



**Manyara v Mberia (Civil Appeal E453 of 2021)  
[2024] KEHC 5167 (KLR) (Civ) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E453 OF 2021**

**CW MEOLI, J**

**MAY 13, 2024**

**BETWEEN**

**JOSEPH MUTHURI MANYARA ..... APPELLANT**

**AND**

**WILLIAM GACANI MBERIA ..... RESPONDENT**

*(Being an appeal from the judgment of Gicheha, L.L., CM.  
delivered on 30th June, 2021 in Nairobi CMCC No. 10381 of 2018)*

**JUDGMENT**

1. This appeal derives from the judgment delivered on 30<sup>th</sup> June, 2021 in Nairobi CMCC No. 10381 of 2018. The events leading up to the said judgment are that William Gacani Mberia (hereafter the Respondent) filed the suit in the lower court against Joseph Muthuri Manyara (hereafter the Appellant) by way of the plaint dated 31.10.2018 seeking a refund on the sum of Kshs 8,889,300/- plus interest at the rate of 14% p.a. from the date of payment until repayment in full.
2. The Respondent averred that the parties herein had previously engaged in various sale transactions at all material times. The Respondent therefore averred that sometime in January 2010 the Appellant invited him to Katani in Mavoko County with the aim of viewing certain parcels of land for which the Appellant claimed ownership jointly with a third party and indicated that he was interested in selling the said parcels.
3. It was further averred that the Respondent agreed to purchase a few of the properties from the Appellant, including the parcel of land known as L.R. No. 12581/8 Athi River (the first property) measuring 3,693 acres at a purchase price of Kshs. 4,500,000/- and plot numbers 60,64,67 and 68 (the plots) measuring about 50 by 100 feet each and which were subdivisions of the parcel of land known as L.R. No. 12581/5 Athi River (the second property) at a purchase price of Kshs. 200,000/- per plot.



- That the Respondent therefore appointed his son (Timothy Mutua Gacani) to be the registered owner of plot number 60 and further appointed Karavan Ventures (the Company) co-owned by himself and his wife (Anne Makandi Mberia) to be the registered proprietors of the remaining plot numbers 64, 67 and 68.
4. That between the months of February, 2010 and March 2011, the Respondent transferred the respective sums of Kshs. 4,134,500/- and Kshs. 800,000/- to the Appellant through his Barclays Bank account, towards the purchase of the first property and the plots mentioned hereinabove. That the Respondent paid a further sum of Kshs. 5,200/- towards alleged land rates in respect of the first property, and that the Appellant acknowledged receipt of the purchase price and completed a draft sale agreement in the names of the Respondent's nominees cited hereinabove.
  5. The Respondent pleaded that notwithstanding the above, the Appellant failed and/or neglected to hand over the requisite transfer documents pertaining to the first property as well as the plots, to the Respondent. The Respondent further pleaded that it was not until April, 2015 that he discovered, upon inquiring from the Machakos County Lands Department, that the first and second properties did not belong to the Appellant, and hence none of the said properties had been transferred to the Respondent. That he further discovered that the invoices pertaining to the sum of Kshs. 5,200/- on land rates had been forged by the Appellant.
  6. It was moreover pleaded that concurrently with the above transaction, sometime in October, 2010 the Appellant herein had indicated to the Respondent that he had three (3) parcels of land situated in Sabasaba area measuring 5, 3 and 2.1 acres respectively (the third, fourth and fifth properties) which he intended to sell. That the Respondent agreed to purchase the third and fifth properties at the sums of Kshs. 1,750,000/- and Kshs. 1,050,000/- respectively. That between November, 2010 and May, 2012 the Respondent therefore transferred the sum of Kshs. 1,805,000/- through his Barclays Bank account-Hurlingham Branch, to the Appellant's Barclays Bank account-Embakasi Branch, towards purchase of the said properties. That similarly, the Appellant failed to transfer the said properties to the Respondent, eventually ceasing all contact with him as at April, 2014.
  7. The Respondent averred that at around the same time of the above transactions, the Appellant took him to visit certain empty parcels of land situated in Kyang'ombe bordering Mombasa Road, where the latter claimed to own various plots therein together with third parties and which he was interested in disposing of. Thus, the Respondent agreed to purchase three (3) plots (the sixth, seventh and eighth properties) in that area, each selling at Kshs. 500,000/- therefore totaling a sum of Kshs. 1,500,000/-. That the Respondent therefore made arrangements to pay the sum of Kshs. 640,000/- towards the purchase thereof, and yet the Appellant did not honour his contractual obligations.
  8. The Respondent further averred that in addition to the foregoing, sometime in October, 2010 the Appellant claimed the ownership of two (2) parcels of land situated in Kimana area-Loitoktok County (the ninth and tenth properties), and selling at a consideration of Kshs. 160,000/- each. That in addition, the Appellant introduced the Respondent to one Mama Wairimu who purportedly owned 10 acres of land (the eleventh property) in the same area of Kimana and which land was similarly for sale. That the Respondent paid a sum of Kshs. 1,006,000/- towards the ninth, tenth and eleventh properties, but that the Appellant failed to complete either sale.
  9. It was the Respondent's averment that in the same October, 2010 the Appellant approached him with a potential sale, in respect of a parcel of land situated in Kajiado, namely LTK/KIMANA-TIKONDO/298 (the twelfth property) on sale for Kshs. 437,200/- which sum was paid in full by way of two (2) instalments. That it was agreed between the parties that the twelfth property would be purchased jointly. That however, the Appellant misled the vendor of that property (Kibarisho Ene



Lenguna) into believing that the parties herein had agreed to transfer the twelfth property directly to a third party.

10. It was equally the Respondent's averment that sometime in May, 2011 the Appellant further informed him that he was selling plots situated in the land opposite Simba Cement Factory in Mavoko Machakos County (the thirteenth property) at a consideration of Kshs. 15,000/- each. That resultantly, the Respondent paid a sum of Kshs. 280,000/- between May and June, 2011 with the aim of procuring 22 of the plots, but that the Appellant never completed the sale.
11. That it was not until the Appellant ceased all communications with the Respondent sometime in April, 2014 that the latter realized that he had been defrauded by the former, the particulars of which are set out under paragraph 22 of the plaint in the following manner:

Particulars of the Defendant's Fraud And Misrepresentation

- a. Misrepresenting to the plaintiff that he was in a position to sell him a plot of land in Katani Mavoko in Machakos County when he knew that he did not own the said plot.
- b. Misrepresenting to the plaintiff that he owned plot ref. No. 12581/8 Mavoko when he knew the property was owned by someone else.
- c. Obtaining ksh. 4.5 million from the plaintiff when he knew that he could not sell the property he was purporting to sell to the plaintiff.
- d. Presenting land rate clearance invoices for ksh. 5,200 which were in the plaintiff's name to the plaintiff when he knew or ought to have known that the said invoices were forgeries.
- e. Obtaining ksh. 5,200 from the plaintiff allegedly for payment of land rates which the defendant knew to be false.
- f. Misrepresenting to the plaintiff that he owned and was willing to sell to him 3 parcels of land measuring 5,3 and 2.1 hectares respectively in Sabasaba Murang'a County which the defendant knew to be false.
- g. Obtaining from the sum of ksh. 1,805,000 from the plaintiff for purchase of two of the parcels of land measuring 5 and 2.1 hectares respectively when he knew that he was not in a position to sell the said properties or had no intention of selling the said properties to the plaintiff.
- h. Misrepresenting to the plaintiff that he owned plots in Kiang'ombe on Mombasa Road and was in a position to sell the said plots to the plaintiff which the defendant knew to be false.
  - i. Obtaining ksh.640,000 from the plaintiff for sale of the said plots in Kiang'ombe when the defendant knew that he was not in a position to sell the plots.
- j. Misrepresenting to Kibarisho Ene Lenguna that the plaintiff and the defendant had agreed to sell Parcel No. LTK/Kimana-Tikondo/298 to a third party which the defendant knew was false.



- k. Misleading Kibarisho Ene Lenguna into transferring Parcel No. LTK/Kimana-Tikondo/298 to a third party instead of the plaintiff and the defendant who were joint purchasers.
  - l. Fraudulently obtaining ksh.1,006,000 from the plaintiff allegedly for sale of 10 acres of land and 2 plots in Kimana Loitoktok Kajiado County which the defendant knew he was not in a position to sell or had no intention of selling to the plaintiff.
  - m. Fraudulently obtaining ksh. 280,000 from the plaintiff allegedly for sale of 22 plots in Mavoko which the defendant knew he was not in a position to sell or had no intention of selling to the plaintiff. sic
12. That the total claim on which the Appellant allegedly defrauded the Respondent was Kshs. 8,889,300/-.
  13. The Appellant upon entering appearance, filed a statement of defence dated 23.04.2019 denying the key averments in the plaint and liability. More particularly, the Appellant averred that contrary to the averments in the plaint, he was at all material times a foreman of the Respondent, whose duties included supervision and representation of the Respondent in his various works and projects. The Appellant further denied any involvement in the alleged transactions, averring instead that any monies received from the Respondent were utilized in his capacity as foreman and not for the sale of any parcels of land as alleged.
  14. The Appellant equally denied ownership of the parcels of land set out in the plaint and put the Respondent to strict proof thereof, save in respect of the twelfth property, which the Appellant admits to owning jointly with the Respondent, but denying that the same was ever sold to a third party. In addition, the Appellant stated that the parties herein were at all material times engaged in Nairobi Chief Magistrate's Court Criminal Case No. 1287 of 2016 wherein the Respondent was the complainant while he was the accused person. Which case revolved around the sale transactions which were the subject of the suit, and was still pending.
  15. The Respondent rejoined with a reply to defence dated 6.05.2019 where he joined issue with the Appellant on his defence and reiterated the contents of the plaint.
  16. The suit proceeded to full hearing with only the Respondent adducing evidence. The Appellant was forced to close his case due to non-availability of the defence witness. Upon the close of submissions, the trial court delivered judgment in favour of the Respondent and against the Appellant, as prayed in the plaint.
  17. Aggrieved with the aforementioned judgment, the Appellant preferred the present appeal through the memorandum of appeal dated 29.07.2021 which is based on the following grounds:
    - “ 1) That The Learned Chief Magistrate erred in law and fact when she dismissed the Appellant's case due to non-attendance.
    - 2) That The Learned Chief Magistrate erred in law and in fact by finding that the Appellant was properly served with the hearing notice by the Respondent.
    - 3) That The Learned Chief Magistrate erred in law and fact by holding that the Respondent had proved his case on a balance of probabilities as required by law.



- 4) That The Learned Chief Magistrate erred in law and fact by admitting to evidence draft sale agreements that were neither signed by the Appellant nor was the Appellant a party thereof.
  - 5) That The Learned Chief Magistrate erred in law and fact by admitting to evidence that the Appellant was the owner of the parcels of land despite the Respondent clearly indicating in his testimony that he had not done his due diligence to ascertain the legitimate owners of the parcels therein.
  - 6) That The Learned Chief Magistrate erred in law and fact by admitting to evidence the Respondent's purported draft sale agreements yet they are in contravention of Section 4 of the Limitation of Actions Act, Section 3(3) of the Law of Contract Act and Section 19 of the Stamp Duty Act.
  - 7) That The Learned Chief Magistrate erred in law and fact by failing to consider the Appellant's submissions in their entirety while arriving in her judgment." (sic)
18. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR and Articles 25(c) and 50(1) of the Constitution of Kenya, 2010, to argue that the Appellant was not accorded the right to a fair hearing since his case was closed for non-attendance. Denying him the opportunity to defend the claim when it came up for defence hearing on 15.04.2021. The Appellant's counsel argued that upon close of his defence case, his then advocates filed an application dated 7.06.2021 seeking to set aside the aforesaid order of 15.04.2021 on account of failure by the advocate to inform the Appellant of the impending defence hearing and his further failure to attend court for the said defence hearing. That unfortunately, the application was never heard. That in the premises, the trial court erred in delivering judgment while there was a pending application. Reliance was placed on the decisions in Belinda Murai & 9 others v Amos Wainaina [1978] eKLR and Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (1982-1988) KAR on the principle that mistake of counsel should not be visited on the client.
  19. Onto the merits of the appeal, the Appellant's advocate cited the decisions in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 and Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR where the respective courts appreciated that the standard of proof applicable in civil cases is a balance of probabilities. According to the advocate, the Respondent did not meet the required standard of proof particularly on two (2) main grounds: that firstly, he sought to rely on draft sale agreements that did not meet the threshold set out under Section 3(3) of the Law of Contract Act which stipulates that no suit shall be brought on the foundation of a contract pertaining to an interest in land, unless such contract is in writing; signed by the parties thereto; and witnessed accordingly. That furthermore, the Respondent sought to rely on transactions which had not been reduced in writing and yet the trial court concluded that the parties herein had entered into agreements for sale of the purported properties.
  20. That secondly, the suit was time barred by dint of Section 4(1) of the Limitation of Actions Act since it was brought eight (8) years after the cause of action arose in 2010 and yet, causes of action founded on contract ought to be brought within a period of six (6) years. That consequently, the trial court ought to have declared the suit time barred and struck it out on that basis. It was counsel's submission that whatever the case may be, the Respondent having not proved his case on a balance of probabilities, was not entitled to the prayers sought. For the above reasons, the court was urged to allow the appeal and



upon doing so, to order that the suit be reinstated for hearing and determination; while condemning the Respondent to bear the costs of the appeal.

21. The Respondent naturally supported the trial court's findings. Counsel for the Respondent anchored his submissions on the decision in *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2018] eKLR also cited in the Appellant's submissions, to submit that the Appellant squandered the opportunity granted to him to be heard on his defence, and hence the trial court cannot be faulted for closing the defence case on its own motion. Counsel further submitted that in any event, the Appellant had taken his time in filing the application seeking to set aside the order closing the defence case, and that previously, there had been delays on the part of the Appellant and/or his former advocates, in complying with pre-trial directions. That consequently, the Appellant is to blame for his misfortunes.
22. On the merits of the appeal, it was counsel's contention that sufficient evidence was tendered at the trial to support the Respondent's claim, while the Appellant did not tender any evidence to counter the said claim. While referencing the decision in *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR counsel contended that owing to the Appellant's failure to adduce any evidence, the Respondent's claim stood uncontroverted and unchallenged. It was equally counsel's contention that the provisions of Section 3(3) of the *Law of Contract Act* and Section 4(1) of the *Limitation of Actions Act* do not apply to the present circumstances, since the claim was for a refund of sums paid by the Respondent on the basis of fraudulent transactions arising from misrepresentation on the part of the Appellant. In the premises, the court was urged to dismiss the appeal with costs, and to uphold the decision of the trial court.
23. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* [1958] EA 424; *Selle and Anor v Associated Motor Boat Co Ltd and Others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278.
24. The Court of Appeal in *Abok James Odera t/a J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR stated that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
25. From the memorandum of appeal and submissions by the respective parties before this court, it is apparent that the Appellant initial grounds 1) and 2) were to the effect that the trial court erred by delivering judgment while there was a pending application which was yet to be heard. This would constitute the first limb of the appeal.
26. As earlier mentioned, the Appellant stated that following closure of the defence case by the trial court on 15.04.2021 owing to non-attendance on his part or that of his advocate, the Appellant's former advocate filed an application dated 7.06.2021 seeking to set aside the aforementioned order to enable the Appellant defend the claim, but that the application did not proceed for hearing. That in the circumstances, the Appellant's right to a fair hearing was denied.



27. The record of the trial court proceedings, reveals that when the matter came up for defence hearing on 15.04.2021 both the Appellant and his advocate were absent. Counsel for the Respondent asserted service of the hearing notice upon the Appellant's former advocates and that an affidavit of service had been filed to that effect. This position was confirmed by the trial court. It is on that basis that the trial court deemed the defence case closed for want of attendance.
28. Upon considering the averments made on the appeal, it is apparent that the application of 7.06.2021 was neither set down for hearing nor prosecuted by the Appellant, for whatever reason. That notwithstanding, the court finds that it was not the duty of the trial court to move the Appellant and his counsel to prosecute the said application; rather, the onus was on the applying party to take active steps in ensuring their application was set down for hearing and prosecuted at the earliest opportunity. No reasonable explanation has been given by the Appellant, as to why the application was not prosecuted in good time or at all.
29. The constitutional right of a party to be heard under Article 50 of *the Constitution*, is not absolute. A party who has been accorded an opportunity and squanders it cannot be heard to complain without a satisfactory explanation why they did not avail themselves accordingly.
30. The Appellant's failure to move the court accordingly, cannot be blamed on the trial court, and the court cannot be faulted for rendering judgment in the matter, notwithstanding the pendency of the said application. In the premises, the court finds that the Appellant has not demonstrated how his constitutional right to a fair hearing was denied in the process. Grounds 1) and 2) automatically collapse.
31. The second limb of the appeal touches on whether the Respondent's suit was time barred by dint of Section 4(1) of the *Limitation of Actions Act*, Cap. 22 Laws of Kenya. The said provisions expresses that:
- The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- a. actions founded on contract;
32. The Appellant on the one part argued that since the dispute is founded on contracts allegedly entered into between the parties herein at various points in the year 2010, the cause of action arose then. According to the Respondent, the above provision does not apply to the present circumstances since the claim here is founded on fraud and misrepresentation.
33. Upon consideration of the rival positions on the subject and upon perusal of the record, particularly the pleadings, the court notes that the cause of action in question relates to alleged fraud and misrepresentation by the Appellant arising from the various agreements purportedly entered into between the parties and set out in the pleadings. That said, Section 26 of the *Limitation of Actions Act*, provides for extension of limitation period in instances of fraud or mistake as follows:
- Where, in the case of an action for which a period of limitation is prescribed, either -
- a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b) the right of action is concealed by the fraud of any such person as aforesaid; or



- c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

34. From the material on record, particularly by the Respondent, it is apparent that the purported sale transactions were entered into on various dates in the year 2011. In his pleadings, the Respondent asserted that it was not until April, 2014 that he came to the realization that the Appellant's intention was to defraud him (allegedly). Drawing from Section 26 (supra), the court is of the view that the time would therefore begin to run from the date of discovery of alleged fraud and misrepresentation, by the Respondent. The suit was filed on 23.11.2018, and therefore the court is satisfied that the claim was filed within the statutory timelines set out in Section 4(1) (supra). Consequently, the court does not agree with assertions that the suit was time barred.
35. Onto the merits thereof, it is evident that the third limb of the appeal turns on the question whether the trial court arrived at a correct finding that the Appellant was liable to refund the sum of Kshs 8,889,300/- to the Respondent on account of the alleged commission of fraud and misrepresentation. The court will contemporaneously consider this limb under grounds 3) to 7) of the appeal, hereunder.
36. The Respondent who was PW1 adopted his signed witness statement dated 31.10.2018 as evidence and produced his list and bundle of documents of like date as P. Exhibits 1-6. He then proceeded to state that he worked as an ENT Surgeon at the time, based in Mater Hospital. He stated that the dispute arose from the failure by the Appellant to transfer the properties listed in his pleadings, in his name, upon payment of the purchase price. The Respondent stated that he had developed the plots situated in Kiang'ombe and put up residence in two (2) of them, adding that he paid a total sum of Kshs. 8,889,300/- on the respective properties.
37. In cross-examination, the Respondent testified that he met the Appellant through a third party, in the year 2009 following which they established a good friendship. He then testified that the respective transactions were therefore based on trust and that therefore saw no need to conduct searches on any of the properties. It was his evidence that concerning the twelfth property, upon completion of payment thereof, the same was to be transferred to the parties herein jointly. However, the Appellant disappeared. That he later came to learn that the said property had been transferred to a third party, unknown to him. The Respondent denied that the Appellant was ever his employee.
38. During re-examination, the Respondent gave evidence that all payment transactions were made through the bank and not via M-Pesa, adding that following the disappearance of the Appellant, he lodged a complaint with the police, resulting in the Appellant's arrest. He stated in conclusion that there were no titles in respect of the properties subject to the transactions in issue, save for the first property.
39. The trial court after restating and analyzing the evidence, found that the Respondent had proved on a balance of probabilities that he had purchased the properties pleaded in the plaint. Upon finding so, the trial court rendered as follows:

“ ...

The defendant did not attend court to controvert this evidence. The defendant in his statement of defence states that he was the plaintiff's foreman and denies all the particulars of the plaintiff's plaint. However, he gives no explanation why such huge sums of money were transferred to his account by the plaintiff. They were most probably transferred for the land transaction which were never completed.



I find that the plaintiff has proved his case on a balance of probability and Judgment is entered in favour of the plaintiff is prayed in the plaint.” (sic)

40. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the [Evidence Act](#). The Court of Appeal in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides as follows:

“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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“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.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

41. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...



are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

42. From a study of the lower court record, it is not in dispute that the Appellant did not call any evidence to controvert the Respondent’s claim. Be that as it may, the legal principle stands that at the end of the day, the onus lies with a plaintiff to prove his or her claim to the required standard, whether or not the evidence is uncontroverted.

43. Thus, the duty of proving the averments contained in the plaint lay squarely with the Respondent. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

44. The Respondent’s claim was founded on alleged fraud and misrepresentation on the part of the Appellant, regarding the multiple alleged transactions detailed in the plaint. Black’s Law Dictionary, 8<sup>th</sup> edition defines fraudulent misrepresentation as:

“A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it.”

45. First, particulars of fraud must be specifically pleaded and proved. In this respect, the Court of Appeal in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR stated the following:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently.

It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

46. Moreover, the former Court of Appeal for East Africa rendered itself as follows, in *R.G Patel v Lalji Makanji* [1957] EA 314:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

47. The second principal is that the burden of proof for fraud lies with the alleging party. In the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another* [1979] eKLR, the Court of Appeal took a similar view, with the same court stating the following in *Moses Parantai & Peris*



Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent.....”

48. The third principal is that the burden of proof for fraud is higher than that required in civil cases but lower than that required in criminal cases. In *Ndolo v Ndolo* [2008] 1KLR (G &F) 742 the Court held that :

“...Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

49. Moreover, in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, the Court of Appeal observed as follows:

“...Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities...”

50. Returning to the fact of this case, the Respondent essentially alleged that the Appellant misled or otherwise misrepresented to him that he was the registered proprietor of a majority of the properties particularized in the plaint, and that he therefore had capacity to sell the said properties to him. That on the basis of such misrepresentation, the Respondent made substantial payments on the properties, only to have the sales fall through. That it was not until April, 2014 that he discovered that he had been defrauded by the Appellant.

51. Regarding the first and second properties, the Respondent tendered sale agreements dated 26.08.2010 in respect of the first and second properties (P. Exhibits 3a) and 3b)). Upon perusal of the same, the court observed that they were dated, signed and witnessed, contrary to the averments by the Appellant. Therein, the Appellant is indicated as having agreed to sell to the Respondent as well as his respective nominees, the first property as well as the four (4) plots situated on the second property, for the respective sums indicated in the plaint. No other credible documentation was tendered in respect of the above properties thereby making it unclear whether the transactions were successful or not.

52. Concerning the third to eleventh, and thirteenth transactions, while the Respondent claimed that the Appellant similarly agreed to sell the same to him, he did not tender any sound proof in support of the claim. No sale agreements or other related documentation was tendered to that effect.

53. Regarding the twelfth property, the court noted that the Respondent did avail a copy of the title deed to the said property issued on 17.10.2007 (P. Exhibit 4) confirming that the property was registered in the name of Kibarisho Ene Lenguna and accompanied by handwritten letters bearing the stamps of 15.10.2010 and 22.10.2010 (P. Exhibits 5 and 6) conveying the abovenamed proprietor's intentions to sell the twelfth property to the Appellant and Respondent, jointly and further confirming receipt of the sum of Kshs. 237,500/- on that account. So far, this evidence seems to support the Respondent's averments that he and the Appellant had agreed to jointly purchase the said property.



54. Nevertheless, in the court's view, the sticking point was the assertion by the Respondent that the Appellant went behind his back and advised the proprietor to instead transfer the twelfth property to an unnamed third party. While the Respondent raised this allegation, he did not tender any credible evidence to support it.
55. Moreover, from the record, the Respondent claims to have made full payments towards the various properties and relied on his bank statements of accounts (P. Exhibit 1) which formed the bulk of his documentary evidence. However, upon perusal of the said statements of accounts, the court observed that it could not discern which payments, if any, related to the transaction (if at all). The court noted that the statements simply set out the various transactions undertaken on the Respondent's account but there was no way of discerning or ascertaining whether any of the transactions were in respect of the aforementioned properties or any of the properties listed in the plaint.
56. Moreover, while the Respondent asserted that the purported payments were made to the Appellant's account, no evidence was tendered to support this assertion. From a glance of the statements of accounts, the seemingly highlighted transactions simply refer to a 'transfer of funds' and no more. Making it difficult to state with certainty whether those funds were indeed transferred to the Appellant's bank account and for the purpose of the alleged transactions. Save for the sum of Kshs. 237,500/- whose payment was confirmed by P. Exhibit 5, the Respondent did not adduce any further evidence to verify the alleged payments made on the respective properties.
57. Regarding the land rates invoices which were produced as P. Exhibit 2 in respect of the first and second properties, the Respondent claimed that the Appellant had instructed him to make payments in the sum of Kshs. 5,200/- towards the land rates on the said properties, only for him to later learn that the invoices constituted forgeries. Upon re-examining the record, the court did not come across any credible material by the Respondent to prove his allegations that the invoices were forged. Moreover, there is no confirmation that the invoices were paid by the Respondent in order to support his claim for refund on the paid sums. As earlier mentioned, a claim for fraud/forgery ought to be strictly proved.
58. As things stand therefore, there is barely proof of the Respondent's allegations of fraud and/or misrepresentation. The evidence on record does not align with the facts averred by the Respondent concerning fraud and misrepresentation. The court is of the view that the particulars thereof were not strictly proved, to the required standard of proof which is higher than that of a balance of probabilities in civil cases.
59. In the premises, the court is of the view that the Respondent having failed to prove his case to the required standard, the trial court erred in finding in his favour and in therefore finding the Appellant liable to refund the sums or any sums sought in the plaint. Consequently, the court is satisfied that the trial court's finding ought to be interfered with.
60. Lastly there is no evidence that the trial court neglected to consider any of the material placed before it in arriving at its decision. Be that as it may, on the premise of its findings above, the court is of the view that the findings of the trial court cannot stand.
61. The upshot therefore is that the appeal succeeds. Consequently, the judgment delivered by the trial court on 30<sup>th</sup> June, 2021 in Nairobi CMCC No. 10381 of 2018 is hereby set aside and is substituted with an order dismissing the Respondent's suit with costs to the Appellant. The Appellant shall also have the costs of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF MAY 2024.**



**C.MEOLI**

**JUDGE**

In the presence of:

For the Appellant: N/A

For the Respondents: Ms. Njeri

C/A: Erick

