

REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

Civil Appeal 32 of 2010

EDWARD WAFULA TUCHI.....APPELLANT

~VRS~

REUBEN SIMIYU WASIKE.....RESPONDENT

(Appeal arising from the judgment and decree of the Senior Resident Magistrate R. O. Oigara in Kimilili court in civil case no.9 of 2008)

RULING

On 19/6/2008 the Appellant filed an amended plaint before the Senior Resident Magistrate at Kimilili seeking an order that the Respondent vacates from his one acre of land and pays costs of the suit. It was pleaded that on or about April 2001 the Appellant agreed to sell to the Respondent one acre of land on which were residential premises. The agreement was subject to the Appellant undertaking succession proceedings to inherit the land. The Respondent took possession of the land. It had been agreed that he pays nominal rent which he had not. The Appellant's case was that now that the Respondent had refused to pay the rent the sale agreement had become void and hence the request that he vacates therefrom.

The Respondent filed a defence to the amended plaint in which the agreement was admitted. He, however, denied that he took possession of the Appellant's houses on the land. He stated that he constructed his own houses on the land in which he stays. He denied being liable to pay my nominal fee, or having breached any term of the agreement. He challenged the competence of the suit and the capacity of the Appellant to bring it. He stated that the suit land had not been sufficiently described.

The trial court received evidence during the trial. At the conclusion of the case it returned the verdict that at the time of the agreement the suit land belonged to a deceased person by registration and that no succession proceedings had been undertaken to inherit the estate. The Appellant did not have letters to administrator the estate and could neither sell the land nor bring the proceedings. The Appellant was aggrieved by the decision to dismiss his suit with costs and filed this appeal on 29/4/2010 in person. He had been represented by J. S. Khakula & Co. Advocates and the Respondent by M/s Bulimo & Co. Advocates.

On 10/5/2010 the Respondent filed notice to show that he was going to be represented by M/s Bulimo & Co. Advocates in the appeal. On 2/12/2010 a letter dated 3/10/10 was written to the Deputy Registrar purportedly signed by the parties in person indicating that they had agreed that the Appellant refunds to the Respondent Ksh.80,000/= which was the purchase price for the one acre bought in the agreement. It had also been agreed that the Appellant pays the Respondent a further Ksh.98,000/= representing the developments he had made on the land. The total was Ksh.178,000/= whose receipt was acknowledged. In return, the Respondent had agreed to vacate from the one acre on land parcel no.Bokoli/Kituni/865 registered in the name of the late father of the Appellant by name Peter Tuchi Namwetako. The parties agreed to file affidavit within 14 days following which a hearing would be done to decide the date that the Respondent would vacate from the suit land. The consent was received by the Deputy Registrar who entered it on record on 8/12/2010 as order of the court. On 3/12/2010 the Appellant filed an affidavit reiterating the consent and annexed a document called "*Revocation of Land Agreement*"

("EWT1") outlining the terms of the consent, but further saying that the Appellant had agreed to withdraw the appeal. The Agreement was indicated to have been witnessed by Anyona Advocate.

On 8/4/2011 the Respondent through M/s Bulimo & Co. Advocates brought the present application under section 3 and 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules to have the consent dated 3/10/10, filed on 2/12/10 and adopted on 8/12/10 set aside. The grounds were that the Respondent had neither signed the consent letter nor agreed on the terms of the same. He stated that the signature attributed to him was forgery, and that he had always been represented by counsel whom he had paid in full and had no business filing a consent. He filed a supporting affidavit to say these. The Appellant filed a replying affidavit to say that the Respondent had voluntarily gone to him and the two had together drafted and signed the consent letter. He stated that the Respondent had told him that he had no funds to go back to his advocate but had instead decided to settle the matter. He had, however, subsequently failed to meet the terms of the consent by filing affidavit and vacating the suit land. The Respondent filed a supplementary affidavit to deny that he ever appeared before Anyona Advocate. He further denied that there was any time he was unable to pay his advocate. The Appellant filed a further affidavit to say that the Respondent to produce a report of a handwriting expert to show he had not signed the consent letter. Further, he needed to get Anyona Advocate to deny that he witnessed the consent.

It should be pointed out that it is the Appellant who filed the consent saying it was signed by the Respondent, and in the presence of Anyona Advocate. The Respondent has denied signing the letter or appearing before the Advocate. The Appellant was relying on the purported consent to say that the dispute and his appeal have been compromised. It was up to him (the Appellant) to show that the letter was signed by the Respondent by, if necessary, having the same subjected to expert opinion as to the signature. He was the one saying that the Advocate had witnessed them agreeing. It was his responsibility to get the Advocate to swear an affidavit to say that the parties appeared before him and agreed as indicated. The consent document was filed by the Appellant and it was up to him to prove it. He cannot ask the Respondent to prove a document he says he knows nothing about. The Respondent is saying that he was always represented and could not enter into the settlement in person. He says that an appeal was filed and he wishes to defend it. He says that his Advocate was perusing the court file when he found the consent which the Appellant had unilaterally filed.

I have considered the application and the affidavits filed by the parties. I have also looked at the history of the case. The consent was filed by the Appellant and said to have been signed by the Respondent who at the time had an advocate. It would appear to me that the sole purpose of the purported consent was to get the Respondent to vacate from the suit land, something that the Appellant had failed to get in the lower court. The Appellant has failed to call evidence from Anyona Advocate and a handwriting expert, both material witnesses, to support the consent. I accept the version by the Respondent that the consent was forgery. It was a fraud. It is hereby set aside. The costs of the application will be paid by the Appellant.

Dated, signed and delivered at Bungoma this 11th day of July 2012.

A. O. MUCHELULE
JUDGE