



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: SICHALE, J. MOHAMMED & KANTAL, J.J.A.)

CIVIL APPEAL NO. 78 OF 2019

BETWEEN

1. MUHAMMED AWADH SALIM

2. MOHAMMED ABDILLAHI YUSUF

3. ATHMAN NAAMAN MOHAMED (Suing as the trustees of

THE QURAN AND SUNNA SOCIETY OF EAST AFRICA).....APPELLANTS

AND

1. KALIMUDDIN EBRAHIM HASSANALI

2. K. M. KARIMBHAI & COMPANY ADVOCATES

3. ABDULNASSER SAID AHMED.....RESPONDENTS

(An appeal from the Judgment of the High Court of Kenya at Mombasa (A. Omollo, J.) dated 22nd February, 2019

in

ELC No. 202 of 2013)

JUDGMENT OF THE COURT

This is a first appeal from the Judgment of the High Court of Kenya at Mombasa (A. Omollo, J.) delivered on 22nd February, 2019. Rule 29 of the rules of this Court mandates us, in such an appeal, to reappraise the evidence and draw inferences of fact. For a judicial pronouncement of that mandate see the case of **Peters v Sunday Post [1958] E.A. 424** where the following passage appears:

“The first duty of this court is to assess, evaluate and subject the evidence tendered before the trial court to afresh scrutiny, and to draw its own conclusions, though bearing in mind that it has neither seen or heard the witnesses and should make allowance in this respect....”

In a plaint filed at the Environment and Land Court (“ELRC”) at Mombasa the appellants, **Muhammad Awadh Salim, Mohamed Abdillahi Yusuf** and

Athman Naaman Mohamed (suing as Trustees of the Quran and Sunnah Society of East Africa) sued the respondents **Kalimuddin Ebrahim**

Hassanali, K.M. Karimbhai t/a Karimbhai & Company Advocates and Abdulmasser Said Ahmed. The suit related to a sub-division of a parcel of land known as **Sub-Division No. 3368 Section 1 Mainland North (“the suit land”)**. It was alleged in the plaint that an agreement had been entered on 18th December, 2007 between the appellants and the 1st respondent where the appellants bought the suit land for Kshs.3,500,000. It was stated that one term of the agreement for sale provided that the 1st and 2nd respondents would deliver to the

appellants, amongst other documents, the original title documents; that the 2nd respondent had acted for both vendor and purchaser in the transaction; that the appellants had paid the entire purchase price for the transaction but that the respondents had failed and refused to release title documents to the appellants and for all that it was prayed:

“a) An order to compel the Defendants to release to the plaintiffs the original documents of title to parcel of Land Subdivision No. 3368 Section 1 MN.

b) Cost of and incidental to this suit.

c) Any other and or further relief that this honourable Court may deem fit and just to grant.”

The respondents filed a Defence and counter claim where the appellants' claim was denied. The following defence was taken at paragraph 3 and 4 of the defence:

“3. With regard to paragraph 2 of the plaint the defendants aver that:

i. That prior to the purchase of Sub-Division Number 3368/Section I/MN the Late Ebrahim Hassanali Mulla Abdullahi donated a portion of undemarcated plot to the public for the construction of a mosque known as Masjid Mulla Mosque.

ii. That the said mosque was build and put under the management of a committee which was later on registered as Masjid Mullah Welfare Committee at the department of social services.

iii. That during the year 2005 the Masjid Mulla Committee requested the Late Mohamed Ibrahim mullah (deceased) to allocate them the portion of vacant land fronting the mosque and offered to pay Ksh.3,500,000/= for the same which offer was duly accepted.

iv. That in view of financial constraints the committee called for contributions from worshippers and other well-wishers.

v. That pursuant to the calls for assistance the Quran and Sunnah Society of East Africa through its trustee Mr. Athuman Naaman Mohamed the 3rd plaintiff offered to boost the kitty by pleading to contribute the entire balance due subject to a condition that the committee would allow the agreement to be drawn in the name of the trustees of the Quran and Sunnah society of East Africa so as to convince their major donors in Canada.

vi. That after long deliberations it was agreed that one of the members of Mulla Mosque committee should be included as one of the purchasers so as to safeguard the interest of Mulla Mosque committee and by reason thereof of 3rd defendant who is the General Secretary was appointed.

vii. That the plaintiff vigorously resisted the 3rd defendant's inclusion in the Title document but the committee of Mulla Mosque insisted that one of their own must be included in the Title document and by reason thereof the 3rd defendant's name was included as one of the trustee.

viii. That the only reason why the plaintiff's names were included in the Title document was that the 1st and 2nd plaintiffs convinced the committee of Mulla Mosque that without doing so their donors in Canada would not release the funds.

4. That further to the foregoing the defendants aver that the plaintiffs through the Quran and Sunnah Society of East Africa contributed towards the purchase of land already donated by the family of the Late Ebrahim Hassanali to the Mulla Mosque.”

The 1st respondent denied having sold the suit land to the appellants at all it being stated that the consideration of Kshs.3,500,000 was a **“... token of charity to Mulla Mosque which existed on the plot long before the agreement was made”**. It was further taken as a defence that there was an agreement between Mulla Mosque Committee and the appellants that the title document for the suit property should be released to that Committee as soon as the transfer was registered. The 3rd respondent in particular denied selling the suit land to the appellants stating that:

“... The plaintiff's action is an attempt to defraud worshippers of Masjid Mulla of their Lawful Land through trickery ...”

Particulars of fraud were given as making false representation to the Committee of Mulla Mosque knowing that the (the appellants) had an intention to defraud the land and concealing to court the fact that the appellants acted as well wishers or donors and had no proprietary rights over the suit land. The appellants were also said to have failed to fulfil a promise not to claim ownership of the suit land.

The counter-claim was taken by the 3rd respondent who stated that the 1st and 2nd appellants had fraudulently registered the suit land in their favour; that the suit land be registered in the name of Mulla Mosque Committee; that he was ready to refund the money paid by Quran and Sunnah Society Trust and it was therefore prayed that the suit be dismissed and judgment be entered on the counter-claim.

In testimony before the Judge the 1st appellant **Mohammed Awadh Salim**, a resident of Canada, stated that on learning that the suit land was available for sale he was asked by his colleagues to mobilize funds which made him approach colleagues in Canada. The Canadians gave as a condition precedent to any donation that an organization be established through which money could be channeled. He approached a

committee in charge of Mulla Mosque in 2005 and the following year he prepared a Trust Deed; opened a bank account and proceeded to collect donations from Kenya and elsewhere; that he and 2 others were the founders of the Society. Further, that the 2nd respondent as lawyer acting for both sides in the transaction insisted that the appellants and the 3rd respondent appear before him to execute some documents, a request which was resisted by the 3rd respondent who refused to recognize him (the 1st appellant) as purchaser of the land. He produced into evidence various documents including Receipts issued in favour of “Quran and Sunnah” and testified that the administration of Mulla Mosque had nothing to do with the purchase of the suit land.

He stated in cross-examination:

“...Mulla Mosque was looking for funds for the mosque to buy land. I was asked to help raise funds and I agreed ...”

Further, that title to the suit land be released to the appellants but that the appellants were not leaders of that mosque.

The 2nd appellant **Mohamed Abdilahi Yusuf**, a resident of Tudor in Mombasa, testified that in 2005 the 3rd respondent was the caretaker of Mulla Mosque. According to him the dispute in the case revolved around the 3rd respondent refusing to visit the offices of the 2nd respondent to execute documents so that a title to the suit land could be procured. In cross-examination he said:

“... Funds were being raised to buy the land of Mulla Mosque.... The Committee of Mulla Mosque approached us to help them get funds from Canada. Canada had organization called Q.S.S. Q.S.S. in Canada has relations with Q.S.S. Kenya. The money from Q.S.S. Canada gave Q.S.S. (K) money to buy the land”

Further, that the signatures to the bank account to which funds collected were remitted were himself, the 3rd appellant and the 3rd respondent.

One **Mohamed Hassan Abdi**, a teacher and preacher was called as a witness in the case. He knew both parties in the case. When he joined Mulla Mosque he found a discussion on a project to buy land which was adjacent to the mosque. A Trust was established and he was one of the trustees and according to him, its purpose was to raise funds and manage the mosque. The trust raised funds in Kenya, Tanzania and Canada. According to him:

“... As a trustee, the land belongs to Mulla Mosque as the trust was formed for their benefit....”

He challenged testimony given by the appellants contending that it was after money had been collected that they had become selfish wanting to take the land which land was for the public interest.

Abdul Halim Abdulrazak Bilel, a businessman, was also called as a witness and it was his testimony that there was need to buy land adjacent to Mulla Mosque where the 3rd respondent was an administrator. A body **“Q.S.S. East Africa”** was formed to collect funds to purchase the said land. He stated that the intention from inception of the idea to collect funds was to enable the mosque purchase the land.

Shabir Mohamedali Ibrahim who worked for an electrical company in Nairobi was called as a witness. He testified that the suit land was originally owned by his grandfather who appointed the witness’s father as administrator of the same. At an unstated time he and his family realized that a building was being erected on their land (the suit land) and upon carrying out investigations they established that it was Mulla Mosque that had entered their land. Discussions took place and the family sold the land to the mosque at a huge discount.

At the close of the whole case submissions were made and the Judge found that the appellants case had no merit and she dismissed it. The Judge allowed the counter-claim ordering that the representatives of Mulla Mosque retain possession of the land as well as the title deed.

Those are the orders that provoked this appeal which is premised on Memorandum of Appeal drawn for the appellants by their lawyers **M/S Mogaka Omwenga & Mabeya Advocates** where 7 grounds of appeal are taken. The Judge is faulted for not ordering release of the title deed to the appellants; for finding that the appellants were acting as trustees of Mulla Mosque; that the Judge erred in writing a contract for the parties and in considering extraneous matters to justify refusal to grant mandatory orders to the appellants. Finally, that the Judge erred in allowing the counter-claim and in granting title deed to the representatives of Mulla Mosque. We are thus asked to set aside the part of the Judgment refusing to grant mandatory orders to the appellants and set aside that part of the decree that allowed the counter-claim.

When the appeal came up for hearing before us on 27th July, 2020 through Virtual **“Go-to-Meeting”** due to the prevailing COVID-19 global pandemic both counsel had filed written submissions which they chose not to highlight. We have perused those submissions and the whole record of appeal.

In the written submissions filed by M/S Mogaka Omwenga & Mabeya Advocates for the appellant a summary of the case is given and grounds of appeal are condensed to four. It is submitted that the Judge erred in not giving effect to the condition in the agreement requiring the 2nd respondent, as lawyer for both sides, to hand over the title to the suit land to the appellants. It is said that Receipts for purchase of the suit land although issued to “Quran & Sunnah Self Group” were collected by the appellants and this act, it is submitted showed that the appellants were the purchasers of the suit land. Counsel for the appellants further submits that there was no evidence to show that the trust created was to facilitate collection of funds for the mosque to purchase the suit land. It is further submitted that the Judge erred in finding in favour of representatives of Mulla Mosque and that by so doing the Judge re-wrote the contract for the parties, something the law does not allow her to do as was held in the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR**. On the issue of the counter-claim which was allowed counsel takes issue based on **Order 7 rule 8** which requires a defendant who takes a counter-claim in his defence to add to the title of the defence a further title similar to the title in the plaint. It is submitted that the counter-claim was defective and should not have been considered and it is further said that particulars of fraud were not given or proved.

In written submissions filed for the respondents by **M/S A.O. Hamza & Company Advocates** technical issues such as whether the person who swore the affidavit in support of the plaint are taken. We note that this issue was not taken before the Judge, neither was the issue whether the suit was a representative one or not.

Counsel for the respondents submitted that the appellants used fraudulent means to register the title to the suit land in favour of a trust and it is submitted that the Judge was right in reaching the findings that she made.

The trial Judge found as fact (from the evidence) that Mulla Mosque existed before the issue of funds arose. She also found that a trust was formed for purposes of raising funds to buy land where the mosque was already built. The Judge also found as fact that the 1st and 2nd appellants were not founders or officials of the mosque.

The agreement for sale dated 18th December, 2007 was made between the 1st respondent (as administrator of the estate of the late Ebrahim Hassanali Mulla Abdullahi) as vendor, and **“The Quran & Sunnah Society of East Africa”** as purchaser. The agreement identified the land to be sold as sub-division of No. 3368 Section 1 Mainland North (as per a sketch plan attached) and consideration was Kshs.3,500,000. It was a condition in the agreement that the 2nd respondent (the lawyers) were, on completion, to deliver completion documents.

There are various Receipts issued by the lawyers and money is received from **“The Quran & Sunnah S/H Group”** and it is on account of **“Q.S.S. Mulla Mosque”**. The Receipts represent the entire purchase price which all parties agreed was duly paid.

There is a Trust Deed made on 1st August, 2006 made between **Athman Naaman Mohamed** and **Muhamad Awadh Salim** (1st appellant) – “the Founders” of the one part and Mohamed Abdillahi Yusuf (2nd appellant), Mohamed Hassan Ahmed, Mohamed Hassan Abdi and Abdulahim Abdurazak Abdulla Biddel (“the trustees”) of the other part. The **“Main Purposes and Assistance”** of the trust is given at Clause 3 of the deed as follows:

“3. Main Purposes and Assistance

(a) The Main purpose of the Trust Fund is the advancement of and improvement of education, health standards and social welfare and the alleviation of poverty and other benefits for the orphans and poor muslim children and generally involve themselves in activities intended and designed for the financial, spiritual and cultural betterment and upliftments of the poor and less fortunate members of the muslim society in general.

(b) To own the trust fund.

(c) To own the schools, madrasas, hospitals etc and any other properties as may be acquired from time to time.

(d) To review recurrent and development budgets.”

There is a document at page 87 of the record titled **“CONTRIBUTIONS TOWARDS Q.S.S. LAND – PURCHASING PROJECT”** where it is stated, amongst other things, that the agreement dated 18th December, 2007 (this was the agreement for purchase of suit land) had been completed on 30th June, 2008. Contributions for the purchase price had been received from various countries and from some individuals.

Masjid Mullah mosque had by a letter dated 25th April, 2005 written to Yusuf Hassanali where it had offered to buy the suit land for Kshs.3,500,000.

We have reproduced in detail the oral testimony given before the Judge. The 1st appellant admitted that he had been approached by the Committee of Masjid Mulla mosque and he agreed to mobilise funds to enable Mulla Mosque purchase land which was adjacent to the mosque; the suit land. The 2nd appellant testified to the same effect.

It is not denied by the appellants that the organization Quran and Sunna Society of East Africa was established when donors particularly from Canada insisted that an organization be established through which funds for purchase of the suit land would be channeled. Indeed the 2nd appellant testified that the land belonged to the mosque. Other witnesses testified to the same effect and the 3rd respondent, who sold the suit land, took as defence that the suit land had been fraudulently registered in favour of the appellants. Detailed particulars of fraud were set out in the counter-claim.

Like the trial Judge we find that the purpose of creating the trust was to receive funds for the purpose of purchasing the suit land for Mulla Mosque. The appellants could not turn around in those circumstances to claim ownership of the land which was bought from funds donated by muslim brethren from various countries for a specific purpose. There was indeed evidence that “Quran and Sunna” was an organization established and registered in Canada and what the appellant did was to register what appears to be an East Africa chapter of the same.

On the complaint that the counter-claim was not properly drawn and did not conform to what **Order 7 rule 8** of the **Civil Procedure Rules** we note, firstly, that the appellants responded to the counter-claim and thus suffered no prejudice. Secondly the appellants did not take that as an issue before the Judge. Further **Order 2 rule 14** of the said **rules** outlaws taking of technical objections on the grounds of want of form. **Rule 15** of those **rules** mandates a court to order amendment or striking out of the pleadings at any stage of the proceedings.

In a persuasive case **H.C.C.C. No. 233 of 2020 of Bridge-Up Containers Limited v Stanbic Bank Limited** Okwengu, J. (as she then was) had this to say of the said **Order 7 rule 8**:

“..... the effects are not fatalthe ends of justice will be met by giving the defendant an opportunity to amend the Defence

and counter-claim.”

The Judge was entitled to find no merit in the suit and to find in favour of the counter-claim. We confirm those findings.

The appeal has no merit and we dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 6th day of November, 2020.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR