REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 49 OF 2014

(Appeal against Judgment of Hon. P. Achieng, PM in Kakamega Civil Suit No. 150 of 2009 on 28/8/15)

LABAN OMUHAKA OTUMBULA…..……APPELLANT

VERSUS

TRUPHOSA OKUTOYI…….RESPONDENT

JUDGMENT

1. The Appellant was the Defendant before the Lower Court in **Civil Case No.150 of 2009** where judgement was delivered on 2.5.2014.

2. The facts leading to this appeal are that the respondent (the plaintiff before the lower court) by her Plaint dated 22.5.2009 claimed for a refund of a sum of Kshs. 45,000/= paid by her husband to the Appellant on account of a consideration for the purchase of a plot at Bukura but he died before the transfer was effected and the Defendant fraudulently transferred the said plot to a third party instead of the Plaintiff who is the administrator of the estate of the deceased.

3. The Appellant on his part filed a Defence 11.8.2009 and denied all the averments in the Plaint and stated that the Plaintiff's suit was time barred.

4. The lower court heard the evidence and made a finding that the respondent had proved her case on a balance of probabilities and entered Judgment in her favour in the sum of Kshs. 45,000/= plus costs and interest.

5. Being aggrieved by the judgement of the lower court, the appellant has filed this appeal based on the grounds that:

> *1. The learned Magistrate erred in law and in fact by considering documents not admitted in evidence as part of the Court record.*
>
> *2. The learned Magistrate erred in fact and in law by finding in favour of the Respondent in a land fraud suit couched in pleadings contravening the mandatory provisions of the law.*
>
> *3. The learned Magistrate failed to appreciate the submissions of the learned Counsel for the Appellant.*

6. For these reasons and grounds the appellant prays that the appeal be allowed.

7. This being the first Appeal, this court is obligated to reconsider and re-evaluate the lower Court evidence and to arrive at its own conclusion. See the case **Selle versus Associated Motor Boat Company Ltd [1968] E.A. 123**.

8. Both parties filed written submissions.

9. The appellant has largely submitted that the trial court considered documents which were not admitted in evidence, and without which this the suit would have been statute barred. The appellant also introduced the issue that the lower court failed to address the fact that the issue of the fraud being claimed by the Respondent was not particularized in the plaint. The two issues were captured in the grounds of Appeal.

10. On the part of the Respondent, counsel submitted in response to ground 1 of the Appeal that they complied with order 3 rule (2) b, c and d of the civil procedure Rules and they filed their list of witnesses and documents and that the Respondent during trial referred to the sale agreement filed in the proceedings.

11. In response to ground 2, it was submitted that at paragraph 5 of the Respondent's Plaint it was clearly stated that fraud had been committed.

The Determination

12. Firstly, it is to be noted that the Defendant did not call any witness to testify on his behalf. However, the fact that the defendant did not call any evidence does not, for that reason alone, entitle the plaintiff to judgment. The plaintiff still has to prove its case on the balance of probabilities. See**. *Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau* NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR.**

13. Although PW 1's testimony was unchallenged, she was cross-examined. The copies of the sale agreements in the list of documents were referred to by both the Respondent and counsel for the Appellant during cross-examination. However, the said documents were never produced as the Respondent's exhibits. Secondly, the Respondent testified that she got letters of administration in the year 1995 but it is not indicated in the Court proceeding whether the said letter of administration were produced.

14. Also, there is no record that the parties herein did enter into any pre-trial consents in regard to the Respondents list of documents. Therefore, the documents were left to the prevailing rules of evidence. It therefore means that Respondent's list of documents were supposed to be taken through the rigors of identification in order to be eventually produced as exhibits and it is only after the said process that the list of documents would become part of the judicial record.

15. The foregone position has been fortified by the Court of Appeal in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** where it was held as follows…

> **"16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?**
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> **17. The respondents' contention is that he appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.**
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> **18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.**
>
> **20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account."**

16. Since the documents referred to in the List of Documents were not formally produced as exhibits in support of the suit, the learned trial magistrate, with respect, fell into error in basing his decision on the documents which were not part of the evidential record in the suit. Without the said documents, the Respondent's case remained hollow and unproved. The suit could not therefore be determined in favour of the Respondent on a balance of probabilities.

17. On the issues of fraud not being particularized, I note that at paragraph 5 of the Respondent's Plaint, it is stated that after the deceased's death the Defendant unlawfully and/or fraudulently transferred the plot to Eli Okutoyi instead of the Plaintiff as the administrator and personal representative of the deceased estate. These are obviously insinuations of fraud on the part of the Appellant; however, no particulars were pleaded in either of the instances that the respondent is alleged to have been fraudulent. It has not been particularized how he may have been fraudulent in the transfer of the plot to Eli Okutoyi.

18. Under **Order 2 rule 4** of the **Civil Procedure Rules** it was incumbent upon the appellant to plead fraud specifically if that was one of his grounds against the respondent's suit. That rule provides as follows: -

> ***4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—***
>
> ***(a) which he alleges makes any claim or Defence of the opposite party not maintainable;***
>
> ***(b) which, if not specifically pleaded, might take the opposite party by surprise; or***
>
> ***(c) which raises issues of fact not arising out of the preceding pleading.***

(2) ….

19. In the case of ***Koinange & 13 Others V. Charles Karuga Koinange 1986 KLR*** *at page 23 Justice Amin citing the case of* ***Ratilal Patel Makanji (1957) EA 314*** *observed as follows:*

> ***"When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. 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 balance of probabilities is required"***

20. Furthermore, in ***Vijay Morjaria v Nansingh Madhusingh Darbar & another*** ***[2000] eKLR (Civil Appeal No. 106 of 2000)*** Tunoi JA (as he then was) stated as follows*:*

> ***"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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." (Emphasis ours)***

21. I have looked at the Respondent's Plaint. At paragraph 5 of the said Plaint it is stated that the Defendant unlawfully and fraudulently transferred the plot to Eli Okutoyi instead of the Plaintiff as the administrator. The said allegations of fraud have not been specifically pleaded and the particulars of the alleged fraud have not been stated on the face of the pleading. See. **Vijay Morjaria v Nansingh Madhusingh Darbar (supra).** I also note that the Respondent having failed to produce the document in her list of documents as exhibits, her case remained shaky and unproved. The Respondent having failed to prove her case on a balance of probabilities could not meet the threshold of proving allegation of fraud since the standard of proof in fraud matters is something more than a balance of probabilities.

22. The upshot is that the appeal succeeds and the Judgment of the trial court is quashed. However, parties shall bear their own costs of the appeal.

Orders accordingly.

Dated, Signed and Delivered, at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE