



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 39 OF 2019

(An appeal from the ruling and orders of Hon. Malesi, Senior Resident Magistrate, in Kakamega CMCCC No. 265 of 2016, delivered and made on 12th March 2019)

JANET SHIKUKU TAALI.....APPELLANT

VERSUS

SAMUEL ADONGO TAALI.....RESPONDENT

JUDGMENT

1. The suit at the primary court was initiated by Janet Shikuku Taali, who I who I shall refer hereafter as the appellant, filed therein on some unknown date, as the plaint on record does not bear a receipt stamp of the court, although the plaint is dated 25th July 2016 and there is an official receipt from court issued on 9th August 2016. The case for the appellant was that the responded, Samuel Adongo Taali, was his brother, who had sold to him a portion of South Kabras/Chesero/873, for Kshs. 70, 000.00. She averred that the respondent did not subsequently allow him access to the demised portion, on grounds that the land belonged to the deceased and that he had no authority to sell it. She sought to recover the money she had paid to the respondent. The respondent, through a defence, dated 9th September 2016, and filed in court on 13th September 2016, denied the allegations in the plaint, and put the appellant to strict proof.
2. The trial court conducted an oral hearing wherein both the appellant and the respondent testified, and the appellant called a witness, and they were cross-examined. The appellant stated that she wanted to recover the purchase price. She mentioned that they had entered into two sale agreements before the elders. She never got the land, adding that the respondent sold it later to someone else. Her witness was Ezekiel Shitanda, the Chief of Chesero Location. He testified that there was indeed a sale transaction over the subject land between the two parties, which was executed in his presence, and to which he appended his signature as witness. The respondent referred to two criminal proceedings in Butali SRMCCR C Nos. 374 of 2014 and 425 of 2014, in respect of which the appellant was the complainant in one of them, while the respondent was the accused, and the respondent was acquitted. He denied selling land to the appellant, and receiving money from her in that behalf. He stated that he was sent to buy land for the appellant, and he was to pay the money to the person who was selling the land to the appellant. He asserted that he was forced to sign the sale agreements that the appellant was relying on.
3. At the end of the oral hearing, the trial court delivered a judgment, in which it found that the case presented by the appellant in her plaint and the oral evidence recorded were not coherent, and that the actual facts relating to it in fact emerged from the criminal proceedings placed in evidence by the respondent. The facts from those proceedings indicated that the sale transaction was not in fact between the appellant and the respondent, but between the appellant and another, and that the role of the respondent was to act as the agent for the appellant. Based on that, the trial court concluded that no fraud was established, and that the two agreements placed on record by the appellant had been obtained under duress. It was concluded that the appellant had not been candid with the court, with respect to the circumstances under which she deposited money with the respondent.
4. The appellant was aggrieved by the said judgment, of 12th March 2019, hence the instant appeal, vide the memorandum of appeal, dated 19th March 2019, and filed herein on 20th March 2019. She raised several grounds: that the trial court had erred in introducing the criminal cases that were not in any way related to the case that the court was trying; the trial court had disregarded the testimony of the witness presented by the appellant and also denied the other witnesses that the appellant had lined up from testifying; and the trial court had erred in finding that the case was not proved when the respondent had even admitted to receiving Kshs. 70, 000.00 from the appellant.
5. On 18th February 2020, the parties agreed to canvass the appeal by way of written submissions. Both sides have complied, by filing their respective papers. The document filed by the appellant is dated 19th February 2020, and was filed in court on even date, and it is titled "appellant's statement." The respondent dated his submissions 28th September 2020, and filed them in court on even date.
6. What the appellant purports to be her written submissions are in fact not submissions, for she advances no arguments based on her grounds of appeal. What she has done is to give a statement of facts, as a background to her appeal. She states that she sold her cows, and raised a sum of Kshs. 70, 000.00, which she gave to the respondent to find a piece of land and buy the same for her. He found a piece of land measuring $\frac{3}{4}$ acres and bought the same from a person known as Ndalul Tsimonjera, for Kshs. 70, 000.00. The land was demarcated and

fenced off. The respondent then sold off the same piece of land to a third party for Kshs. 185, 000.00. She pleads ignorance to the arrangement between the respondent and Musa Mwani. She states that she and the respondent entered into a sale agreement in the presence of the Chief, for respondent to sell to him a portion of South Kabras/Chesero/873, which he eventually declined to let her access, saying that the same belonged to the deceased and he had no authority to sell it. He thereafter neglected to refund the sum of Kshs. 70, 000.00 that he had received from her.

7. On his part, the respondent submitted on three grounds, in turn. On Ground 1 of the appeal, he submitted that the trial court had jurisdiction and discretion to accept all the evidence placed before it by the parties in support of their case. He submits that the two criminal cases were connected to the dispute at hand, as in one of them the two parties on appeal were the accused and the complainant, and, therefore, the two cases were properly admitted in evidence. On Ground 2, about the appellant's witnesses being locked out, the respondent pointed out that the appellant had listed herself as the sole witness, and it was her sole witness statement that was filed. After she testified, she applied to call a second witness, and the respondent acquiesced to that. He submits that the appellant did not apply to call any other witness, neither did the court bar any witness from testifying. On Ground 3, about the trial court not taking into account all of the appellant's evidence, it is submitted that the trial court analysed all the evidence, and came to a sound judgment. It is further submitted that the appellant's case was founded on fraud, and the appellant failed to prove fraud on the part of the respondent. It is submitted that the allegation made in the plaint was that the respondent had misrepresented himself to the appellant as able to sell to her land, yet the evidence tendered was that the money raised was not intended for the respondent to sell to the appellant, but rather for the respondent to procure land for the appellant. He was not to sell land to the appellant. He did procure land, but the transaction fell through, and the money was refunded. He then got into another transaction, but the seller failed to surrender the land, leading to a series of cases. It is submitted that the appellant was aware of all these developments since she was kept informed. The respondent has cited the decision in *David Wahome Mbeu vs. Catherine Wanjiru Maina & another* [2019] eKLR to support his case.

8. The oral testimonies of the parties, on record, are rather sketchy. Perhaps because the appellant and the respondent mainly adopted and relied on their written statements. It would be prudent to recite the said statements so that all the facts that were before the trial court are placed in proper perspective.

9. The appellant listed only one witness, herself, and, therefore, the only witness statement on record is hers. The facts narrated in that statement are a replica of the pleadings in the plaint. Essentially, that the appellant and the respondent were children of the same father, the deceased owner of South Kabras/Chesero/873. The respondent then sold a portion of that property to the appellant for Kshs. 70, 000.00, and a sale agreement was entered into on 27th May 2013. Subsequently, the respondent declined to let her access the land, saying that he had no land to sell, since the demised property belonged to the deceased, and he had no authority to sell it.

10. The respondent filed only one statement, his own. He told of how in 2008, his uncle and brother sold cows belonging to the appellant, raising a sum of Kshs. 70, 000.00, which was given to him, with instructions to buy land for her. He got a piece of land from one Ndoli Tsimonjera, which he bought. He informed the plaintiff about it, and advised her to build a house on it as soon as possible. She delayed, and the seller rescinded the sale, on grounds that his estranged wife had come back, and he had allocated her the land in question. He refunded the sale money. The respondent then got another parcel that was being sold by Musa Mwani, for Kshs. 215, 000.00. He paid him a deposit of Kshs. 90, 000.00, and later cleared the balance using his own money. The seller then refused to transfer the property to the appellant. The respondent reported the matter at the Butali police station. The seller was arrested, charged and convicted, of obtaining money by false pretences, in Butali SRMCRC No. 325 of 2014. He informed the appellant about the development, who, in turn reported him at the same police station, accusing him of obtaining money from her by false pretences. He was arrested, but he explained himself, whereupon the police forced him to sign the sale agreement dated 27th May 2013, while still in police custody. Upon his release from the police custody, he declined to honour the said agreement, whereupon he was arrested and charged in Butali SRMCRC No. 425 of 2014, of obtaining money by false pretences. He was eventually acquitted. He thereafter sued Musa Mwani, in Butali SPMCCC No. 129 of 2016, for a refund of the purchase price, and the court ruled in his favour. The said Musa Mwani filed appeal against the said judgment, in Kakamega HCCA No. 10 of 2018. He asserted that he never offered to sell a portion of South Kabras/Chesero/873 to the appellant for Kshs. 70, 000.00. The respondent then placed the proceedings in the three cases at the lower court, that is to say Butali SRMCRC No. 325 of 2014, Butali SRMCRC No. 425 of 2014 and Butali SPMCCC No. 129 of 2016, on record.

11. In Butali SRMCRC No. 374 of 2014, the accused person was Musa Mwani Abulwa. The complainant was the respondent. He was accused of receiving money from the respondent pretending that he was in a position to sell to him a parcel of land. The trial court found, in a judgment delivered on 1st March 2016 that the accused person did receive money on those promises from the respondent, and the respondent did not owe him anything since he had paid the agreed purchase price in full, but he never conveyed the land to him. He was found guilty of obtaining money by false pretences and trickery.

12. In Butali SRMCRC No. 425 of 2014, the accused person was the respondent, while the appellant was the complainant. The charge was that the respondent had falsely received a sum of Kshs. 70, 000.00 from the appellant, pretending that he could sell to her a portion of South Kabras/Chesero/873. The trial court found that the respondent had admitted that he had received the money in question, he was to buy land for the appellant, he did buy the land, but the transaction ran into difficulties that culminated in a criminal matter, being Butali SRMCRC No. 374 of 2014. The court also found that the money was still intact, and the appellant had been offered alternative land, since she wanted land rather than a refund. The court found that the principal witnesses did not even mention South Kabras/Chesero/873. Eventually, the trial court found that fraud was not proved, and proceeded to acquit the respondent. In Butali SPMCCC No. 129 of 2016, the respondent sued Musa Mwani to recover moneys that he had paid to him over a land transaction which had failed. The trial court found in favour of the respondent, basing itself on, among others, the outcome in Butali SRMCRC No. 374 of 2014.

13. Having considered the material that was before the trial court, let me now consider the grounds of appeal. Grounds 1 and 2 can be taken together, as they both relate to the criminal proceedings referred to by the trial court. The argument is that the trial court ought not have referred to those cases, since they were not relevant to the matters before the court.

14. Were those proceedings relevant? One of the criminal proceedings involved both the respondent and the appellant, where the appellant was the complainant, while the respondent was the accused person, and the facts of the criminal case, were the same as the facts in the civil case which gave rise to the instant proceedings. I am talking about Butali SRMCRC No. 425 of 2014. Since Butali SRMCRC No. 425 of

2014 and Butali SPMCCC No. 129 of 2016 turned on the same facts, the proceedings in Butali SRMCCRC No. 425 of 2014 were relevant for the purposes of Butali SPMCCC No. 129 of 2016. Butali SRMCCRC No. 374 of 2014 did not involve the appellant, since he was not a complainant in it. However, the same was referred to in Butali SRMCCRC No. 425 of 2014, which suggested that the two criminal cases were connected, and, therefore, the two needed to be placed before the trial court for completeness of the picture that the respondent was painting. In any event, evidence taken in criminal proceedings is admissible under various provisions of the Evidence Act, Cap 80, Laws of Kenya. See *Captain Moses Kariuki Wachira vs. Joseph Mureithi Kanyita & 3 others* [2013] eKLR.

15. Of course, an issue could be raised as to the place of reliance on all the three proceedings, that is to say Butali SRMCCRC No. 374 of 2014 Butali SRMCCRC No. 425 of 2014 and Butali SPMCCC No. 129 of 2016, given the kind of pleadings that the respondent had filed in his defence. He did not refer to the said cases, and his defence was bare, comprised, as it was, of mere denials, saying that he was putting the appellant to strict proof. Since the background that emerges from the three cases was not pleaded or given in the defence statement, it would be a potent argument to say that there was no basis for presenting the said proceedings as evidence, since parties are bound by their pleadings, and the material in those proceedings was not supported by the pleadings before the court. The appellant, therefore, has a powerful argument in saying that that evidence ought not have been adduced, and if adduced, the trial court ought not to have considered the material.

16. I note though that the defendant, in his witness statement, did give a detailed factual background, which is supported by those cases. He then went on to list the proceedings in the three cases in his list of documents, and to attach copies of the typed proceedings and judgments in all three cases. That was, of course, sloppy draftsmanship on the part of the respondent, for that material was not supported by the pleadings, and much of the what was put in the witness statement ought to have been part of the defence, so as to provide a basis or foundation for presentation of that evidence at the trial. Anyhow, the respondent led or adduced evidence on that material without any objection from the appellant. The respondent went on to produce the proceedings in the three cases without any objection from the appellant, and the same were marked as exhibits. Any objections would have led to the said evidence being locked out. The moment the appellant acquiesced to its being placed on record, and proceeded to cross-examine on the material, meant that it became admissible, and available for consideration by the court. The trial court cannot, therefore, be faulted for having relied on that evidence to find in favour of the respondent. There is, therefore, no merit at all in Grounds 1 and 2 of the appeal.

17. Ground 3 of the appeal raises two issues. The first is that the testimonies of the appellant and his witness were not taken into account. The second is that the appellant was barred from calling other witnesses. On the first issue, I note that the trial court did narrate the testimony of the Chief, which meant that it was in the mind of the court, but in the analysis, the court did not mention it. That would suggest that the same was either not considered, or the trial court thought it was of no consequence and, therefore, made no reference to it. From the material before the trial court, it would appear that the issue did not arise in 2013, when the alleged agreement between the appellant and the respondent was executed, but went back to 2008, when the respondent was given the money to buy the land. He gave a detailed background, complete with three court cases that arose from the whole affair. He stated that he was coerced into signing the impugned agreement, and the trial court believed him, which, therefore, meant that the court did not give much credence to the Chief's story. Whether the Chief was present or not at the execution of the agreement was of no consequence, so long as the court was satisfied that that execution was obtained through coercion. In any event, the criminal proceedings in Butali SRMCCRC No. 425 of 2014 were amounted against the respondent after he ignored that agreement, the court conducted a trial and eventually exonerated the respondent, which meant that that agreement was of no consequence.

18. On the second aspect of that ground, I do note that when the appellant lodged his plaint in the matter, she had listed only one witness, herself, and she filed only one witness statement, her own. She was expected, in the circumstances, to be the only person to testify in her favour. I note, however, that after she testified on 22nd August 2017, she applied for adjournment to call the Chief, despite his not being listed as a witness and not having filed a witness statement. That application was not resisted by the respondent. The Chief was availed on 5th June 2018. He testified. There is no indication on the record that the appellant intended to call more witnesses. No application was made in that behalf, and, therefore, it cannot be said that the trial court denied the appellant an opportunity to call more witnesses. Indeed, after the Chief testified, the advocate for the appellant indicated that she was closing her case. Therefore, there is no basis for the second aspect of Ground 3.

19. Ground 4 is to the effect that the trial court ought to have found for the appellant since the respondent had admitted receiving the sum of Kshs. 70, 000.00. It is, indeed, true and correct that the respondent did concede that he received the money, but he explained the circumstances under which the same was received. According to him, he did not receive the amount as consideration for selling a portion of South Kabras/Chesero/873 to the appellant. He explained that the money was given to him to buy land for the appellant. He entered into a transaction with Ndoli Tsimonjera, but that transaction fell through for the reasons that he gave. After the money was refunded, he entered into another transaction with Musa Mwani, but the land was not transferred to him. That sparked off litigation between him and the seller, in Butali SRMCCRC No. 425 of 2014 and Butali SPMCCC No. 129 of 2016, which terminated in his favour. Musa Mwani was found liable, and was ordered to refund the money. In the face of that evidence, and, in particular, the court cases, I find that the respondent had given a plausible explanation that he did receive the money, but not in the circumstances given by the appellant. The trial court believed him. The appellant has not sought to persuade me why the trial court should have believed her instead of the respondent.

20. I find it curious, that when the appellant was given a chance to file written submissions, the document that she filed herein, in the name of written submissions, actually supports the position taken by the respondent, in terms of how her cows were sold and the money given to the respondent, and how he entered into a transaction with Ndalu Tsimonjera. She expresses doubt as to what transpired after that transaction and how Musa Mwani came into the picture, but the gaps in her mind, are filled by the proceedings in SRMCCRC No. 325 of 2014, Butali SRMCCRC No. 425 of 2014 and Butali SPMCCC No. 129 of 2016. The background that she gives in her written submissions ought to have been given in her plaint. She concealed that background, which distorted the correct picture and misrepresented the facts she placed before the court, only for the record to be put straight by the respondent. The proceedings in SRMCCRC No. 325 of 2014, Butali SRMCCRC No. 425 of 2014 and Butali SPMCCC No. 129 of 2016 laid bare what transpired, and the trial court believed the respondent. I am not persuaded that the said proceedings do not present a true picture of what actually happened.

21. Finally, I find that the case, that the appellant mounted at the trial court, was founded on fraud. She was bound to prove the allegations of fraud. The fraud allegations made in the civil case were the same allegations made in the criminal case, Butali SRMCCRC No. 425 of 2014, which terminated in favour of the respondent. Of course, in criminal cases the threshold of proof is higher, and the same case can still be

presented in civil proceedings where the burden is lower, and the court may proceed to determine liability despite the acquittal. However, the civil court faced with a case founded on fraud must be alive to the fact that fraud amounts to criminality, and the civil court should expect the parties to present a higher degree of proof than balance of probability. See *Kuria Kiarie & 2 others vs. Sammy Magera* [2018] eKLR, *Kinyanjui Kamau vs. George Kamau* [2015] eKLR and *Ndolo vs. Ndolo* [2008] 1 KLR (G&F) 742. I am not persuaded that the appellant adduced any evidence to prove fraud on the part of the respondent. None of the particulars of fraud pleaded in the plaint were proved, and, therefore, the trial court was not at fault when it dismissed the suit.

22. Overall, I have not found any material upon which I can disturb the decision of the trial court, of 12th March 2019, made in Kakamega CMCCC No. 265 of 2016. The said decision is hereby upheld. The appeal is, accordingly, dismissed. The respondent shall have the costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF November 2020

W. MUSYOKA

JUDGE