IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE, & ODEK JJ.A)

CIVIL APPEAL NO 169 OF 2016

BETWEEN

SHAHEEN KOSSAR.....APPELLANT

AND

RAZAK MAQBOOL AHMED.....1ST RESPONDENT

SABIA KOSAR.....2ND RESPONDENT

(Appeal against the Ruling and Order of the High Court of Kenya

at Nairobi (Sergon, J.) dated 3rd March, 2016

in

Nairobi Civil Suit No 29 of 2013 (O.S.)

****

JUDGMENT OF THE COURT

Razak Maqbool Ahmed and ***Sabia Kosar*** (hereinafter the '1st respondent and '2nd respondent respectively) lodged an Originating Summons dated 17th December, 2013 at the High Court at Nairobi (Milimani) on 14th February, 2014 seeking the following orders against Shaheen Kossar (hereinafter the ' appellant'):-

> ***"***
>
> ***1. THAT the contract made on 1st September 2006, with the Respondent provide for arbitration upon any contractual dispute arising.***
>
> ***2. THAT the respondent has failed / neglected and refused to concur with the appointment of an arbitrator causing applicants to apply for this Honourable Court to confirm the appointment of Mohamed Yunis Sroya.***
>
> ***3. THAT the court do confirm the appointment of Mohamed Yunis Sroya as arbitrator of the dispute between the parties as defined in the Arbitration Act and as per the parties agreed.***
>
> ***4. THAT the cost of this application be met by the respondent".***

A brief background that led to the institution of the suit as stated by the respondents is that pursuant to a written contract entered into on 1st September, 2006, the appellant borrowed the sum of **Ksh 7, 000, 000/=** from the respondents herein for purposes of facilitating the final phase of construction and completion of a block of flats erected on **Land Reference No 209 / 118 / 96** (the property) situate in Nairobi. The respondents contended that they lent the said sum to the appellant on conditions spelt out in the contract of 1st September, 2006 that she would *inter alia*:-

(i) Deposit as a security with the lenders, the original title documents of the land (Grant No I.R. 9770 / 1 (d)-L.R. No 209 / 118 / 96) (the property) upon which the 8 flats had been constructed.

(ii) Allow the lenders to cause a caveat to be registered claiming 'lender's interest' against the title of the property.

(iii) Hand over possession of flat numbers 6 and 4 and keys thereto, upon completion to the respondents, who would in turn decide whether to utilize them for personal use; or whether to let them out to third parties at a rent of their choice.

Other salient terms contained in the said contract were that the principal amount was to be repaid within three years from the date of the agreement, or such extended time to be declared at the sole discretion of the respondents. Further, that any dispute was to be referred to ***Mohamed Yunis Sroya***, whom the parties chose as their arbitrator.

As fate would have it, a dispute did arise between the appellant and the respondents, as can be discerned from the Originating Summons which we have already adverted to in this judgment, and a Supporting Affidavit sworn by ***Mohamed Razak Maqbool Ahmed*** (presumably one and the same person as ***Razak Maqbool Ahmed***) the 1st respondent herein at Nairobi, on 17th December, 2013. Discord stemmed from the appellant's alleged failure to hand over possession of flats numbers 6 and 4; keys thereto and rent which had accrued to the respondents following the completion of the said flats. Related to the foregoing was the appellant's alleged failure, refusal and or neglect to acknowledge the existence of a dispute between herself and the respondents. It was further alleged that the appellant had failed and/or refused to confirm ***Mohamed Yunis Sroya*** as the Arbitrator as per the contract of 1st September, 2006.

Seven (7) issues were framed by the respondents for determination in their Originating Summons namely whether:-

"1. The contract entered on first September 2006, provided for arbitration process in settling contractual disputes.

2. The parties agreed specifically in the said agreement on a particular arbitrator to settle their contractual disputes.

3. The said arbitrator has rescinded his appointment as an arbitrator in this contractual dispute.

4. …

5. …

6. …

7. …"

In reply, the appellant lodged a replying affidavit sworn at Nairobi on 21st October, 2014 and filed in court on the same date. Therein, she attacked the respondents' suit as one which was fatally flawed, and devoid of both factual and legal basis. The appellant assailed the contract dated 1st September, 2006 on two main fronts contending that it was drawn or attested by a stranger who was not an Advocate of the High Court of Kenya, and that as a result, it could not be produced in evidence. Further, the appellant also contended that the contract in question was null and void for all intents and purposes as the signature appearing thereon and attributed to her was a forgery. The 1st respondent rebutted the contents of the said replying affidavit vide a further affidavit sworn at Nairobi on 26th February, 2015.

Upon closure of pleadings and the subsequent filing of written submissions, the trial court reserved its ruling for 3rd March, 2016. In his ruling, Sergon, J. found the respondents' Originating Summons dated 17th December, 2013 to be meritorious, and awarded the prayers therein in their entirety. Dissatisfied by the foregoing outcome, the appellant filed the requisite Notice of Appeal and Memorandum of Appeal wherein the appellant faulted the learned trial judge for erring both in law and in fact by:-

i. Misdirecting his mind in granting the prayers sought by the respondents in their Originating Summons dated 17th December, 2013.

ii. Misdirecting his mind in holding that there was a valid agreement despite the appellant denying ever entering into an agreement with the respondents herein.

iii. Totally ignoring issues raised by the appellant in the written submissions.

iv. Totally ignoring the case law raised by the appellant in the written submissions and list of authorities.

v. Totally ignoring issues raised by the appellant in the written submissions in his ruling, which include whether the dispute could be referred to arbitration despite the fact that the Arbitration Agreement provided for only specific circumstance / dispute which could be referred to arbitration and the alleged dispute was not envisaged by the arbitration agreement**.**

On 3rd December, 2018 ***Mr. Ochieng Odipo***, and ***Mr. Francis Kalwa,*** learned counsel appeared for the appellant and the respondents respectively at the plenary hearing before us. In urging the appeal ***Mr. Odipo*** submitted that the trial court erred in referring the dispute herein to arbitration. It was also his submission that the appellant did not sign the contract dated 1st September 2006 and that there was no dispute to be referred to arbitration. Counsel reiterated the the appellant's submissions before the trial court and maintained that what was to

be referred to arbitration was a dispute with regard to the true and correct meaning of the contract.

According to counsel, under ***Section 6 (1) (b)*** of the Arbitration Act a court is to ascertain whether there is a dispute between parties and if so whether such a dispute is to be referred to arbitration based on the agreement of the parties. The case of ***UAP PROVINCIAL INSURANCE COMPANY LTD V MICHAEL JOHN BECKETT - CIVIL APPEAL NO 26 OF 2007*** was cited in support of the proposition that if ***"… there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration then the dispute ought not to be referred to arbitration.***" In conclusion, Mr. Odipo submitted that in the absence of the appellant's signature on the contract, the alleged contract was null and void and illegal *ab initio* as it was witnessed by ***Jason A.O. Namasake*** who was an impostor and not an advocate. Reliance was placed on the decision of ***Heptulla vs NoorMohamed [1984] 580*** wherein this court stated:

> ***"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not if the evidence by the plaintiff proves the illegality, the court ought not to assist him."***

In the alternative, it was contended that the appellant was not a willing signatory to the contract of 1st September 2006.

On his part, ***Mr***. ***Kalwa*** submitted that the title deed being grant no. IR 97770 was deposited with the respondents as security for the sum of Ksh.7, 000, 000/-advanced to the appellant; that the appellant had drawn cheques in the name of the 1st respondent towards part payment; and that at any rate, the appellant having enjoyed benefits arising from the contract, she could not turn back and say that the same was not lawful or valid. He further submitted that payment of Kshs7,000,000/-was made directly to the appellant's contractor namely ***Kahid Iqubal***.

In a brief reply, ***Mr. Odipo*** pointed out that the two cheques drawn in the name of the 1st respondent were issued by the appellant's husband and not by the appellant herself.

We have considered the record, the rival written and oral submissions made before us, the authorities cited and the law. The appeal before us is a first appeal. Our mandate therefore, is to reconsider the evidence, re-evaluate it and draw our own independent conclusion. In so doing however, we shall bear in mind that unlike the trial court, we did not have the benefit of seeing and hearing the witnesses. (see ***SELLE VS ASSOCIATED MOTOR BOAT CO. LTD AND OTHERS [1968] EA 123)***.

The appellant herein has disowned the contract dated 1st September, 2006. She maintained that she did not sign it and in the alternative, she contended that if indeed she signed it, she was not a willing signatory. Secondly, the appellant assailed the said contract on the basis that ***Jason A.N. Namasake*** who witnessed the contract was not an advocate. On the other hand, the respondents maintained that they drew and prepared the contract by themselves and that it was later attested to by Jason ***A.N. Namasake*** when it became necessary to register it. It is important to note that the contract was not drawn by Jason ***A.N. Namasake*** who in this case was simply a witness, albeit a belated witness. Nowhere on the contract is it indicated that it was drawn or attested by ***Jason A.N. Namasake*** in his capacity as an advocate. Having not drawn the contract, the issue of whether ***Jason A.N. Namasake*** was qualified as an advocate (or not) does not lie. A party witnessing an agreement need not be an advocate. In our view, heavy weather cannot be made of a witness on the basis that he/she was not an advocate at the time of attestation. It is also not denied that the respondents have in their custody title documents1 in respect of the property. Paragraph 1 of the contract of 1st September, 2006 provided "***that the borrower shall deposit as a security with the lenders the original of all the title documents pertaining to the said piece of land and in particular grant No. L.R. 97770."*** It goes without saying that the respondents took possession of the title pursuant to the contract of 1st September, 2006. The appellant did not also dispute the respondents' contention that they are siblings; that the appellant had contracted ***Kahid Iqubal*** to carry out construction work for her; that she was unable to pay the contractor and a suit was filed against her by the contractor through the firm of ***Salim Dhanji & Co***. ***advocates***; that the respondent made direct payment of Ksh.7,000,000/- to ***Kahid Iqubal*** on behalf of the appellant (the two cheques each of Ksh.3,500,000 are dated 5th September, 2006). Further, there are two cheques for the sum of Ksh.200,000 and Ksh190,000/- which the respondents contend that the appellant made out as part of the repayment of Ksh.7,000,000/-. The appellant refuted the respondents' contention of the part payment on the basis that the two cheques were not drawn by her but by her husband. However, no explanation was given as to why the appellant's husband would be paying the respondents. Be that as it may, it is instructive to note that the two cheques bore the names of the account holders as "***Mohamed Parvez Ismail &/Or Shaheen***." In our view, the appellant was splitting hairs in trying to argue that she did not make part payment as she did not sign the two cheques. We say so because the two cheques drawn on Habib Bank AG Zurich could be signed by either herself or her husband or both of them by virtue of being the mandated account holders as appears on the face of the two cheques of Ksh.200,000/- and Ksh. 190.000/-. Further, the two cheques were issued hot in the heels of what was referred to as a "***Discharge of Contract***" which undeniably was prepared and signed by the appellant but which the respondents refused to sign as its terms were at variance with the terms of the contract of 1st September, 2006.

The other contention by the appellant is that she did not append her signature on the agreement of 1st September, 2006 and that her alleged signature was a forgery. However, she tendered no evidence to support the assertion of forgery. In this court's decision of ***VIJAY MORJARIA VS NANSINGH MADHUSINGI DARBAR & ANOTHER CA NO. 106 OF 2000*** it was stated:

> "***It is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently."***

Similarly, in ***R. G. Patel Vs. Lalji Makanji [1951] EA 314*** at page 317 this court stated:

> ***"…allegation 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 probability is required***."

As stated above, there was no evidence of the alleged fraud. Further, in view of what we have said above, there is overwhelming evidence in support of the respondents contention that the appellant being in dire financial straits, sought help from them as her siblings and the respondents paid Kshs.7,000,000/- to the appellant's contractor. The appellant later attempted to vary the agreement of 1st September, 2006 by the "***Discharge of Agreement***" signed by herself and witnessed by ***Nephat Momanyi Kiboi***, advocate and which the respondents declined to sign. The appellant's husband drew two cheques of Ksh.200,000/- and Ksh.190,000/-towards part payment of the debt owed to the respondents. It is clear from the above that the appellant tried to get out of the contract of 1st September, 2006 and made all manner of allegations, including fraud, not being a willing signatory and that the agreement was not witnessed by a qualified person. All these were in a bid to get out of her contractual obligations. In this court's decision of ***Vijay Morjaria V. Singh Madhusingh Darbar*** (supra) Tunoi, JA. (as he then was) stated thus of and concerning contracts freely entered into.

> ***"It is inimical for courts to limit freedom of contract on the grounds of unconscionability. Sir George Jezzel, Master of Rolls, in Printing & Numerical registering Co. vs. Sampso (1875) L.R. 19 page 462 said:-***
>
> ***'…. if there is one thing which more than another***
>
> ***public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice'"***

The appellant cannot get out of the contract of 1st September, 2006 on the basis that she was an unwilling signatory, that the contract smacks of fraud and/or that it is null and void for having been witnessed by an unqualified person. She has to live with the consequences of having entered into a contract dated 1st September, 2006 with the respondents. The upshot of the above is that we find no merit in this appeal. It is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 8th day of March 2019

W. OUKO (P)

……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

OTIENO – ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR