree with the reasoning of the learned trial magistrate that it was the appellant who was responsible for ascertaining the signatures of the respondent by calling forensic evidence since the appellant was not reasonably expected to have knowledge of the respondent's signature(s). In any event, as earlier noted the respondent did not raise any object to the production of the first agreement and related exhibits.

43. The *second* limb of the appeal associated with ground (vi) of the appeal has to do with whether the appellant proved his case against the respondent on a balance of probabilities.

44. In his testimony, the appellant who was PW1 stated in his evidence that on 20th September, 2003 the respondent approached him and offered to sell to him one (1) acre of the suit property at a consideration of Kshs.350,000/ leading to the preparation and execution of the first agreement in Nairobi, which was witnessed by advocate Alex Karanja Ndung'u. The appellant stated that he paid the respondent a sum of Kshs.300,000/ in cash.

45. According to the appellant, he subsequently paid the respondent a sum of Kshs.28,000/ and was issued with an acknowledgment note MFI P2 and later produced as P. Exh 2, followed by a further payment of Kshs.22,000/ with an acknowledgment MFI P3 later produced as P. Exh 3.

46. It was the evidence of the appellant that on inquiring about the subdivision of the suit property, he was informed by the respondent that he was unwell and needed some time. Soon thereafter, the respondent sought a loan advancement of Kshs.6,000/from the appellant and the second agreement being a friendly loan agreement produced as P. Exh 4 was drafted to that effect.

47. The appellant stated in his evidence that the respondent neither subdivided the suit property nor refunded any of the monies given to him by the appellant.

48. In cross-examination, the appellant testified *inter alia*, that the respondent permitted him to occupy and utilize the suit property before forcing him out sometime in 2006.

49. Alfred Njiru Benjamin who was PW2 stated that he accompanied the appellant who is his brother to the advocate's offices and that he witnessed the execution of the first agreement as well as the payment of Kshs.300,000/ by the appellant to the respondent. This was reiterated during cross-examination.

50. On his part, the respondent denied entering into any agreement with the appellant in respect to the suit property and further denied receiving any payment from the appellant. However, the respondent admitted to having taken out the loan of Kshs.6,000/ from the appellant but stated that this had nothing to do with the suit property. The respondent restated his position at cross-examination.

51. Moses Munyi Ndwiga who was DW2 gave evidence that he is a son to the respondent and that the respondent never sold any land to the appellant. The witness further gave evidence that the visit to advocate Alex Karanja was purely in relation to a loan the respondent wished to obtain from Family Bank.

52. In cross-examination, DW2 stated that the respondent did not lodge a complaint with the police regarding the forgeries and instead filed Civil Suit No.33A of 2006 at Runyenjes Law Courts.

53. In the end, the learned trial magistrate in addition to finding that the appellant had not discharged the burden of proof as relates to the signatures purported to have been appended by the respondent, reasoned that since the assistant chief who accompanied the respondent to visit the advocate testified that there was no such agreement in existence, the appellant's case had doubts.

54. From my study of the exhibits tendered by the appellant, I observed that the first agreement dated 22nd October, 2003 produced as P. Exh 1 was entered into between the parties herein in respect to one (1) acre of the suit property and for a consideration of Kshs.350,000/. According to the agreement, the payment of Kshs.300,000/ was acknowledged as having been paid at the time of execution of the first agreement while the balance of Kshs.50,000/ would follow. It is apparent that the first agreement was signed by the parties and witnessed. In addition, the respondent did not challenge the clause of the first agreement that indicates acknowledgment of payment of the Kshs.300,000/. The evidence on record speaks for itself.

55. In the absence of any evidence to support the averment of the respondent that his signature was forged or that the first agreement was a fake, I am inclined to find that the appellant proved on a balance of probabilities that the parties herein had entered into the first agreement and which was therefore binding upon them. There is also nothing to indicate that the respondent performed his contractual obligations under the contract.

56. Further to the foregoing, I studied the acknowledgments dated 16th June, 2004 for the sum of Kshs.28,000/ and dated 7th October, 2004 for the sum of Kshs.22,000/ produced as P. Exh 2 and P. Exh 3, as well as the second agreement dated 6th February, 2005 indicating that the respondent received a sum of Kshs.6,000/ from the appellant as a friendly loan and produced as P. Exh 4. All the three (3) documents are shown to have been witnessed by advocate Alex Ndung'u.

57. The above documents combined are evidence that the appellant had paid to the respondent the abovementioned monies and again, there was no credible evidence brought to challenge their authenticity.

58. From the foregoing analysis, I disagree with the finding of the learned trial magistrate that the appellant had not proved his case against the respondents. To my mind, the appellant proved his case on a balance of probabilities.

59. This brings me to the *third* and final limb touching on ground (vii) of the appeal, concerning whether the learned trial magistrate considered the evidence of the appellant. From my study of the impugned judgment, I observed that the learned trial magistrate did not in the analysis make particular reference to the other exhibits tendered by the appellant to show payments made to the respondent or to the oral testimonies of the appellant and his witness. In this sense, my answer to this limb is in the affirmative since the approach taken by the learned trial magistrate leads me to conclude that the appellant's evidence was overlooked.

60. For all the foregoing reasons, I am satisfied that the decision of the learned trial magistrate warrants interference.

61. In the end, therefore, the appeal has merit and the same is allowed in terms of prayers a), b) and c). Consequently;

a) The judgment in Embu CMCC NO. 45 of 2007 as dismissing the appellant's suit is hereby set aside and is substituted with an order in favour of the appellant and against the respondent; thereby granting the appellant a refund of the sum of Kshs.556,000/ being the sum of Kshs.356,000/ paid by the appellant to the respondent, and the sum of Kshs.200,000/ constituting a penalty fee for breach of the first agreement.

b) The appellant shall also have costs of the suit and the appeal.

c) Interest on the sum of Kshs.556,000/ above shall accrue at court rates from the date of filing the suit until payment in full.

d) CMCC NO. 33A of 2006 is consequently dismissed with costs to the appellant.

Dated, Signed and Delivered at Embu this 23rd day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent