



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OUKO (P), GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 262 OF 2019**

**BETWEEN**

**OGLA JEMELI BARNG'ETUNY.....APPELLANT**

**AND**

**SHIRJI NARAN VIRJI.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of the Environment and Land Court at Eldoret (Ombwayo, J.) delivered on 29<sup>th</sup> August, 2019***

***in***

***Eldoret ELC Case No. 157 of 2016)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. In this appeal, the appellant has challenged the judgment of the Environment and Land Court (ELC) (**A. Ombwayo, J.**) given on 29th August 2019 compelling her to specifically perform obligations under a land sale agreement dated 28<sup>th</sup> May 2011 and transfer a property known as Title Number Eldoret Municipality Block 13/886 to the respondent. In the same judgment, the court restrained the appellant by an order of permanent injunction from interfering, in any manner howsoever, with the respondent's title over the said property.

2. In a nutshell, the respondent's case before the ELC was that he entered into a sale agreement with the appellant dated 28th May 2011 by which he agreed to purchase, and the appellant agreed to sell to him half an acre of land out of a parcel of land known as Title Number Eldoret Municipality Block 13/530 for the price of Kshs.3,500,000.00; that it was agreed that upon subdivision, the appellant would transfer one of the resultant subdivisions to him; that the appellant proceeded to subdivide the same into two half acre plots that were registered as Title Numbers Eldoret Municipality Block 13/885 and 886; and that despite the respondent having paid the full purchase price, the appellant, in breach of the agreement, refused to transfer or convey parcel Title Number Eldoret Municipality Block 13/886 to the respondent. He accordingly prayed for the reliefs the court granted.

3. In her statement of defence, the appellant averred that she did not at any time transact with or enter into any sale agreement with the respondent; that the purported sale agreement of 28th May 2011 "*was a fiction, a concoction, a forgery, a narrative weaved to take away the [appellant's] property without a sale agreement, without the [appellant's] consent...*"; that she did not receive any money towards the alleged purchase price; and that the respondent's claim was wholly baseless.

4. In her counterclaim, the appellant prayed for dismissal of the respondent's suit; a declaration that the properties belong to her; that the purported claim over the property by the respondent was invalid, null and void; and a permanent injunction to restrain the respondent from dealing with the property in any manner.

5. The critical question which the learned trial Judge had to determine was whether the appellant did, in fact, execute the agreement for sale and if so, whether she breached the same by failing to transfer the property to the respondent. In that regard, the Judge framed the issues in the suit thus: whether there was a valid contract between the parties; if so, whether it was breached; and whether the respondent was entitled to specific performance. Having found the answers to those questions to be in the affirmative, the Judge allowed the respondent's suit and, to the chagrin of the appellant, granted the reliefs to which we have already made reference hence the present appeal.

6. The appellant complains: that there was insufficient evidence to sustain the respondent's claim to the required standard; that the Judge

failed to properly analyze the evidence of forgery of the appellant's signature on the alleged sale agreement of 28<sup>th</sup> May 2011; that the Judge did not give any reasons why he did not believe the appellant's testimony and that of her witnesses; that the Judge placed undue weight on the testimony of the advocate who allegedly handled the sale transaction for the parties; and that the Judge erred in failing to determine the appellant's counterclaim.

7. Urging the appeal before us **Mr. Arusei**, learned counsel for the appellant relied on his written submissions which he orally highlighted. He submitted that the Judge erred in granting specific performance as the respondent did not demonstrate existence of a valid enforceable contract in respect of which that relief could be granted; that the appellant denied signing the alleged sale agreement or even appearing before the advocate who allegedly witnessed the agreement and neither did she receive the alleged purchase price. In those circumstances, counsel urged, the judgment of the trial court is clearly wrong and the same should be set aside.

8. Learned counsel for the respondent, **Mr. Maina Nyabuti**, on the other hand in opposing the appeal submitted that the respondent proved his case to the required standard; that the case that was put forward by the respondent before the trial court is believable and this Court should not therefore interfere with the judgment; that the respondent did produce before the trial court the agreement for sale in question and the advocate who prepared it and who witnessed its execution testified to it; that the validity of the sale agreement was tested and upheld and evidence tendered showing that the purchase price was paid in full; and there is no basis for faulting the Judge for ordering the enforcement of the agreement.

9. We have considered the appeal and the submissions. The main issue for determination is whether the conclusion by the Judge that the appellant executed the agreement for sale in favour of the respondent, paid the purchase price and that the appellant breached the agreement is supported by evidence.

10. On first appeal such as this, it is incumbent on the Court to review and re-evaluate the evidence and draw its own conclusions making allowance for the fact that the trial court had the advantage over this Court, of seeing and assessing the demeanor and credibility of the witnesses. See **Selle & Another vs. Associated Motor Board Co. Ltd (1968) EA 123**. We also bear in mind that the Court can interfere with a finding of fact of the trial court if such finding is not based on evidence or is based on misapprehension of the evidence or the Judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did. (See **Jabane vs. Olenja (1968) KLR 661**). With those principles in mind, we next review the evidence.

11. The respondent, who was the plaintiff in the lower court, testified as PW1 and stated that having negotiated and agreed with the appellant on the purchase of the property, they instructed Isaack Kipkenei Terer (PW3) of the firm of Terer Kibii & Company Advocates who prepared the agreement for sale dated 28<sup>th</sup> May 2011 and also attested its execution; that the agreement was duly witnessed by Erick Barngetuny (PW5) and Stephen Kipleting Missoi (DW3), the appellant's brother and husband respectively, who appended their signatures to the agreement; that on execution he paid a deposit of Kshs.140,104.00 to the appellant while the balance of the purchase price was paid progressively by instalments, making up the total of the agreed purchase price of Kshs.3,500,000.00.

12. The respondent tendered into evidence, as exhibits, the agreement for sale, payment vouchers and bank deposit slip, copies of cheques issued by the appellant's sister-in-law, Magdaline Chepkemboi Kibor (PW2) who apparently witnessed the payments to the appellant, and who issued cheques in favour of the respondent as surety or guarantee that the appellant would perform her obligations under the agreement.

13. Cross examined by counsel for the appellant, the respondent stated that although the manner of payment of the balance of the purchase price as stipulated in the agreement for sale was not strictly followed, the entire balance of the purchase price was nonetheless paid to the appellant or to her account on her request and the appellant acknowledged part of the payment on petty cash vouchers that were also produced as exhibits.

14. Magdaline Chepkemboi Kibor (PW2), the appellant's sister-in-law, testified for the respondent. She stated that she was involved in the transaction in that she would, on occasion, accompany the appellant to the respondent's office to collect payments towards the purchase price. In her words, *"I would go with my sister-in-law to Mr. Patel's office, Mr. Patel would give me the money and I give her the money and I issue my cheque to Mr. Patel. In case she fails to transfer the land to Patel, I would be the guarantor."* In that regard, PW2 stated that she received a total of approximately Kshs.600,000.00 from the respondent on behalf of the appellant and paid the same over to the appellant towards the purchase price and that she issued six cheques in favour of the respondent, copies of which she produced as exhibits. Under cross examination, she re-asserted that, *"I had to write the cheque so that she receives the money from Mr. Patel"* and maintained that despite the respondent having paid the purchase price, the appellant refused to transfer the plot to the respondent.

15. Next to testify for the respondent was Isaack Kipkenei Terer (PW3) an advocate. He stated that the appellant and the respondent were his clients; that he prepared the sale agreement in question based on negotiations between the parties; that both parties and their witnesses signed the sale agreement in his presence and he affixed his stamp; that the witnesses to the agreement were the appellant's brother, Erick Barngetuny and the appellant's husband Stephen Kipleting Missoi; that on execution of the agreement, a deposit of Kshs.140,104.00 was paid to the appellant; and that he could not however confirm whether the balance of the purchase price was paid as that was not done through his office.

16. Jane Choge (PW4) a secretary at Kiplelei Limited where the respondent was employed stated that she was familiar with the sale transaction; that she prepared petty cash vouchers to capture payments of purchase price made by the respondent to the appellant. She identified three of such vouchers prepared on 4<sup>th</sup> June 2011, 22<sup>nd</sup> December 2011 and 10<sup>th</sup> December 2013 for Kshs.100,000.00, Kshs.10,000.00 and Kshs.45,000.00 respectively all signed by the appellant in acknowledgment of the payments and stated that she was present when the appellant signed those vouchers; that in her presence the appellant also signed an acknowledgment confirming receipt of the balance of the purchase price from the respondent. Cross examined at length on the vouchers, PW4 maintained that she was present when the appellant received the payments as indicated in the vouchers and that she acknowledged doing so by signing in her presence.

17. Also testifying for the respondent was appellant's brother, Erick Barngetuny (PW5). He stated that the appellant, *"sold half of the land to Patel"* and that he was present and witnessed the signing of the agreement for sale at the advocates office when a deposit of Kshs.140,104.00

was paid; that he accompanied the respondent to National Bank of Kenya to deposit money in the appellant's account; that Kshs.569,000.00 was paid by bankers' cheque on 14<sup>th</sup> February 2012 and that the respondent 'put' Kshs.1,000,000.00 in her account on 3<sup>rd</sup> April 2012. With that, the respondent closed his case.

18. On her part, the appellant (DW1) asserted in her testimony that the purported sale agreement "*is a forgery*"; that she did not sell the land to the respondent; that the signature appearing on the agreement for sale is not hers; that she has never appeared before the advocate, PW3 for any purpose at all; and that she has never received any money towards the alleged purchase price. She stated that she is the registered owner of Block 13/530 which she sub-divided into Block 13/885 and 886 and "*never sold the land*" to the respondent; that the payment vouchers and other documents relied upon by the respondent were made without her participation; that she engaged a document examiner who confirmed that the signature appearing on the sale agreement was not hers; that the deposits of Kshs.1,000,000.00 and Kshs.569,000.00 made into her bank account by the respondent relate to money she borrowed from her father and not the purchase price; that no cash payments were made to her and neither had she ever acknowledged payment.

19. Emmanuel Karisa Kenga (DW2) a document examiner and a retired police officer stated that on 15<sup>th</sup> August 2017, at the request of the appellant's advocates he examined signatures on photocopies of documents furnished to him against specimen signatures provided and concluded that the signature on the sale agreement purporting to be that of the appellant was not hers.

20. The appellant's husband Stephen Kiplelei Misoi (DW3) stated that although his name was indicated in the agreement as one of the persons who purportedly witnessed the signing of the sale agreement, he did not in fact witness the agreement and did not at any time appear before Isaack Kipkenei Terer (PW3) as claimed.

21. The appellant's children Shaleen Jerotich Missoi (DW4) and Macleeverly Kiprop Missoi (DW5) also testified on behalf of the appellant and termed the claim by the respondent that he bought a parcel of land from their mother as "*fraudulent*"; that they were not aware of the alleged agreement and neither were they present when it was allegedly made.

22. After the close of the defence case, the trial court invited a forensic document examiner, John Munde, a senior superintendent of police to examine and render an opinion on the authenticity of the contentious documents. In his testimony Mr. Munde stated that having examined, alongside two other experts, the signatures on the original sale agreement and other documents supplied to him by the Registrar of the court, he formed the opinion that the signatures on the sale agreement were authentic and that the signatures thereon agreed with the known signatures of the persons referred.

23. The learned trial Judge was however not impressed by the expert opinions given by the two document examiners and disregarded their opinion altogether. He found, "*both reports without credibility.*" In relation to Mr. Munde, the Judge expressed that his report "*is of less probative value to the court*" because he did not consider the national identity cards of the appellant and her husband and neither did he "*consider specimen signature and known signatures.*" The report by Mr. Kenga was also discredited by the Judge because the specimen signatures

*"were taken in his absence and therefore the authenticity of the same is questionable".*

24. With the expert opinions discredited, and rightly so in our view for the reasons given by the Judge, what remained was for the trial court to determine whose version of facts, as between that of the appellant and that of the respondent, was credible and whether the respondent had established his case to the required standard. In that regard, the judge was particularly impressed by the evidence of PW2. The Judge observed that,

*"Mr. Terer appeared before court as PW2 and confirmed that all the parties and the witnesses appeared before him" and his "evidence remained steadfast on cross examination and reexamination".* The Judge then concluded that there is no doubt that the sale agreement, "*was drawn by Terer & Co Advocates witnessed by Isaac K. Terer an advocate of the above said firm who stated that parties and the witnesses named in the agreement appeared before him and signed the agreement.*"

25. It is difficult to quarrel with the trial Judge's conclusion in that regard bearing in mind that all the witnesses testified before him and he had the opportunity to observe their demeanor and assess their credibility or lack thereof. As this Court stated in ***Joseph Kariuki Ndungu & another vs. Republic [2010] eKLR (Criminal Appeal Nos. 183 & 188 of 2006)***, albeit in the context of a criminal appeal:

***"...the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law."***

26. Earlier, in ***R vs. Oyier [1985] KLR 353***, the Court stated that an appellate court should not interfere with findings by a lower court, which are based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that there existed errors of law.

27. As already noted, Isaack Kipkenei Terer (PW3) who prepared the agreement for sale on behalf of the parties was categorical that the agreement was executed by the parties and witnessed in his presence. As noted by the trial Judge, his testimony was not shaken on cross examination. The respondent in his evidence explained and demonstrated the manner in which the entire purchase price was paid, even though the mode of payment contemplated in the agreement was not strictly followed. Jane Choge (PW4) who prepared vouchers relating to some of the payments made by the respondent to the appellant towards the purchase price on three different occasions was also categorical that the appellant received and signed for those payments in her presence. She also witnessed the appellant sign an acknowledgment of payment of the balance of the purchase price on the back of a cheque leaf confirming that the balance of Kshs.1,100,000.00 had been paid.

28. The appellant's answer to the overwhelming evidence tendered by and on behalf of the respondent was to claim that the signatures were forged and that the documents tendered in support were also not genuine. She was supported in that endeavour by her husband and children. She sought to explain that the amount of Kshs.1,569,000.00 paid into her account, and which the respondent asserted was paid in part payment of the purchase price, was according to her money she borrowed from her father but offered no evidence in support her claim.

29. All in all, we are satisfied that there was sufficient evidence before the learned Judge on the basis of which he concluded that the sale agreement was duly executed by the parties; that the purchase price was paid in full; and that the appellant had breached the agreement by failing to transfer the property to the respondent. We are therefore fully in agreement with the learned Judge when he expressed that:

***“In conclusion, I do find that there was an agreement and consideration was fully paid by the plaintiff and therefore the plaintiff is entitled to an order of specific performance.”***

30. We have no basis for interfering with the judgment of the learned Judge. Having concluded that the respondent's case was proved to the required standard, it followed that the appellant's counterclaim for the declarations that she had sought failed.

31. The result of the foregoing is that the appeal is devoid of merit. It is accordingly dismissed with costs to the respondent.

Orders accordingly.

***Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2021.***

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**