



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 66 OF 2016

BETWEEN

BHIMJI PARBAT DHANJI KERAIAPPELLANT

AND

STEPHEN NJOROGE MBONOH.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kitale (S. Githinji, J.) dated 15th February, 2016 in HCCC NO. 4 OF 2014)

JUDGMENT OF THE COURT

[1] **Bhimji Parbat Dhanji Kerai**, the appellant herein is dissatisfied with the judgment of the High Court (S Githinji J), in which his suit against the respondent **Stephen Njoroge Mbonoh** was dismissed. The appellant's claim against the respondent was for judgment for Kshs.12,065,000/= being amounts paid by the appellant to the respondent, for purchase of four (4) parcels of land, but in regard to which there was total failure of consideration.

[2] The respondent filed a defence in which he admitted entering into an agreement with the appellant, in regard to land parcel No. Kitale/Municipality/Block10/198 (Block10/198) but contended that the appellant only paid him Kshs.1,000,000/= out of the agreed consideration of Kshs.4,500,000/=. and failed to pay the balance. The respondent denied having entered into any agreement or receiving the amount of Kshs.6,800,000/= in regard to the sale of Kitale/Municipality Block 11/151, 152 and 153.

[3] Hearing of the suit proceeded before J.R. Karanja J, who heard the evidence of the appellant who was the only witness, and that of the respondent who was also the only witness for the defence. Both parties then filed written submissions. Unfortunately, J.R. Karanja J was transferred and the judgment was therefore prepared and delivered by S Githinji J, who took over the station.

[4] In his memorandum of appeal, the appellant has challenged the judgment of the High Court contending that the judge erred: in finding that the appellant did not prove his case; in considering matters that were not pleaded; in holding wrongly that the appellant did not adopt his witness statement which was on record; in failing to appreciate the evidence that was adduced by the appellant; in failing to appreciate the burden of proof that the appellant was required to discharge; and in making propositions that were based on conjecture.

[5] Each party filed written submissions that they each fully adopted in support of their position in regard to the appeal. In brief, the appellant submitted that he had filed his statement in court and relied on it in adducing evidence; that in accordance with **Order 3 Rule 2(1)** of the **Civil Procedure Rules**, his statement was part of the record; and that the trial judge erred in disregarding the statement.

[6] The appellant drew the court's attention to his evidence that was unchallenged by the respondent, which included, the payment voucher of Kshs.1,800,000/= signed by the respondent, wherein it was acknowledged that only Kshs.200,000/= was outstanding out of the agreed price of Kshs.4,500,000/=. He also pointed out that the respondent acknowledged receipt of Kshs.350,000/= on account of Block 11/151, 152 and 153, and that the respondent also admitted receiving a sum of Kshs.1,000,000/= and 115,000/=. The appellant faulted the learned judge for disregarding these facts, and also failing to address the fact that the respondent had signed and issued a cheque for Kshs.6,800,000/= which was consistent with the appellant's evidence. He urged the Court to allow the appeal and set aside the judgment of the High Court.

[7] On his part, the respondent submitted that the appellant had neither discharged the burden of proof as required, nor proved his case as

pleaded. He admitted having entered into the first agreement, but denied ever entering into any other agreement. He challenged the appellant's evidence, pointing out, that it was not supported by any other witness. He maintained, that in regard to the first sale, the appellant was aware that his title was to emanate from Joab Lumbasi Simiyu.

[8] The respondent urged the Court not to accept the appellant's evidence in regard to the payment of Kshs.1,800,000/=, arguing that the payment could not have been made before the execution of any agreement; that the appellant's evidence in regard to the payments for Block No. 151, 152 and 153 was inconsistent; that the documents concerning the payment of rates, were also inconsistent; and that the cheque for Kshs.6,800,000/= allegedly issued by the respondent to the appellant was a forgery. He therefore urged the Court to uphold the judgment of the trial court.

[9] We have carefully considered this appeal and the submissions made by the parties together with the authorities cited. This being a first appeal to this Court, we reiterate what this Court stated in Susan Munyi vs Keshar Shiani [2013] eKLR, that:

“As a first appellate court, our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at our own independent conclusion.

In undertaking this task, however, 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 evidence as captured in the cold letter of the record.”

[10] The issue that is for determination in this appeal is whether the trial judge of the first appellate court, properly considered the burden of proof and properly directed himself in regard to matters for consideration in arriving at his conclusion. In considering this issue, we have reconsidered and evaluated the evidence that was before the trial court. The appellant's claim as pleaded in his plaint, was anchored on two agreements for purchase of land. The first agreement was a written agreement dated 12th June, 2013 (written agreement), and the second agreement was an oral agreement (oral agreement). While the respondent admitted the written agreement, and receiving a sum of Kshs.1,000,000 from the appellant pursuant to that written agreement, the respondent denied receiving the balance of the purchase price in regard to the written agreement or entering into the oral agreement.

[11] Before we address the evidence in regard to the two agreements, we wish to point out that the learned judge referring to the appellant's statement filed together with his plaint under **Order 3 Rule 2(c)**, found it to be more detailed and to contain better particulars than his oral evidence. However, the judge declined to accept the statement as evidence maintaining that the appellant did not in his evidence in chief adopt the statement as part of his evidence. On perusal of the record, we concur that the appellant did not make any reference to the statement that he had filed nor did he vouch for the contents of the statement.

[12] A statement filed under Order 3 Rule 2(c) of the Civil Procedure Rules, is intended to provide prior information to a defendant of the evidence that a plaintiff intends to rely upon in support of his suit. Indeed, Order 18 Rule 2(1) and Order 19 Rule 1 of the Civil Procedure Rules, shows that a plaintiff is required to prove his case either by oral evidence or affidavit evidence. Thus, it is expected that during the trial, the plaintiff testifying under oath, will either reiterate or adopt the contents of the statements that he had filed, or put in a sworn affidavit. The appellant not having made reference to the statements, the truth of that statement could not be vouched for, and the learned judge was right in ignoring the same.

[13] We have considered the evidence regarding the written agreement, and note that although the respondent was indicated as the Vendor, it was stated in the written agreement, that he had purchased Block 10/198 from one Joab Lumbasi Simiyu, who was the registered allottee, and who was yet to transfer that property to him. The respondent undertook to ensure that Joab Lumbasi Simiyu executed all necessary documents to effect the transfer into the appellant's name. In effect what this meant, is that the respondent was only the holder of a beneficial interest in Block 10/198, pursuant to the written agreement of sale, entered into between him and Joab Lumbasi Simiyu, the registered allottee, and that he was assigning this interest to the appellant.

[14] There is no evidence that Joab Lumbasi Simiyu was party to the written agreement between the appellant and the respondent. Nor was anything produced to confirm that Joab Lumbasi Simiyu was an allottee of Block 10/198, or that the land was transferred to him. The respondent having admitted the written agreement, and receipt of the initial payment of Kshs.1,000,000/=, he did not adduce any evidence to confirm that his alleged beneficial interest had crystallized. It is interesting that although the respondent claimed that the appellant took possession of Block 10/198 and that he had not been paid the balance of Kshs.3,500,000/=, the respondent did not lodge any counterclaim for this amount.

[15] Under **section 107 & 109** of the **Evidence Act**, the burden of proof falls on the person who desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, to prove the existence of those facts. In regard to the written agreement, the appellant asserted and proved the existence of the written agreement. The appellant also established the payment of Kshs.1,000,000/=, as was provided in the written agreement.

[16] According to the written agreement, the balance of Kshs.3,500,000/= was to be paid, upon successful transfer and issuance of the title deed in favour of the appellant. The appellant claimed that although he cleared the balance of Kshs.3,500,000/=, the property was not transferred into his name. However, apart from a petty cash voucher for Kshs.1,800,000/=, which the appellant claimed to have been signed by the respondent, the appellant did not produce any other evidence to show how he paid the balance of Kshs.1,700,000/= to the respondent .

[17] The appellant testified that he was given a title deed for Block 10/198 that turned out to be fake. We take judicial notice of the fact that a transfer of immoveable property can only be done following a clear and specific procedure that involves both the Transferor and Transferee. Yet in the appellant's case, it is not clear how he secured the transfer of the suit property to himself. Nor is any evidence of any due diligence having been undertaken by the appellant to ensure that a proper conveyancing process was followed.

[18] In addition, other than the appellant's word, that the title that he was given by the respondent was fake, there was no attempt to call evidence from the Land's Registry to confirm this allegation. If indeed, as the appellant claimed the respondent had conned him of his money and given him a fake title, the matter was a criminal issue that should have been reported to the authorities for investigations. As it is, there is no evidence at all that the appellant made any such complaint. One gets the impression that the appellant may have been complicit in an irregular deal.

[19] On assessment of the evidence that was adduced before the trial judge, we find that, although there was a written agreement between the appellant and the respondent for sale of Block 10/198, the appellant was well aware that the respondent was not the registered proprietor of that property. While it is not disputed that the appellant paid the sum of Kshs.1,000,000/= to the respondent, there was paucity of evidence regarding the payment of the balance, which balance the respondent denied having received. We take cognizance of the fact that the appellant produced a petty cash voucher, purported to have been signed by the respondent. Nevertheless, there was no evidence tendered to prove that the respondent was the one who signed the voucher. For the above reasons, we find that in regard to the written agreement, the appellant only established payment of Kshs.1,000,000/=.

[20] As regards the oral agreement, there was nothing to substantiate the appellant's contention that he entered into an agreement with the respondent for purchase of Block 11/151, 152 and 153. Indeed, there was no evidence at all to show that the respondent was the registered proprietor of these land parcels or that he had any beneficial interests in the properties that he could transfer.

[21] The appellant's evidence in regard to the purchase price for the three properties, was not clear. At paragraph 3(ii) of the plaint, the appellant pleaded that the three properties were being sold at an agreed aggregate price of Kshs.6,800,000/= and yet in his plaint, the appellant claimed a total of Kshs.12,065,000/=. We appreciate that, the claim includes the consideration of Kshs.4,500,000/= that was agreed for Block 10/198. Assuming that figure is reduced from the total sum claimed, there would be a balance of Kshs.7,565,000/= in regard to the claim for the three properties. This figure does not tally with the amount of Kshs.6,800,000/= that the appellant claims to have been the agreed aggregate price that he paid, for the three properties. Even if we are to include the further amounts of Kshs.115,000/= and 350,000/= that the appellant claimed to have paid to the respondent, there would still be a difference.

[22] In addition, the appellant relied on a cheque for Kshs.6,800,000/= that was allegedly issued to him by the respondent. However, there was nothing to connect this cheque to the failed transaction.

[23] Of importance, is **Section 3(3)** of the **Law of Contract Act** that states as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded –

(i) is in writing;

(ii) is signed by all the parties thereto;

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: provided that this sub section shall not apply to a contract made in the cause of a public auction by an auctioneer within the meaning of the Auctioneer's Act (Cap 526) nor shall anything in it affect the creation of a resulting, implied, or constructive trust.”

[24] Needless to state that the oral agreement, purportedly entered into by the parties' not having been supported by any written documents, signed by the parties', and witnessed by another person, the appellant's suit anchored on the oral agreement, is barred by section 3(3) of the Law of Contract Act. In our view, the appellant failed to discharge the burden of establishing the facts upon which the Court could find in his favour. Accordingly, we find that the learned judge was right in dismissing his suit. We uphold the judgment of the trial court and dismiss this appeal with costs to the respondent.

Those shall be the orders of this Court.

DATED and delivered at Eldoret this 7th day of February, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR