Weru v Barclays Bank of Kenya Ltd (Civil Appeal 368 of 2018)
[2024] KECA 973 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 973 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 368 OF 2018

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

JULY 26, 2024

BETWEEN

FREDRICK KANYIRI WERU ..... APPELLANT

AND

BARCLAYS BANK OF KENYA LTD ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 19th April 2017 in HCCC No. 612 of 2007)

JUDGMENT

1. At all material times, the appellant, Frederick Kanyiri Weru, was the registered owner of the property known as Title No. Kajiado/Olchoro-Onyore/3831 situate in Kajiado County (the suit property). On 31st July 1998, the suit property was charged in favour of the respondent, Barclays Bank of Kenya Ltd, to secure part of a loan of Kshs 2,000,000 advanced to Storm Chemicals Industry Ltd. In addition, a personal guarantee to the tune of Kshs 1,000,000 said to be executed by the appellant in favour of the respondent, was registered on 23rd July 1998.

2. On or about 21st November 2001, the respondent issued upon the appellant a statutory notice of intention to sell the suit property by public auction following default on the loan by Storm Chemical Industry Ltd, which loan, as of that date stood at Kshs. 2,901.114.40.

3. It is not clear from the record exactly what transpired after the service of the statutory notice but, about six years later on 22nd November 2007, the appellant filed a suit in the High Court at Nairobi against the respondent claiming that the charge and the personal guarantee were null and void because they were procured fraudulently.

4. The appellant further pleaded that his title deed to the suit property was stolen from his house and that a cousin of his, Harun Armstrong Kanyiri (Harun), was charged and convicted for forgery in Kibera

Criminal Case No. 3110 of 2005. He added that he could not have executed the charge and the personal guarantee because, on the dates of execution, he was incarcerated in Kamiti Maximum Security Prison serving a sentence handed down in Criminal Case No. 3257 of 1996.

5. Accordingly, the appellant prayed for a declaration that the charge and personal guarantee were null and void; an order for cancellation of the same; an order compelling the respondent to return to him the original documents of title to the suit property; and a permanent injunction to restrain the respondent from selling the suit property.

6. By a defence filed on 27th February 2008, the respondent denied the appellant's claim and pleaded that Harun's prosecution did not relate to the charge and personal guarantee. The respondent further averred that the appellant had validly executed the charge and personal guarantee and his signature duly attested by an advocate of the High Court.

7. The trial court granted the appellant leave to issue and serve a Third Party Notice through substituted service upon Harun, who never entered appearance.

8. The suit was heard by Tuiyott, J. (as he then was) with each party calling one witness. The learned judge framed two issues for determination, namely:

    i. whether the appellant was serving a prison sentence at the time of execution of the charge and the personal guarantee; and

    ii. whether the appellant's signatures on the said documents were forgeries.

9. After considering the evidence, and by the judgment impugned in this appeal, the learned judge held that there was no evidence that the appellant was incarcerated in prison for the entire period of his sentence and that, indeed, he had admitted that he obtained bail pending appeal. As regards Harun, the court found that he was never charged with stealing the title to the suit property, and that it was the appellant who had given him the title. Moreover, Harun was not charged with forging the charge and personal guarantee in issue in this appeal. For those reasons, the learned judge concluded that the appellant had not proved his case on a balance of probabilities and dismissed the same with costs.

10. The appellant was aggrieved and lodged this appeal in which he faults the High Court for failing to hold that the charge and personal guarantee were not executed by the appellant but were instead forged by Harun, who was charged and convicted for the offence; for shifting the burden of proof on the appellant; and for using a standard of proof beyond a balance of probabilities.

11. On the first ground of appeal, the appellant submitted that he adduced sufficient evidence to prove that he did not execute the charge and personal guarantee because, at the time those documents were executed, he was incarcerated in Kamiti Prison. He further added that he adduced uncontroverted evidence that the said documents were forged by Harun, who was duly charged and convicted. He contended that the respondent did not call any witness to prove that he (the appellant) appeared before an advocate to execute the documents.

12. On the shifting of the burden of proof, the appellant submitted that the burden of proof was not on him, but on the respondent to prove that the documents in question were executed by the appellant. He cited Sakar's Law of Evidence, 17th Ed. Vol. 1 page 1325 in support of the proposition that a negative fact cannot be proved by positive evidence.

13. Finally, on the last ground, the appellant contended that the standard of proof in a civil case is on a balance of probabilities, but that in this case, the learned judge raised the bar to a level beyond that standard. For the foregoing reasons, the appellant prayed the Court to allow the appeal with costs.

14. The respondent opposed the appeal and urged the Court to dismiss it with costs for lack of merit. It was submitted that, although the appellant convicted and jailed for 5 years on 19th June 1998, on cross-examination, he admitted that he lodged and appeal against his conviction and sentence, and was released on bail pending appeal after 2 to 3 months. It was contended that, although the burden was on the appellant, he did not produce any documents or records to show exactly when he was released on bail pending appeal.

15. As regards Harun, the respondent submitted that the record of the trial court in his criminal case clearly indicated that it was the appellant who gave Harun the documents on 29th July 1998 at City Centre, the very same day the charge was executed, and on a day that the appellant purports to have been in prison. The respondent added that the criminal court record indicated that the appellant went out of the country soon thereafter, which further indicates that the appellant was not in prison at the material time.

16. It was the respondent's further submission that the burden of proof was on the appellant to satisfy the court that the signatures on the documents were forged. It was contended that the evidence adduced by the appellant failed to prove forgery, and that the record of the criminal trial relied upon by the appellant did not relate to the loan the subject of this appeal.

17. The respondent relied on the decision in Elizabeth Kamene Ndolo v. George Matata Ndolo [1996] eKLR and submitted that the appellant did not prove forgery and fraud to the required standard. The decision in Lalchand Fulchand Shah & another v. Investments & Mortgages Bank Ltd. [2000] eKLR was cited in support of the proposition that the appellant was obliged, but failed to call the advocate who attested the documents. For the foregoing reasons, the respondent urged the Court to dismiss the appeal with costs.

18. We have carefully considered the record of appeal, the submissions and the authorities cited by the parties. We are satisfied that this appeal turns only on two issues, namely the burden and standard of proof, and whether there was proof to the required standard that the impugned charge and the personal guarantees were indeed forgeries.

19. On the burden of proof, the starting point is section 107 of the Evidence Act, which provides that:

> "
>
> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> Section 109 further provides that unless the law otherwise provides, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

20. In Delphis Bank Ltd v. Channan Singh Chatthe & 5 Others [2014] eKLR where a charge registered over a parcel of land was challenged as fraudulent, this Court reiterated that the party that wishes the court to give judgment in its favour regarding any legal right or liability dependent on existence of facts

which that party asserts, bears the burden of proving the existence of those facts. The Court cited with approval the following extract from Mulla on the Code of Procedure, 16th Ed. Vol. 2:

> "...the burden of proof lies on that party who would fail if no evidence at all were given on either side. It is well settled law that a person who sets the law in motion and seeks a relief before the court, must necessarily be in a position to prove his case and get relief molded by the law."

21. In the instant case, it is the appellant who filed suit against the respondent based on his assertion that the charge and the personal guarantee were fraudulent or forged. In accordance with section of 108 of the Evidence Act, it was the appellant who stood to lose his case if neither of the parties called any evidence. Since it was the appellant who wished the court to believe that the the charge and the personal guarantees were forged, the burden of proof was squarely on him.

22. To the extent that the dispute giving rise to this appeal was a civil dispute, the standard of proof was on a balance of probabilities or on a preponderance of evidence. The authors of Wigmore on Evidence, 3rd ed. para 32 state as follows on the balance of probabilities:

> "In deciding on a balance of probabilities, the court balances probabilities and selects a conclusion which seems to be more natural or plausible conclusion among several conceivable ones, even though that conclusion may not be the only reasonable one."

23. While the standard of proof was on a balance of probabilities, it must be borne in mind that, in his plaint the appellant hinged his case on alleged fraud and forgery. Contrary to the rules of pleading that require fraud to be specifically pleaded, the appellant did not do so. Nevertheless, in paragraph 9 of the plaint, he pleaded that:

> "That the said charge and guarantee bear forged signatures purported to be the plaintiff's (appellant's) and avers that the said two documents are null and void."

24. It was on the basis of that pleading on the alleged forgery that the plaintiff prayed the court to issue a declaration that the charge and the personal guarantees were null and void.

25. When a civil claim is founded on fraud or illegality, the fraud or illegality has to be strictly proved. In R. G. Patel v. Lalji Makanji [1957] EA 314, a decision that has been consistently followed by this Court, the former Court of Appeal for Eastern Africa held as follows regrading proof of fraud:

> "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 mere balance of probabilities is required."

26. Similarly, in Demutila Nanyama Pururu v. Salim Mohamed Salim, CA No. 138 of 2018, this Court stated:

> "...since the respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely beyond balance of probabilities; in cases where fraud is alleged, it is not enough to simply infer fraud from facts."

27. Having carefully considered the first issue, we are not persuaded that the learned judge misapprehended the question of burden of proof. Nor are we convinced that he unlawfully shifted the burden of proof

to the appellant. As regards the standard of proof, we are equally satisfied that the learned judge did not rely on a standard beyond what the law requires. If anything, he actually did not advert to the higher standard that was required of the appellant in so far as his case was founded on fraud and forgery. As regards the first issue, we find against the appellant.

28. On the second issue as to whether the appellant proved his case to the required standard, we note that the appellant adduced evidence on two sets of facts to prove that the charge and the personal guarantee were forged and fraudulent. The first was the fact that at the time of execution of the two documents, he was incarcerated in Kamiti Prison. The invitation to the court was to conclude that, by reason of the imprisonment, the appellant was not in a position to and could not have executed the two documents. The second fact was that his cousin Harun was charged and convicted of forgery of the appellant's documents of title.

29. After the appellant adduced evidence pertaining to those two facts, the evidential burden shifted to the respondent. Overall, the legal burden of proof never shifted from the appellant. It was only the evidential burden that shifted. In this regard, it is apt to refer to the opinion of the Supreme Court in Raila Odinga & 5 others v. IEBC & 3 others [2013] eKLR, where the Court held:

> " ...the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made."

30. In discharge of the shifted evidential burden of proof, the respondent was able to get the appellant to admit that, although he was jailed on 19th June 1998 for a term of 5 years for the offence of theft of motor vehicle, he was shortly thereafter released on bail pending appeal. Once again, the evidential burden shifted back to the appellant to show that, although he was released on bail, the release was not before the date of the execution of the charge and guarantee. The appellant did not adduce evidence of the actual date on which he was granted bail pending appeal, which was a fact peculiarly within his knowledge. Section 112 of the Evidence Act provides:

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

31. When a party on whom lies the duty under section 112 of the Evidence Act to prove a fact especially within his knowledge fails to do so, the court is entitled to treat that as a strong circumstance going to discredit the truth of that party's case. Having failed to adduce evidence which was peculiarly within his knowledge regarding the date he was granted bail, the appellant left the distinct probability that he was actually out on bail on the date that the charge and the personal guarantee were executed.

32. This probability was further boosted by the statement of facts read to the criminal court after conviction of Harun on his own plea of guilty. That statement indicated that, on 29th July 1998, at City Square in Nairobi, the appellant gave Harun the title to the suit property, which the latter had borrowed from the appellant. Thereafter, the appellant left the country. This evidence, which was produced by the appellant, utterly contradicted his evidence that on 29th July 1998 he was in Kamiti Prison. On the contrary, it suggests that the appellant was out of the prison and right in the heart of Nairobi's central business district.

33. The second fact relied upon by the appellant was the conviction of Harun. Harun was charged with the offence of forgery contrary to section 345 of the Penal Code. In the same statement of facts which Harun admitted, it was stated that he presented documents to the bank, which detected some forgery and declined to grant him a loan. The sum total of the evidence adduced by the appellant raised

fundamental questions as to whether the alleged forgery by Harun related to the charge and personal guarantee in issue in this appeal, or whether it related to some other transaction.

34. Again, contrary to the appellant's pleading in paragraph 8 of the plaint that the original title deed to the suit property was stolen from his house on an unknown date, the evidence at the criminal court which the appellant was relying upon indicates that it was actually the appellant who gave the documents of title to Harun.

35. In the South African case of National Employers' General Insurance v. Jagers 1984 (4) SA 437 (ECD) at 440 D- 441A, Eksteen J. held as follows regarding discharge of the burden of proof:

> " It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected."

36. After hearing the appellant's and the respondent's evidence, the learned judge found the respondent's evidence more compelling and that of the appellant full of gaps and question marks, leading him to conclude that:

> " The many gaps in the plaintiff's case leads this court to conclude that he has not proved his case on a balance of probabilities."

37. On our part, taking all the foregoing into account, we are satisfied that the appellant did not prove to the required standard that the charge and the personal guarantee were forgeries. Contrasted with the respondent's case, the appellant's case did not convince the trial court that it was true or believable. The learned judge had the benefit of seeing the witnesses as they testified and observing their demeanour. He clearly did not believe the appellant's story. Accordingly, from the record, we have no basis for faulting or interfering with the conclusion of the learned judge.

38. We also recall the caution of this Court in Susan Munyi v. Keshar Shiani CA. No. 38 of 2002:

> " ...we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanour and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."

As regards the second issue, just as with the first, we find against the appellant.

39. Ultimately, we are satisfied that this appeal has no merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, C.Arb, FCIArb

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR