



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT GARISSA**

**Civil Appeal 4 of 2011**

**MOHAMED ADEN ALI.....1<sup>ST</sup> APPELLANT**

**IBRAHIM ADON DIIS.....2<sup>ND</sup> APPELLANT**

**ABDULLAHI KHALIF.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**MOHAMED MOHAMUD KASSIM.....RESPONDENT**

**JUDGEMENT**

1. By a memorandum of appeal dated 2<sup>nd</sup> December 2008, Mohamed Aden Ali, Ibrahim Adon Diis and Abdullahi Khalif (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively) are challenging the whole of the judgement of the Resident Magistrate in Garissa Principal Magistrate's Civil Case Number 6 of 2005 dated 17<sup>th</sup> May 2006. In the lower court case, Mohamed Mohamud Kassim (the respondent in this appeal) was the plaintiff suing the three appellants and one Aden Hassan Muse (the fourth defendant in the lower court civil case) for refund of Kshs 380,000/ being the purchase price of plot number GSA/B/1785B, interest thereon, payment of monetary value of the building material and costs of the suit.

2. The appellants have listed five grounds of appeal but submitted in support of grounds 1, 2, 3 and 4. The grounds of appeal are as follows, that:

i. The Learned Magistrate erred in fact in failing to appreciate that the appellants merely acted as witnesses in the purported sale of Plot N. GSA/B/1785B, to the respondent herein.

ii. The Learned Magistrate erred in fact in making a finding that the appellants' participation in the purported sale of Plot No. GSA/B/1785B went beyond merely witnessing the sale agreement entered into between the respondent (as purchaser) and Aden Hassan Muse (as vendor) in respect thereof

iii. The Learned Magistrate erred in fact in making a finding that the appellant deliberately sought to defraud the respondent herein of Kshs. 380,000/-.

iv. The Learned Magistrate misdirected himself in making a finding that the respondent

had indeed succeeded in discharging the burden of proof encumbered upon him

v. In view of the circumstances set out herein above, the Learned Magistrate wholly misdirected himself in delivering judgement in favour of the respondent by failing to consider and appreciate the evidence adduced on behalf of the appellants.

3. I understand the grounds of appeal as raising the following issues for determination in this appeal:

i. Whether the appellants were mere witnesses to the sale of Plot Number GSA/B/1785B or whether they had a stake in the ownership of the same.

ii. Whether the appellants' intention in participating in the sale of Plot Number GSA/B/1785B was to defraud the respondent of Kshs 380,000/.

iii. Whether the respondent succeeded in discharging the burden of proof in the lower court.

4. Mr. Kigen for the appellants chose to condense grounds 1 to 4 into two limbs and submitted in support of the each limb. In support of grounds 1, 2 and 3, it was submitted that the Learned Magistrate failed to appreciate that the appellants were mere witnesses to the sale of Plot Number GSA/B/1785B. He pointed out sections of the evidence adduced before the lower court to support this. He noted that the respondent admitted in court that the 3<sup>rd</sup> appellant approached him and informed him of a plot of land for sale and therefore from the beginning the respondent was aware that the 3<sup>rd</sup> appellant was not the owner of the plot but the broker.

5. Further submissions show that the evidence of the Provincial Planning Officer was that the plot in question had been allocated to two people the fourth defendant in the lower court and one Halima. The evidence adduced in the lower court points out to the said Halima having sued the fourth defendant for having interfered in the Plot in question therefore leaving no doubt as to who the owner of the Plot in question was. It was further submitted that 1<sup>st</sup> and 2<sup>nd</sup> appellants were witnesses to the sale transaction between the respondent and the fourth defendant according to their testimony in the lower court.

6. In support of the ground of appeal number four, it was submitted that the Learned Magistrate misdirected himself in finding that the respondent discharged the burden of proof encumbered on him when this is not true. It was submitted that the burden of proof in cases where fraud is alleged is higher than the balance of probability. Two cases were cited in support of that point, namely **Gudka V. Dodhia, Civil Appeal No. 21 of 1980** and **Koinange & 13 Others V. Koinange [eKLR 1986] 23**

7. In opposing the appeal, Mr. Otieno for the respondent argued that there was no doubt that the appellants received the money; that the respondent knew the appellants very well and that he paid Kshs 10,000 to the 3<sup>rd</sup> appellant as the broker; that the appellants presented themselves to the respondent as family members making the respondent believe the Plot in question existed and that it belonged to them. He further submitted that the appellants received the money from the respondent and their objection to be photographed as they received the money was a clear indication that they had something to hide from the respondent.

8. Counsel further submitted that the owner of the Plot testified confirming that the Plot belonged to her, a fact that was admitted by the Physical Planner. Court was further informed that the decretal amount has been paid by the fourth defendant in the lower court proceedings who did not prefer to appeal against the lower court judgement and this is an admission of liability. This being the case, it was argued, and since the fourth defendant in the lower court acted jointly with the appellants, the court cannot be asked to draw a boundary between appellants and fourth defendant.

9. On the issue of burden of proof, counsel for the respondent submitted that the respondent has discharged this by producing documents showing that the appellants were involved in the transaction as

witnesses.

10. I have read the proceedings from the lower court, both in the criminal case 998 of 2002 against the fourth defendant in the civil case and civil case number 6 of 2005 filed by the respondent against the appellants and the fourth defendant. From the evidence adduced in the civil case, the respondent told the court that he had asked the third appellant whom he knew as a broker, that he (respondent) wanted to buy a plot. The third appellant went back to respondent on 5<sup>th</sup> June 2001 and told him that he had found a plot. The respondent was shown the said plot by the third appellant. The respondent was interested in the plot and on asking the third appellant whom the plot belonged to he was told it belonged to a young man. The respondent wanted to meet the people responsible and was shown the fourth defendant as the owner and first and second appellants. Further evidence shows the respondent telling the court when he managed to get the balance of the purchase price (Kshs. 90,000) he told the third appellant, the broker, to bring the seller and the two elders (first and second appellants) so that he could pay them. He admits paying the third appellant Kshs 10,000 as broker's fees.

11. In his evidence the fourth defendant told the lower court that he owned plot number GSA/1856 but when a dispute arose, the plot was subdivided into GSA/B/1785A and GSA/B/1785B. He got GSA/B/1785B while the other plot went to Halima. He decided to sell his plot and informed the third appellant, the broker, to get a buyer for him. Later the third appellant told him that he had got a buyer, the respondent in this case. The fourth defendant then asked two elders first and second appellants to witness the transaction for him.

12. The third appellant testified for the prosecution as witness number seven in the criminal case. He denied being a broker and denied knowing the respondent or being sent by the respondent to look for a plot for him to buy. He claimed he was called by the fourth defendant as a witness to a sale transaction. The second appellant testified as prosecution witness number eight and he too said he was a witness to the sale transaction between Aden Hassan Muse and the respondent. He denied seeing any money changing hands. The first appellant testified for the prosecution as witness number nine and he too said he was a witness to the sale transaction and denied receiving any money in respect of the transaction.

13. A look at a document titled "Allocation for Plot Transfer" marked as 'exhibit 5' appearing on page thirteen of the record of appeal shows the names of the fourth defendant as the transferor and the respondent as the transferee of GSA/B/1785B. The three appellants appear at the bottom of that document as witnesses. There is also 'exhibit 6' signed by the respondent and witnessed by second and first appellants respectively. It shows a balance of Kshs. 90,000 in respect of the sale of the plot in question.

14. From all the evidence adduced in the lower court in both the criminal and civil case, I am persuaded that indeed the third appellant who was a broker in respect of plot number GSA/B/1785B purportedly belonging to the fourth defendant. Going by 'exhibit 5', the plot transfer document, I am also persuaded that the first and second appellants were witnesses to the sale transaction. They appear as such in that document and they state so in their evidence in the criminal case. I am also persuaded that the purported owner of that plot was the fourth defendant. If the appellants had a stake in the ownership of the plot in question, it is my finding that this has not been proved.

15. I also find that the appellants, especially the third appellant, have not been truthful in their evidence. They seem to know something that did not come out during the hearing of both criminal and civil cases in the lower court and their evidence is contrary in certain respects. It is clear from the evidence in the lower court that the plot in question has attracted many court cases. It would seem that the allocation of that plot has been compromised by double allocation or sub-division in unclear circumstances.

16. On the issue of the intention of the appellants to defraud, I have considered the submissions in respect of this issue. I have read the cited cases **Koinange & 13 Others v. Koinange – Civil Suit No 66 of 1984; Gudka v Dodhia, Civil Appeal No 21 of 1980 as well as Central Bank Kenya Ltd v Trust Bank & 4 others (1996 eKLR)**. These cases emphasize that it is not enough for a party to make vague and general allegations of fraud. Allegations of fraud and conspiracy to defraud are serious allegations requiring strict

proof. The onus of prima facie proof is much heavier on the party alleging them than in ordinary civil cases. In the **Koinange case**, it was held, inter alia, ***that allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities*** (emphasis added).

17. The respondent was required by law to strictly prove to a standard higher than a balance of probabilities as understood in ordinary civil cases but lower than beyond reasonable doubt that the appellants:

- a) Represented to the respondent that there was plot number GSA/B/1785B located next to Garissa Municipal Council Offices when they knew this to be untrue.
- b) Represented to the respondent that the said plot was on sale when in fact they knew it never existed.
- c) Obtained Kshs 380,000 from the respondent as the purchase price for the plot which they knew never existed.
- d) Purported to transfer to the respondent a property which they knew never existed.
- e) Represented to the respondent that plot number GSA/B/1785B belonged to all of them save that it was registered in the name of the name of the 4<sup>th</sup> defendant as a trustee.
- f) Jointly and/or severally showed the respondent a vacant plot on sale knowing that the plot did not belong to either of them.

18. Looking at the particulars of fraud and the evidence adduced in the lower court, it is clear that it falls short of the threshold in fraud cases. I also note that the particular of fraud number five, in the plaint before the lower court, contradicts the other particulars. It cannot be said that the plot did not exist and again state that it did not belong to all the appellants but to fourth defendant! After considering the evidence and the cited authorities above I am persuaded that the respondent did not discharge the onus of proof encumbered on him by the law.

19. The lower court held that the plaintiff (respondent) '**had managed to establish his case on probability of success**', and with that the learned magistrate proceeded to award him the prayers contained in the plaint. This finding is being challenged on the ground that the proof required in fraud cases is higher than what the learned magistrate found and this court finds that by so finding he misdirected himself. He failed to take into account that the standard of proof in fraud cases is higher than in ordinary civil cases. To this extent, this appeal succeeds.

20. In view of the findings above I hereby allow the appeal with costs and set aside the judgement of the Principal Magistrate's Court dated 17<sup>th</sup> May 2006.

**Dated, signed and delivered this 5<sup>th</sup> day of June 2012 in open court.**

**STELLA N. MUTUKU, JUDGE**