Manoti v Gemstaviv Limited & 5 others (Environment and Land Appeal 26 of 2020) [2023] KEELC 21915 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21915 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL 26 OF 2020

CG MBOGO, J

NOVEMBER 30, 2023

BETWEEN

CHARLES MANOTI ..... APPELLANT

AND

GEMSTAVIV LIMITED ..... 1ST RESPONDENT

KAMAKEI OLE KARIA ..... 2ND RESPONDENT

FREDRICK LENKANONI NAMPASO ..... 3RD RESPONDENT

ANTHONY NAMPASO ..... 4TH RESPONDENT

PM MENGI ..... 5TH RESPONDENT

THE REGISTRAR OF LAND-NAROK ..... 6TH RESPONDENT

(Being an appeal from the Judgment of Hon. W.Juma-Chief Magistrate delivered on 26th August, 2020)

JUDGMENT

1. The appellant being aggrieved by the entire judgment of the honourable W. Juma delivered on 26th August, 2020 in Chief Magistrate ELC Civil No. 56 of 2018 filed a memorandum of appeal dated 23rd September, 2020 challenging the judgement of the trial court on the following grounds: -

    1. The learned magistrate erred in fact and law by making conclusions based on pleadings which are not otherwise supported by any concrete evidence or proof.

    2. The learned magistrate erred in fact and law by holding that the 4th defendant was part of the fraud disregarding the uncontroverted evidence that the fraudulent land sale agreement was

entered into on 4th April, 2012 and payment of part of the purchase price effected and the appellant was hired on 7th April, 2012 to erect beacons.

3. The learned magistrate erred in fact and law by making conclusions that the appellant was not a surveyor ignoring evidence on record evidenced with issuance of receipt for Kshs. 10,000/- for erecting beacons.

4. The learned magistrate erred in fact and law by concluding that the Directors of the 1st respondent (PW1 and PW2) could not have known the land they were buying and that it was the appellant to show them the land ignoring ample evidence that the 1st respondent had identified the land and entered into a sale agreement prior to meeting with the appellant.

5. The learned magistrate erred in fact and law by wrongly holding that the appellant was supposed to provide the 1st respondent with coordinates yet coordinates can only be obtained from Survey of Kenya and not the appellant to prepare them.

6. The learned magistrate erred in fact and law by holding the appellant jointly liable with the respondents ignoring the uncontroverted evidence as to who were recipients of the purchase price pursuant to the sale agreement dated 4th April, 2012.

7. The findings of the trial court were not supported by the evidence on record.

8. The trial magistrate erred in misdirecting herself in relying solely on the submissions of the 1st respondent failing to consider at all the appellant's submissions.

9. The learned magistrate erred in fact and by law by failing to appreciate that the sale agreement dated 4th April, 2012 was a subject of criminal investigations office Narok leading to Narok criminal case no. 1035 of 2014 and the appellant was cleared/exonerated of any fraudulent criminal conduct by the CID and was not charged in the said criminal case.

10. The learned magistrate reached an erroneous findings and conclusions both fact and law.

2. The appellant therefore prays for the orders that: -

a. That the honourable court do set aside and quash the entire judgment delivered by honourable W. Juma on 26th August, 2020.

b. That this honourable do make its own decision on the merits of the case, or in the alternative, upon setting aside the judgment, refer the case for determination before a different magistrate.

c. That this appeal be allowed.

d. That the costs of this appeal be borne by the 1st respondent.

e. That this honourable court does award such other or further relief as it may deem just and expedient under the circumstances of this case.

3. The grounds of appeal were canvassed by way of written submissions. On 10th July, 2023, the appellant filed his written submissions dated 6th July, 2023. On grounds one to four (1-4) of the memorandum of appeal, the appellant submitted that the trial court did not set out the standard of proof in a claim based on fraud and that it did not consider the specific fraudulent conduct attributed to the appellant as pleaded in the amended plaint dated 27th July, 2015. Further, that the allegation particularized under paragraph 24 does not constitute an element of fraud and can only be an ingredient of negligence as the role of the appellant was not to identify the property as parties had already entered into a sale agreement. As such, the two particulars of fraud attributed to the appellant stand unproven.

4. On ground five, the appellant submitted that the 1st respondent is estopped from introducing oral evidence into a written document as the rule on parole(sic) evidence dictates that no extrinsic evidence can be introduced to contradict, vary or alter the terms of the deed or written instrument. He relied on the case of Urbanus Kyalo Wambua versus Briggitta Ndila Musau [2019] eKLR.

5. On grounds six, seven and eight of the appeal, the appellant submitted that the findings contained in the judgment were not supported by the evidence on record for the reason that he did not receive any part of the purchase price. He submitted that GPS machines are used to ascertain acreage hence re-establishing beacons which confirms that neither the appellant nor the directors of the 1st respondent were in possession of the map of the area when the appellant went to the ground to re-establish boundaries after the property had been purchased by the 1st respondent.

6. On grounds nine and ten of the memorandum of appeal, the appellant submitted that the sale agreement dated 4th April, 2012 was a subject of criminal proceedings and that the criminal investigations exonerated him of any fraudulent conduct and, the fraudulent land transaction was between the 1st,2nd,3rd and 4th respondents only.

7. On 27th September, 2023, the 1st respondent filed its written submissions dated 6th September, 2023.With respect to grounds one to five (1 to 5) of the appeal, the 1st respondent submitted that the appellant was not a qualified surveyor and that he was part of the fraudulent transaction.

8. On ground six, the 1st respondent submitted that the appellant failed in his purported capacity as a surveyor to warn the 1st respondent that the land he was purportedly surveying was not one and the same as title no. Cis/Mara/Lemek/1477.

9. With respect to grounds seven to ten (7 to 10) of the appeal, the 1st respondent submitted that the trial court's decision was substantiated and supported by evidence.

10. As a first appellate court, my duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This was stated in Selle & another versus Associated Motor Boat Co. Ltd.& others [1968] EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan [1955], 22 E.A.C.A. 270)"

11. The 1st respondent filed an amended plaint dated 27th February, 2014 seeking that judgment be entered against the defendants jointly and severally for: -

    a. The sum of Kshs. 8,242,500/-

    b. Costs of this suit.

c. Interest on (a) and (b) above court rates.

12. The appellant herein filed his statement of defence dated 16th July, 2014. In his defence, the appellant maintained that he was a stranger to the agreement for sale entered into between the 1st and 2nd respondents. The appellant further denied that he ever received Kshs. 300,000/- as survey fees and stated that he charged Kshs. 10,000/- for beaconing. It was also his position that his instructions were to put beacons on land that had already been surveyed. He denied any collusion to swindle the 1st respondent of the purchase price and other charges.

13. The matter proceeded for trial which culminated into the judgment that is the subject of this appeal. In its judgement, the trial court framed the issues for determination as "who takes responsibility for that fraudulent sale, who played what role and where should the blame lie."

14. In his written submissions, the appellant faulted the trial court for holding that he was part of the fraud and that he was not a Surveyor ignoring the evidence on record based on the issuance of the receipt of Kshs. 10,000/- whose payment was for boundary establishment. According to him, the 1st respondent had no prior arrangements with the appellant for survey services. According to him, the court was wrong in finding him liable alongside others when he was not present during execution of the agreement when the purchase price had already been paid.

15. I have taken time to read the impugned judgment and I note that the trial court properly analysed and considered the pleadings, evidence on record and the written submissions as can be seen from the judgment itself. In their evidence, the 1st respondent through PW1 and PW2 testified that they went to the office of the Surveyor who had an assistant who fixed the beacons. PW1 testified that he saw the appellant with a small piece of map and they requested for coordinates on the ground but did not go back to the office of the Surveyor to ask for the coordinates. PW2 testified that they visited the suit land twice before formalizing the agreement and during these times, the appellant was not present.

16. In his evidence, the appellant testified that on 7th April, 2012, he received visitors in their office who were the directors of the 1s respondent (PW1 and PW2), the 3rd and the 4th respondent who wanted his colleague Henry Nyaema. According to him, his assignment was to put beacons on the land and that he was not asked for coordinates. Also, that he did not conduct a survey. During cross examination, it came out clearly that he was not a registered surveyor and he insisted that he was not to survey the land but to establish the beacons. From the evidence of PW1, PW2 and the appellant, it was evident that the appellant was not a licensed surveyor but identified himself as such and proceeded to conduct the so-called establishment of the beacons. In my view, the appellant is liable to the extent that he falsely identified himself as a surveyor whereas he knew very well that he was not licensed to carry out the works. The appellant did not bother to inform the 1st respondent that he was not a licensed surveyor and he ought to bear the consequences of his unlawful and illegal actions.

17. The trial court made the following conclusion which I find necessary to reproduce as follows: -

> " The 4th defendant has explained himself and his role. His participation boils down to one point. What is a surveyor expected to do in a survey or beaconing process. According to 4th defendant, he says he was shown the land on a slate, first, he says by PW1. This is highly doubtful because PW1 or the plaintiff for that matter was but a buyer. He cannot be expected to know the area he bought, an area of over 100 acres, unless it is surveyed to confirm.1st defendant was the seller and his markings needed to be ascertained by an expert. That is what a surveyor would have been expected to add to the equation, not to even go by

the beacon areas the seller points out. He was using a GPS. PW1 saw him with a map. He cannot ascertain and place beacons on unspecified land.

If the 4th defendant did his work and did not promise to give any coordinates, was he to be chased to give the same. Does 4th defendant have anything to show that he visited the land and fixed the beacons, apart from his word of mouth. He is expected to come up with something that can explain that he did the work.

4th defendant was not a professional, at least he has not proved he was. He started by introducing himself as a surveyor. He reduced himself to saying he worked under a registered surveyor. When 2nd defendant went to the survey office, they expected a different surveyor.

4th defendant said he is trained but does not say what he has trained in or as. From the available evidence one cannont tell what his expertise was. He was a good candidate for confusing PW1 and PW2 to imagine they had an expert marking this land that was never to be. A map would have assisted a surveyor to even notice the shape of the land and if it tallied as per the drawing.

The 4th defendant was an addition meant to complete the process of convincing PW1 and PW2 as they moved to the next stage of documentation. He was part of the fraud and it matters less that he was or could have been seen receiving part of the defrauded funds."

18. A look at the above finding and the evidence shows that the appellant herein was not a licensed surveyor to carry out the work he did on the land. He did not place any material before the court to show that he was skilled in the task. In addition, he did not place evidence before the court to show that he visited the land and placed beacons thereon. The court was satisfied that his presence in the transaction was meant to complete the process of convincing the 1st respondent to complete the transaction.

19. As such, the trial court found all the 6 defendants liable to the 1st respondent for the fraud committed and the funds lost. The question then is, was the trial court in order to find the appellant jointly and severally liable of the claims by the 1st respondent alongside the other parties?

20. The uncontroverted evidence must bring out the fault and negligence of the appellant, and a court should not take its truthfulness without interrogation for the reason only that, it is uncontroverted. A plaintiff must prove his case on a balance of probability whether the evidence is unchallenged or not.

21. In Kanyungu Njogu versus Daniel Kimani Maingi [2000] eKLR it was held that:

> " when a court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other"

22. Arising from the above, I find that the court properly applied its mind in arriving at the decision and I see no cause to interfere with it. The memorandum of appeal dated 23rd September, 2020 is hereby dismissed with costs to the 1st respondent.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 30TH day of NOVEMBER, 2023.

HON. MBOGO C.G.

JUDGE

30/11/2023.

In the presence of: -

CA:Meyoki