



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO. 31 OF 1976

BETWEEN

NJUGUNA WAMUTI.....APPELLANT

AND

SIMEON KOIMBURI.....RESPONDENT

(Appeal from the Judgment of the High Court (Nyarangi J) Dated 26th May 1973 in Civil Case No 117 of 1973)

JUDGMENT

The respondent to this appeal (to whom we will refer as “the plaintiff “) was the occupier of plot 301 in the Suwerwa settlement scheme, under a letter of allotment dated 12th June 1966, and the land was subject to a charge in respect of moneys advanced by the settlement land trustees to the plaintiff. In 1971 the plaintiff agreed to transfer his interest in the plot to the appellant (to whom we will refer as “the defendant”) who is related to him. The agreed consideration was Shs 6000. The consent of the Land Control Board was sought. The application for consent, dated sometime in January 1971, was signed by both parties. It is not on record, as it should be, having been exhibited in the court below. It was, however, an application for consent to the transfer of plot 301, and the requisite consent was duly obtained.

The settlement fund trustees (hereinafter called “the trustees”) will not themselves consent to the transfer of allotted land unless the transferee agrees to take upon himself the transferor’s liability to repay moneys advanced by the trustees to the transferor and still outstanding at the date of the transfer. In order to secure this consent, the parties appeared before an officer of the trustees and, on 22nd February 1971, executed a further document (exhibit A) consisting of a printed form with blanks which when completed recited: (1) that the plaintiff as transferor being the present allottee of plot 301 in the Suwerwa settlement scheme, in consideration of Shs 6000 paid to him by the defendant as transferee, receipt of which acknowledged, transferred to the defendant all his right, title and interest in that plot; (2) that the transferor and transferee accepted that the amount outstanding under the charge on the land was as stated in the certificate endorsed on the form, that is to say Shs 7789; and (3) that the transferee agreed to pay that amount to the trustees by stated instalments.

The plot was duly transferred to the defendant, who went into occupation. On 16th July 1973 the plaintiff sued the defendant for the sum of Shs 6000. The defence was a bare denial that the sum of Shs 6000 or any part of it was owed to the plaintiff. At the trial, the plaintiff deposed that he had received any part of the agreed purchase price, and he called a witness who deposed that some time in 1973 he was present when the plaintiff asked the defendant for his money, and that the defendant undertook to pay by giving

the plaintiff cattle.

The defendant began his evidence by deposing that the plaintiff gave him the land for nothing as they were related. He then qualified this statement by saying that he paid Shs 6000 before exhibit A was signed. In cross-examination, he said that he paid the Shs 6000 over a period of six years by selling cattle from his farm. He did not produce any other evidence of having paid. Mr Wafula for the defendant submitted to the judge that section 100 of the Evidence Act applied, and that as the words “the receipt whereof is hereby acknowledged” in exhibit A were plain language, evidence to the contrary was not admissible.

Nyarangi J, in a very short judgment, found as a fact that the consideration of Shs 6000 had not been paid by the defendant and gave judgment for the plaintiff. He did not deal with Mr Wafula’s submission of law arising out of section 100.

On appeal by the defendant against this judgment, his advocate, Mr Wafula, advanced two grounds of appeal; firstly, that the judge erred in admitting evidence of non-payment having regard to the plain language admitting receipt of the Shs 6000 in exhibit A, contrary to section 100 of the Evidence Act, and secondly that the appellant was estopped by his conduct in acknowledging receipt of the Shs 6000 from denying the truth of that unambiguous statement.

As regards the aspect of estoppel, we cite the following passage from 15 *Halsbury’s Laws of England* (3rd Edn) page 219:

A receipt for consideration money in the body of a deed or endorsed thereon is not conclusive as between the parties that the money has in fact been paid, though it may, in the case of a conveyance, raise an estoppel in favour of a subsequent purchaser.

Subject to the substitution of the word “document” for the word “deed” in the above passage, it represents in our view the law on the subject applicable in Kenya. In *Halsbury’s Laws of England* (3rd Edn) page 423, the following is stated:

A receipt for money ... is not conclusive that the money has been in fact paid, and parol evidence can be given of the non-payment of the whole or part of it.

It seems to us to be clear that no estoppel arises, as between the parties, from an acknowledgement of payment of consideration money. An estoppel in such a case only arises where the representation of fact is untrue to the knowledge of the person making the representation, but not to the knowledge of the person to whom it is made, with the intention that the latter should act thereon and thereby alter his position to his prejudice. In the case of the payment of money, the true facts are known to both parties, and no question of estoppel arises as between them from the giving of a receipt. Whether or not money has been paid is a question of fact, on which parol evidence can be given, and an acknowledgement or receipt given by one of the parties to the other is not conclusive. We do not think that section 100 of the Evidence Act takes the matter any further. It reads:

When language used in a document is plain, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

This section, in our view, does not operate to prevent a person, who has used plain language in a document such as “I hereby acknowledge receipt of Shs” from adducing evidence that his statement did not apply accurately to an existing fact, that the money was not in fact paid. It is common for such an unambiguous statement to be made, and it is always open to the person making the statement to prove by evidence that the existing fact was not accurately stated, in the case of an acknowledgement of payment. In this case we consider that the judge was right in admitting evidence of non-payment, notwithstanding the clear language to the contrary used in exhibit A. The question of payment or non-payment was a question of fact on which parol evidence could be given, and such evidence is not in our view excluded by section 100 of the Evidence Act. In this case, on the facts, the judge believed the plaintiff, whose case

was that the consideration money had not been paid, and disbelieved the defendant, whose case was that it had been paid. Having regard to the conflicting accounts given by the defendant, firstly that he had been given the land gratuitously, and then that he had paid the full consideration by instalments, neither of which contention was pleaded, we are of the view that the judge was justified, on the evidence on record, in finding as a fact that the consideration money was not paid. We are of the opinion that this appeal fails, and we accordingly dismiss it, with costs.

Appeal dismissed with costs.

Dated and Delivered at Nairobi this 11th day of February 1977.

E.J.E.LAW

.....

VICE PRESIDENT

A.MUSTAFA

.....

JUDGE OF APPEAL

J.S.MUSOKE

.....

JUDGE OF APPEAL

I certify that this is a true copy of
the original.

DEPUTY REGISTRAR