Ochieng v Orembe & another (Civil Appeal 26 of 2019)
[2024] KEHC 4824 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4824 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL 26 OF 2019

WM MUSYOKA, J

MAY 8, 2024

BETWEEN

GEORGE OUMA OCHIENG ..... APPELLANT

AND

SYVERIOUS OKECH OREMBE ..... 1ST RESPONDENT

PAUL SHIUNDU ..... 2ND RESPONDENT

(An appeal arising from the judgement and decree of Hon. S Temu, Principal Magistrate, PM, delivered and passed on 16th October 2019, in Busia CMCCC No. 327 of 2014)

JUDGMENT

1. The suit at the primary court was initiated by the respondents, against the appellant and another, for refund of monies they had paid to the appellant and the other, with respect to purchase of land. The sale transaction fell through, after the land was sold to another, but the appellant and the other did not refund the monies received by them. The appellant filed a joint defence with the other, in which, whilst acknowledging the sale transaction, they denied liability.

2. A trial was conducted, wherein 1 witness testified for the respondents, while 2 witnesses testified for the appellant and the other. A judgement was delivered on 16th October 2019. The court found and held that the respondents had established that the appellant owed Kshs. 250,000.00 to them, and entered judgement in their favour.

3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 29th October 2019, revolve around the evidence presented not supporting the case by the respondents; the case presented by the appellant not being considered; no credible evidence was adduced to support the claim; and allowing the claim without hearing the defence and submissions.

4. Directions were given on 26th February 2024, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.

5. What is the basis of the claim? My understanding of it, from the perspective of the 1st respondent, is that the land in question was family land, that was or had just gone through a process of succession. There was agreement within the family, for disposal of part of it to a buyer. The buyer, the 2nd respondent herein, paid a portion of the purchase price, Kshs. 500,000.00, and the money was shared out amongst 4 members of the family. The sale transaction fell through at some point, and the property was not transferred or conveyed to the buyer, for some of the sellers had purported to sell the same land to another buyer. It was then agreed, vide a document dated 26th June 2014, that the moneys received from the first buyer, the 1st respondent herein, would be refunded. The dispute was over the refund. The 1st respondent allegedly paid his portion of the refund to the 2nd respondent, together with what was due from the other family members, but the appellant did not refund his. The appellant denied being party to any such arrangement. The trial court was persuaded that the appellant was party to the agreement to sell the land, and later to refund the money to the 2nd respondent, and allowed the claim.

6. In his written submissions, the appellant denies privity to the sale of land transaction, as well as the alleged agreement to refund the moneys received. He argues that whereas, according to the bank records availed, the money was received on 6th January 2014, by the 1st respondent, the acknowledgement was not executed until some 5 months later. He further submits that the land could not legally be sold before the grant was confirmed, and since the grant, in the succession cause, was confirmed on 3rd June 2014, the only valid sale was the second one, of 26th June 2014. It is submitted that the first agreement was tainted with intermeddling, contrary to section 45 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and In *re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR (Musyoka, J) is cited in support. It is submitted that the principle of privity of contract meant that whoever was not party to the first sale, could not be bound by that contract.

7. The respondents submit that 2 documents were produced, dated 7th January 2014 and 26th June 2014, with respect to the receipt of the proceeds of the purchase price, which was subsequently shared out, where the appellant got a portion of the money, and when the transaction fell through, on how the moneys were to be refunded.

8. The starting point should, perhaps, be with the issue raised by the appellant about intermeddling. The material relating to the succession cause were not produced at the trial court, and there would be no basis upon which it can be determined, one way or the other, whether there was intermeddling with the estate of the deceased. Intermeddling would be relevant only where the court has to determine the validity of the land sale agreement, and whether it was binding to those who were party to it. That was not the issue before the trial court. The validity of the sale agreement was not on trial before the court, and, therefore, the issue of intermeddling was neither here nor there. It is a matter that ought not exercise the mind of the appellate court. That land sale transaction fell through, and whether it produced a valid or binding contract was irrelevant. The only issue before the trial court was whether the moneys paid and received on the basis of that failed transaction were refundable.

9. Was the said money refundable? Any money given out and received as consideration for some contract or in some transaction is always refundable, where the contract falls through, unless there was breach, for which the payer or the person from whom the consideration came was guilty. Such moneys are payable on the basis of money had and received. The money herein was received as consideration for land that was being sold. The substratum of the sale was the land. Once the title to the land was not conveyed to the buyer, and the land was in fact sold to a second buyer, the substratum was lost, and the first buyer became entitled to a refund of his money. It would be against public policy, for a person

to sell property twice, receiving sales money from the double sales, and then withholding the moneys from the short-changed buyer.

10. So, what happened here? The respondents produced 2 documents at the trial. The first document was meant to be evidence on how the money raised from the first sale was shared out, on 7th January 2014, between 4 individuals, who allegedly included the appellant, with each receiving a sum of Kshs. 125,000.00. The second document, dated 26th June 2014, was evidence relating to the agreement of the persons who had received the moneys on 7th January 2014, about refunding it, after the sale transaction failed. It was signed by the 4 alleged recipients, including the appellant. At the trial the appellant denied that first sale, receiving part of the sales money from that first sale, and executing the document acknowledging the sharing of the sales money, and undertaking to refund the money. He asserted that the signature purported to be his, in the 2 documents, was false, although he acknowledged that the national identity card number indicated was his.

11. So, what should I make of all this? The 2 documents were allegedly signed by the appellant. But he denied the signatures on them, in his defence statement, and in his testimony in court. The 2 signatures were not compared with any of the known signatures of the appellant by the court. The said signatures were not subjected to forensics by a handwriting expert or a document examiner. The principle in law is that it is he who alleges that must proof. It was the respondents all alleging that the appellant signed those 2 documents. Upon the appellant denying that that was not his signature, the respondents ought to have subjected the impugned signatures to forensics. The burden of proving the authenticity of the 2 documents lay with the party who was relying on the documents, in this case, the respondents. Without proof of the authenticity of those 2 documents, there was no proof that the appellant ever received the money in question, nor undertook to pay it back. Without any other or further evidence, I am not persuaded that the trial court had any basis for finding against the appellant.

12. In view of the above, it is my finding and holding that the appeal herein has merit, and it is hereby allowed. The consequence is that the finding and holding of the trial court, in favour of the respondents, for Kshs. 250,000.00 is set aside, and it is hereby substituted with a finding and holding that the case before the trial court was not established, and the plaint is hereby dismissed with costs. The appellant shall have the costs of the appeal. The appeal herein is disposed of in those terms. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 8TH DAY OF MAY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Eroba, instructed by Nandwa & Company, Advocates for the appellant.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the respondents.