REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 195 OF 2015

FREDRICK MUASYA MUSYOKI...APPELLANT

-VERSUS-

PETER MBITHI MUTUNGA...RESPONDENT

(Being an appeal from the judgement delivered on the 30th day of October, 2015 by Honourable Mr. M.K. Mwangi in CMCC No. 419 of 2011 at Machakos)

BETWEEN

PETER MBITHI MUTUNGA...PLAINTIFF

-VERSUS-

FREDRICK MUASYA MUSYOKI...DEFENDANT

JUDGEMENT

1. By a plaint dated 21st June, 2011, the Respondent herein claimed from the Appellant Kshs 80,000.00 being money which the Appellant undertook to pay to the Respondent vide an agreement dated 6th September, 2008 and a supplementary agreement dated 1st June, 2009 which according to the plaint was duly signed by the said parties. The Respondent also claimed for costs and interests.

2. Together with the plaint, the Respondent filed his witness statement in which he stated that in 2008 sons of **Mutiso Malinda** and his two grandsons approached him for a negotiations of the dispute between the Respondent and their late father vide a ruling in civil suit no. 25 of 1999 dated 1st December, 1999. According to the statement, the said persons informed him that they had agreed to refund him his money and the costs of the suit in which the decretal sum of Kshs 90,000.00 and the costs of Kshs 80,000.00. Though he paid the principal sum of Kshs 90,000.00. he declined to pay the costs of the suit.

3. In his evidence before court, the Respondent stated that the Appellant sent someone to him so that he could collect the refund of his payment towards the purchase of land which was ever transferred to him, the Respondent. According to the Respondent he had suit the Appellant's father and **Musyoka Mutiso**, **Wambua Nyamai** and **Mbaluka** undertook to pay him but they did not do so. Though the claim was for Kshs 188,000.00 the said persons agreed to pay the Respondent Kshs 70,000.00 leaving a balance of Kshs 80,000.00. In support of his case he produced two agreements as exhibits.

4. In cross-examination, the Respondent stated that the person who had agreed to sell the land was **Malinda Mutiso**. He stated that he was aware that the estate of the said Malinda was being administered by among others, **Charles Mbaluka**. According to him, the Appellant bought land from the sons of the late Malinda but was unaware of any payments made. According to him, the genesis of the agreement was a suit he filed against **Mutiso Malinda**, which suit the Appellant was not a party to. Neither was he a party to the agreement for sale. However, by the time of the agreements the subject of the suit appealed from, the said **Mutiso Malinda** had died. Referred to the grant, he admitted that **Nyamai Mutiso** was not sued yet he is an administrator. According to him, he did not know the administrator before and simply relied on the sale agreement. He however did not give anything in exchange. But he stated that since the Appellant had built his home on the land, he was safeguarding the family property where he lives and agreed to pay on his own accord in order to protect the family land from whom he was to get land.

5. In his defence, the Appellant denied owing the Respondent the said amount and in the alternative pleaded that the alleged agreement was

not binding on him as it did not meet the basic requirements of a valid contract due to lack of consideration hence not legally enforceable against him rather than the parties in the alleged civil suit no. 25 of 1999.

6. In his witness statement the Appellant stated that on or about 6th September, 2008 and 1st June, 2009, he witnessed his uncles enter into an agreement acknowledging a debt to the Respondent. The said debt allegedly emanated from an earlier sale entered into between the Respondent and their father, one **Mutiso Malinda**, deceased. Hence they were paying their father's debt. According to the Appellant, he only agreed to buy a parcel of land from his uncles, the proceeds wherefrom were to be utilised towards the settlement of their debt. According to the Appellant, he was therefore not indebted to the Respondent in any way whatsoever and cannot be forced to pay since he neither had contractual obligation to the Respondent nor was there any consideration given by the Respondent to warrant a claim of the said sum.

7. In his evidence in court, the appellant stated that he became aware of the decree between his late grandfather and the Respondent arising from an agreement for sale of land by the Respondent from the deceased in which the deceased had been ordered to pay the Respondent Kshs 272,870.00. After the death of the deceased the Appellant decided to assist the beneficiaries of the estate of the deceased since the Respondent was threatening to sell the deceased's property. The Appellant was thus approached by the beneficiaries of the deceased's estate to sell to him land for the sum of Kshs 280,000.00 to enable them pay the Respondent, a sum which he paid. He however insisted that the said debt was never his liability. Accordingly, they entered into an agreement with his father and his uncles and he paid in instalments.

8. However, the Respondent insisted that interest be paid first and though his uncles protested, they agreed to sell him another parcel of land in the sum of Kshs 160,000.00 and after he paid Kshs 35,000.00 his uncles' children changed their minds and sold the land to another person. Similarly, the agreement was that he would pay the sellers and not the Respondent. It was therefore his case that he was contracting with his uncles who were selling land to him and he was unaware if the said uncles in turn paid the Respondent since they were never sued. It was his case that the Respondent never gave him anything in return and he was not the seller of the land. Therefore, the Respondent ought to have sued the administrators and beneficiaries such as **Nyamai Mutiso**, an administrator.

9. In cross-examination, he stated that he came in to assist in preventing the land from being sold. He confirmed that the land was never sold as there was no auction. Referred to the agreement he admitted that he undertook to pay and that the agreement did not state the he would first pay the family who would then pay the Respondent.

10. In the judgement the learned trial magistrate found that consideration need not be adequate and that the Appellant pursued the Respondent to forebear his right of recovery whereas the Appellant redeemed the dignity of his family property not being auctioned. According to the learned magistrate, that was good consideration hence the agreement between the said parties was enforceable. He accordingly entered judgement for the Respondent against the Appellant as prayed in the plaint.

11. In this appeal it is submitted that contrary to the finding by the learned trial magistrate, there was no undertaking by the Respondent not to sue or institute proceedings in exchange for the payments made by the Respondent. It was further submitted that the Appellant lacked the capacity as he was not an administrator of the estate of the deceased.

Determination

12. I have considered the submissions of the parties in this appeal.

13. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."**

14. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

15. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial**

Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

16. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. It is contended that there was no consideration between the Appellant and the Respondent. The place of a consideration in a contract was discussed in **Namusisi and Others vs. Ntabaazi [2006] 1 EA 247** where it was held by **Tsekooko, JSC** as follows:

"Consideration and performance mean two different things. Consideration is crucial at the time the contract is formed and its sufficiency is really not the business of the Courts…Under the English Law of contract which is the applicable law in Uganda, consideration is important and consideration is an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable…Thus the doctrine of consideration implies or means reciprocity…The Courts will not inquire into the sufficiency or adequacy of the consideration as long as there is some consideration…A peppercorn does not cease to be good consideration if it is established that the promisee does not like peppercorn and will throw it away."

18. In **Mohamed Badrudin M Dhanji vs. Lulu & Co. [1960] EA 541, Crawshaw, J** held that:

"A promise, or unequivocal acceptance of liability, intended to be binding, intended to be acted upon, and in fact acted on, is binding. Thus a creditor is not allowed to enforce a debt which he has deliberately agreed to waive if the debtor has carried on business or in some other way changed his position in relation to the waiver…Unilateral promises have long been enforced so long as the act of forbearance is done on the faith of the promise and at the request of the promissor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises *ex posto facto.*"

19. In **H M B Kayondo vs. Somani Amirali Kampala HCCS No. 183 of 1994** it was held that:

"Since the agreement stated that a representative of the debtor would pay a specified sum to the plaintiff and the representative of the debtor is the defendant, that agreement is legally enforceable contract and the consideration for the contract is the plaintiff's forbearance to stop the auction sale. The fact that the receipt for the cheques was issued by the Court Broker does not change the character of the contract. The plaintiff can maintain an action without requiring a power of attorney."

20. Similarly, in **Patel Brothers vs. H D Hasmani [1952] 1 EACA 170** it was held that:

"The real question of fact in this case, which is not discussed in the judgement, was whether there had been a forbearance to sue the son, Esmail, at the request of the defendant. In law a promise to forbear is a good consideration and....actual forbearance at the request express or implied, of the defendant is also a good consideration."

21. In **Sameh Textile Industries Limited & Another vs. Delphis Bank Limited Civil Case No. 2186 of 2000** it was held that:

"The phrase "valuable consideration" has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other at his request. It is not necessary that the promisor should benefit by consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise. Thus consideration for a promise may consist in either some benefit conferred on the promisor, or detriment suffered by the promisee, or both. On the other hand, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is causally linked to that promise."

22. It is therefore clear that if the Appellant promised to pay the debt due from the deceased to the Respondent if the Respondent agreed not to sale the deceased's property, that would be good consideration notwithstanding the fact that the Appellant was not an administrator of the estate of the deceased. That is so because a new contract was thereby created between the Respondent and the Appellant and once the Appellant fulfilled his part of the contract the Respondent would be estopped from reneging on the same. If on the other hand the Appellant reneged on the terms of the said forbearance, the Respondent could sue the Appellant.

23. In his evidence the Respondent stated that the said agreement was meant to safeguard the Appellant's family interest in the said land in which the Appellant was staying. In his evidence, the Appellant stated that the Respondent was threatening to sell his grandfather's property. As a result, he was approached by the beneficiaries of the deceased's estate to purchase part of the land to enable them settle the debt due to the Respondent. Although he stated that the agreement was between him and the said beneficiaries and that he was to pay the money to the beneficiaries and not the Respondent, in cross examination he admitted that there was no mention of the land and that it was stated that he did not wish to see the name of his grandfather tarnished and that he undertook to pay. He admitted that the name of the deceased was never mentioned and that the agreement did not say that he would first pay the family who would in turn pay the Respondent. In fact, a perusal of the agreement shows that the Appellant had agreed to pay Kshs 80,000.00 based on the fact that the deceased was friendly and he did not wish to see his name mentioned in court.

24. It is therefore clear from the foregoing that the Appellant and the Respondent agreed that in consideration of further legal proceedings not being taken against the deceased, the Appellant would pay the Respondent Kshs 80,000.00. In my view forbearance to take legal proceedings on the promise to pay is a good consideration. Accordingly, that ground fails.

25. The other ground was that the Appellant not being an administrator of the estate of the deceased ought not to have been sued. However, the contract between the Appellant and the Respondent was not based on the fact of the Appellant being the administrator of the estate of the deceased. It was based on the forbearance by the Respondent to execute on condition that the Appellant paid a sum of Kshs 80,000.00 the subject of this suit. It was admitted by the Appellant that as a result of the agreement no execution took place. Accordingly, the Respondent properly sued the Appellant based on his promise to settle the deceased's debt in consideration of the Respondent not proceeding with the execution.

26. In the result this appeal fails and is dismissed. However, as parties did not comply with the court's directions to furnish soft copies, there will be no order as to costs.

27. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos 16th day of January, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Ms Ndegwa for Mr Mulei for the Appellant

CA Geoffrey