Agingu v Owiti & 2 others (Civil Appeal 389 of 2019)
[2025] KECA 188 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 188 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 389 OF 2019

PO KIAGE, K M'INOTI & WK KORIR, JJA

FEBRUARY 7, 2025

BETWEEN

WILLIAM OWEKE AGINGU ..... APPELLANT

AND

MAURICE ODHIAMBO OWITI ..... 1ST RESPONDENT

VICTORIA VILLAS COMPANY ..... 2ND RESPONDENT

ROACK CONSULT LTD ..... 3RD RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court at Nairobi (B.M. Eboso, J.) delivered on 10th December 2018 in ELC Case No. 144 of 2014 (OS))

JUDGMENT

1. The facts in this appeal are not contested, as we will shortly demonstrate. Despite raising 12 grounds of appeal, at the hearing of the matter, William Oweke Agingu (the appellant), only pursued grounds 9 and 10 of the memorandum of appeal, which we reproduce as follows:

> " 9. The Learned Judge erred in ordering an investigation into the acquisition of the title to the suit property and entertaining questions on the appellant's title when the claim before the Court was for refund of monies paid;
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> 10. By directing the Director of Public Prosecutions and Director of Criminal Investigations to investigate the circumstances under which the appellant acquired the title to the suit property, the learned judge misdirected himself in law as no such relief had been prayed for by the parties and no issue had been framed for determination by him in respect thereof thereby entering into the arena and showing open bias against the appellant."

2. The dispute between the parties arose from their dealings in respect to land parcel number Kisumu/Konya/6346 (the suit property) measuring 0.56 hectares which at the material time was registered in the name of the appellant. The appellant was also a director of Victoria Villas Company (the 3rd respondent). At the same time, Roack Consult Ltd (the 2nd respondent) and the 3rd respondent were developing residential and business premises which included maisonettes on the suit property. Through a letter of offer dated 16th November 2012, the appellant together with the 2nd and 3rd respondents offered to sell 8 maisonettes at a cost of Kshs. 67,000,000 to Maurice Odhiambo Owiti (the 1st respondent). The 1st respondent immediately paid a deposit of 10% being Kshs. 6,700,000 to the 3rd respondent. The project later stalled and it was then that the 1st respondent learned that the suit property was in the process of being transferred to the 3rd respondent. The 1st respondent who was aggrieved by the state of affairs rescinded the contract and sought a refund of the deposit. The refund was not forthcoming, prompting him to take out the originating summons against the appellant and the 2nd and 3rd respondents that yielded the impugned judgment.

3. Upon hearing all the parties, B.M. Eboso, J. of the Environment and Land Court at Nairobi found the 2nd and 3rd respondents jointly and severally liable to refund the 1st respondent Kshs. 6,700,000/- with interest at court rates from the date of the suit. The learned Judge proceeded to condemn the 2nd and 3rd respondents to pay the costs of the suit. Additionally, and which forms the gist of this appeal, the learned Judge held as follows:

> "21. Lastly, a copy of this judgment shall be forwarded to the Director of Public Prosecutions and the Director of Criminal Investigations, respectively, to cause to be investigated the circumstances under which the subsequent title to the suit property was procured by the 3rd respondent [the appellant], and if indeed a crime was committed, take appropriate measures within their respective constitutional and statutory mandate."

4. At the hearing of the appeal, learned counsel Mr. Wasuna appeared for the appellant while learned counsel Mr. Kiplangat was present for the 2nd respondent. They had both filed written submissions. Despite having submissions on record, counsel for the 1st respondent did not appear at the hearing.

5. For the appellant, learned counsel Mr. Wasuna relied on the written submissions dated 13th May 2020 while also rehashing the same orally. Regarding the impugned order, counsel pointed out that none of the parties pleaded any issue that could yield the order. Counsel contended that by entering the arena of the acquisition of the title, the learned Judge redrafted the pleadings for the 1st respondent. It was counsel's submission that such a move violated the appellant's right to fair hearing as he was denied an opportunity to put forth his defence. According to counsel, the matter was by an originating summons and prosecuted through affidavits and written submissions, leaving no room for proper ventilation of evidence on record. Counsel referred to Charles C. Sande vs. Kenya Co-operative Creameries Ltd [1992] KLR 314 to assert that rules of pleadings and procedure are meant to crystalize the issues and to ensure that parties are made aware in advance as to the issues between them. Mr. Wasuna referred to Abdul Shakoor vs. Abdul Majid Sheikh, Civil Appeal No. 161 of 1991 in support of the proposition that a party was not entitled to a relief not specifically pleaded in the claim. Counsel cited Mbogua Getao vs. Simon Parkoyiet Mokare & 4 Others [2017] eKLR for the holding that allegations of fraud must be strictly pleaded and proved to a standard higher than a balance of probabilities for ordinary civil cases but not beyond reasonable doubt as set for criminal cases, and submitted that the 1st respondent did not discharge the burden placed on him by the law. Consequently, Mr. Wasuna urged us to allow the appeal and set aside the impugned order.

6. On behalf of the 1st respondent, the firm of Achillah T. & Co. Advocates filed written submissions dated 28th August 2020. Regarding the impugned order, counsel submitted that the allegations of fraud were brought to the fore by the by the appellant and the 1st respondents in their submissions before the trial court. Further, that in any event the learned Judge did not make any finding that there was fraudulent activity but correctly referred the issue for investigation by the constitutionally mandated authorities. Counsel urged us to dismiss this appeal and uphold the findings of the learned Judge, including the impugned order.

7. Submitting on behalf of the 2nd respondent, learned counsel Mr. Kiplangat through submissions dated 10th September 2020 argued that there was sufficient evidence on record to warrant the issuance by the trial court of the impugned order. Counsel referred to Nyaga Cottolengo Francis vs. Pius Mwaniki Karani [2017] eKLR to submit that there are exceptions to the general rule that parties are bound by their pleadings and that this case fitted within those exceptions. Counsel also urged that even though the fraud was not particularized, the issue was pleaded, and the findings of the learned Judge and the impugned order should remain undisturbed.

8. This appeal turns on the question as to whether a basis was properly laid for the issuance of the impugned order by the learned Judge. The appellant contends that the impugned order that directed investigations into how he acquired the title to the suit property was neither pleaded nor relief sought in that regard.

9. There is a well-settled principle that parties are bound by their pleadings and courts are bound to only determine that which is pleaded. For instance, this principle was reiterated in Chalicha Farmers Co-operative Society Limited vs. George Odhiambo & 9 Others [1987] KECA 70 (KLR) thus:

> " As stated earlier, there was no counter-claim filed. However, sympathetic the judge may be towards the defendants, no order can be made (unless by consent) outside the pleading. Two decisions of this court are on this point one in Captain Harry Gandy vs. Caspair Air Charters Ltd (1956) 23 EACA 139 at page 140 Sinclair V P stated:
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> 'The object of pleadings is of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given. As the English Practice Scrutton, L J said in Blay v Polland and Morris [1930] 1 KB 628.
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> Cases must be decided on the issues on the record, and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course'.
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> This decision was considered in Bhag Bhari vs. Mehdi Khan [1965] EA 94. The order the judge gave is a nullity. It is not one of the prayers asked for by the plaintiffs or the defendant in the absence of a counter-claim."

10. In the present appeal, we have looked at the pleadings and note that the 1st respondent sought recovery of the deposit of Kshs. 6,700,000 with an interest rate of 5% per month from the date of the deposit, interest at the court rates from the date of filing suit, and the costs of the suit. The fraud element did not feature in the grounds supporting the originating summons.

11. Regarding the procedural edicts of making a plea of fraud, counsel for the 2nd respondent urged the Court to find that fraud was pleaded but not particularized and that this should be treated as an

exception to the general rule that fraud ought to be pleaded and particularized. This Court in John Mbogua Getao vs. Simon Parkoyiet Mokare, Karempu Kaata, Nkama Group Ranch, Chief Land Registrar & Attorney General [2017] KECA 156 (KLR) reiterated that fraud in itself is not only a quasi-criminal allegation but also a matter of fact that ought to be particularized. In that regard the Court stated that:

> "The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities... Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. It would be foolhardy for the appellant to dismiss allegations carrying such far reaching consequences as merely procedural. In Emfil Ltd vs. Registrar of Titles Mombasa (supra), this Court pronounced itself as follows on the issue:-
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> "Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence."
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> The appellant cannot therefore fault the trial court for not invoking the saving provisions and admitting his claims of fraud without having particularized the alleged acts or omissions so that the respondents could sufficiently answer to them and allow for their canvassing through evidence in trial. In the case of Rosemary Wanjiku Murithi vs. George Maina Ndinwa (2014) eKLR, this Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. Even if perchance we were to be swayed by the appellant's arguments and invoke Article 159 of *the Constitution* so as to determine the appellant's allegation of fraud against the respondents on merit, then we would still find that the claim fails for want of evidence."

12. Flowing from the cited decision, it is imperative that allegations of fraud must be specifically pleaded and particularised. They must also be proved to a standard higher than the standard of balance of probabilities applicable to ordinary civil cases but of course not beyond reasonable doubt as is required of criminal cases. None of those rules were complied with in the pleadings placed before the trial court. Indeed, the learned Judge correctly appreciated and applied the law by not making any finding of fraud in his judgment. He ought to have stopped there. By issuing the impugned order, the learned Judge went beyond the pleadings and issued a relief that none of the parties had sought. The issue of fraud did not arise from the facts stated by the parties and their advocates so that the exception to the rule formulated in Odd Jobs vs. Mubia [1970] EA 476 as cited in Nyaga Cottolengo Francis vs. Pius Mwaniki Karani [2017] eKLR, could be said to be applicable in the circumstances of this appeal. The issues arising for determination between the parties was a breach of contract and not the procedure of acquisition of the title by the appellant. From the originating summons, it is clear that the 1st respondent's interest was in recovering the 10% deposit made for the purchase of 8 maisonettes. The advocates did indeed confirm to the Court at the hearing that the money had been refunded to the 1st respondent. Upon refund of the deposit, there was no way the 1st respondent would retain any interest in who owned the suit land or how the title moved from one party to the other. We, therefore, find that the learned Judge erred in issuing the impugned order.

13. The upshot of the foregoing is that the appeal on this singular issue must be allowed and the impugned order set aside.

14. Regarding the costs of this appeal, we have considered the fact that the appellant abandoned all the other grounds of appeal for which the respondents must have prepared for. In the circumstances a just order on costs is to direct each party to meet own costs of the appeal, which we hereby do.

15. The final orders of the Court are as follows:

    a. The appeal partially succeeds so that the order appearing in paragraph 21 of the impugned judgment is hereby quashed and set aside;

    b. The parties shall bear their own costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.