



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 105 OF 2018

BETWEEN

CHARLES LANGAT.....APPELLANT

AND

MUKESH KUMAR KANTILAL PATEL.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kericho (J. M. Onyango, J), dated 6th July, 2018

in

HCCC NO. 37 OF 2014)

JUDGMENT OF THE COURT

By a Plaint filed at the High Court at Kericho dated 5th August 2014 the appellant, Charles Langat filed suit against the respondent, Mukesh Kumar Kantilal Patel seeking for the following orders in respect of a parcel of land which was formerly known as L.R No. 7288/94 and subsequently registered as lease number Sotik Township/667 (suit property) measuring approximately 0.2627 hectares within Bomet County;

- a) An order of vacant possession
- b) mesne profits
- c) unpaid rent for 36 months from July, 2011 at the rate of Kshs. 50,000/- per month.

The appellant was an employee of Kenya Commercial Bank (KCB), until December, 2014, when he opted for early retirement. He stated that the suit property belonged to KCB and was offered for sale in 2001. One Mr Shigali who was then the branch manager, Sotik Branch successfully out bid the appellant for the suit property in the same year. Mr. Shigali paid KCB only Kshs. 1,100,000 out of the purchase price of Kshs. 1,750,000 and after retiring from the bank in the year 2009, he was unable to pay the balance of the purchase price.

The appellant then approached Mr. Shigali who agreed to cede his rights in the suit property to him and wrote a letter to KCB to that effect sometime in July, 2011. Thereafter, the appellant paid KCB the balance of the purchase price of Kshs. 650,000 after reimbursing Mr. Shigali Kshs. 1,100,000. The appellant then entered into a sale agreement with KCB dated 23rd August 2011 and was subsequently issued with a title for the suit property on 20th June 2014. The appellant attested that when he visited the suit property with Mr. Shigali, the latter informed him that he had rented the house to the respondent.

The respondent filed a Defence dated 12th August 2014 in which he denied the appellant's claims. He stated that he had been in possession of the suit property since 2001. The respondent also claimed to be the registered proprietor of the suit property having bought it from Mr. Shigali. The respondent claimed that upon signing the agreement, he refunded Mr. Shigali the deposit and paid the balance of the purchase price to KCB. He subsequently took possession of the suit property in the year 2001 and finally acquired a title to the suit property in 2009.

The respondent specified that he had constructed an additional three bedroomed house on the suit property and had enjoyed quiet possession and exclusive use of the same until 2012, when the appellant claimed to be the registered owner of the suit property and started demanding rent from him. In conclusion, the respondent urged the court to strike out the suit.

J.M Onyango, J considered the pleadings, evidence before the court, the submissions and the authorities cited and rendered judgment thereon on 6th of July 2018 as follows;

- a) That the Certificate of Lease in respect of land parcel no. Sotik Township/667 issued Charles Kipkurui Langat on 20th June 2014 be cancelled forthwith.
- b) That the title issued to Mukesh Kumar Kanthilal Patel is hereby declared as valid.
- c) That the register in respect of the said title be rectified and restored to the name of Mukesh Kumar Kanthilal Patel.
- d) That this judgment be served upon the Land Registrar, Bomet for purposes of ensuring the rectification of the register by cancelling the title to the suit property issued to Charles Langat and restore the name of Mukesh Kumar Kanthilal Patel.
- e) As the defendant categorically stated that he was not interested in costs, I make no order as to costs.

The appellant, being dissatisfied with that judgment preferred an appeal to this Court. The memorandum of appeal raises 13 grounds, which can be condensed to a trio that the learned judge erred in law and in fact by;

- a) Granting orders in favour of the respondent that were not sought for thereby violating the appellant's right to a fair trial.
- b) Finding that the appellant was not a *bona fide* purchaser since he allegedly colluded with KCB and Mr. Shigali to manufacture documents yet no such evidence was adduced by the respondent.
- c) Finding that Mr. Shigali could transfer title to the respondent.

When the appeal was listed for hearing, learned Counsel **Mr T.M Wachira** appeared for the appellant, while **Mr Sigei Hillary** appeared for the respondent. All the parties had filed written submissions and had furnished the Court with their respective authorities.

Mr Wachira submitted that the suit was for vacant possession since the appellant was the registered owner of the suit property with a title under the repealed **Registration of Lands Act**. The respondent did not at any point file a counterclaim yet the learned judge gave orders of cancellation of the appellant's title when such orders were not sought for by the respondent. He relied on the holding in **PROVINCIAL INSURANCE CO. EAST AFRICA LIMITED VS. MORDEKAI NANDWA [1995-98] 2 EA 288**.

Counsel continued that the court exceeded its jurisdiction by turning a suit filed for vacant possession into a contest for the legitimacy of the titles that were presented before it hence violating **Article 50** of the **Constitution**. The court made conclusions that were contrary to the evidence tendered before it which was; the presence of the two allotment letters alleged to have been issued to KCB, one presented by the appellant which indicated that the allotment was issued on 30th October 1985, and the other presented by the respondent indicated which that the allotment was issued on 4th June 1995; the witness statement of the Land Registrar which stated that the legitimate allotment letter was the one dated 30th October 1985; the letters written by KCB dated 6th October 2014 and 8th June 2012 which indicated that it had never sold the suit property to the respondent and that they were not party to the sale agreement dated 23rd August 2011 between KCB and the appellant, respectively. The foregoing pointed towards the fact that KCB transferred the suit property to the appellant pursuant to the completion of the payment of the purchase price. The agreement dated 23rd August 2011 was entered into between the appellant and KCB, who had authority to dispose the suit property.

It was submitted by Counsel that the respondent purported to have bought the suit property from Mr Shigali and the same was subsequently transferred to him by KCB, yet no evidence was adduced to show that KCB transferred the suit property to Mr. Shigali using the prescribed format as envisioned in **Section 85, 108 and 109** of the **Registered Land Act** (repealed). Therefore Mr. Shigali had no capacity to pass ownership of the suit property to the respondent. On the same he relied on **ARTHI HIGHWAY DEVELOPERS LIMITED & WEST END BUTCHERY LIMITED & 6 OTHERS [2015] eKLR**.

Finally, Counsel pointed out that the learned Judge further erred by finding that the transfer in favour of the appellant was executed by attorneys rather than by the directors of KCB without taking judicial notice that it is common place for Banks in Kenya to give powers of attorney to their attorneys to execute documents on their behalf. He urged the Court to allow the appeal with costs.

Mr Sigei in opposing the appeal contended that the court's pronouncement was founded on the pleadings. The appellant alleged forgery on the part of the respondent but tendered no evidence of such. In the defence, the respondent clearly stated that he purchased the suit property from Mr Shigali in 2001 and that the same was directly transferred to him by KCB in 2009. Hence the appellant had fraudulently obtained his title documents since the respondent was the *bona fide* purchaser.

It was Counsel's rather novel assertion that in as much as there was no counter-claim, **Article 23** of the **Constitution** provides that a court can grant appropriate reliefs of redress *suo motu*. Thus the orders granted in favour of the respondent were lawful and sound under the circumstances. Indeed, the court could not sustain the appellant's title upon finding that the same had been improperly obtained.

Counsel acknowledged that Mr Shigali did not have a title to the suit property since he did not have complete interest. However, he had a bid document. To him, the testimony of PW1 vindicated the respondent when he acknowledged that he was informed of the existence of another title that had already been issued over the suit property as he was trying to register the suit property in favour of the appellant. Counsel alleged that the documents adduced by the appellant as correspondence between himself and KCB were all fraudulent, and that he used his privileged position in the Bank to commit the crime.

Mr Sigei argued that the appellant did not lay enough evidence to discharge his burden of proof as provided for in **section 107** of the **Evidence Act**. The trial court rightly pronounced itself that the appellant's title was not lawfully acquired following procedural flaws including the failure by the directors to execute and seal the alleged transfer documents. Further, the orders granted were sought for because when the respondent pleaded for the dismissal of the appellant's case, the natural consequence was the affirmation of the opposing title he held. Counsel urged the Court to dismiss the appeal as it had no merit.

Having carefully read and considered those rival submissions in light of the entire record we have distilled the following as the issues for determination; whether there was enough evidence adduced that the appellant had committed fraud; whether the trial court granted orders in favour of the respondent that were not sought in violation of the appellant's right to a fair trial and and whether Mr. Shigali could transfer title to the respondent.

This being a first appeal this Court is enjoined to re-analyse and re-evaluate the evidence afresh and arrive at its own factual conclusions and findings, see ***ROBIN ANGUS PAUL & 2 OTHERS V MIRIAM HEMED KALE [2019] eKLR***.

On the issue of whether the appellant committed fraud, the learned judge held that the appellant's title was not clean because; it was issued three years after the issuance of the respondent's and without acknowledging or recalling the same; the Transfer instrument had a defaced photo and was purportedly signed by the KCB's undisclosed Attorney without any explanation as to why its directors were unable to sign the same under the company seal as required by the law; the evidence of PW5, the Land Registrar Bomet, on the purported removal of the caution placed by the respondent was wanting because he could not confirm whether or not the notice of removal of caution was sent to the respondent; the evidence alluding that the appellant bought the suit property from KCB after Mr. Shigali assigned his right to him was not credible as there was correspondence between KCB and the respondent indicating that KCB was aware that the said Shigali had ceded his right to buy the suit property to the respondent; the appellant's failure to call Mr Shigali as his witness to prove that he bought the property from him was quite telling and that the purported purchase price of Kshs. 1,750,000 paid by the appellant in 2011, which was the same as the price allegedly paid by the respondent in 2001 is suspect, since the court took judicial notice that the price of land in town cannot remain static over a ten-year period; the appellant having worked for KCB, colluded with Mr Shigali to manufacture documents aimed at authenticating his purported purchase of the suit property from Shigali and subsequent transfer by KCB to himself; the fact that the appellant instituted the suit in 2014, five years after purchasing the suit property was telling, since the appellant did not explain why he never took immediate possession of the suit property and immediately instituted proceedings to evict the defendant who had been staying in the suit property, with the full knowledge of both the appellant and KCB without paying a cent to either of them.

The appellant's Counsel attacked the trial court's findings above and argued that they were contrary to the evidence tendered before it. To him, the learned judge erred in ignoring the implication of the two allotment letters alleged to have been issued to KCB, one dated 30th October, 1985, as adduced by the appellant and the other dated 4th June, 1995, as presented by the respondent. She failed to weigh this against the witness statement of the Land Registrar which stated that the legitimate allotment letter was the one dated 30th October 1985.

Moreover, that there were letters on record as adduced by the appellant that were written by KCB dated 6th October 2014, which denounced the agreement entered into between Mr Shigali and the respondent and 8th June 2012 to the Commissioner of Lands Nairobi in which KCB clearly indicated that it had never sold the suit property to the respondent. There was also tendered a letter written by the Ethics and Anti-Corruption Commission dated 11th December 2012 to the Provincial Criminal Investigation Office indicating the fraudulent conduct of the respondent in the purported acquisition of the suit property which at the time rightfully belonged to KCB.

It was urged that the learned judge ought to have been persuaded by all that and eventually by the sale agreement dated 23rd August 2011 between KCB and the appellant and the fact that KCB, which had title to pass, had indeed transferred the suit property to the appellant upon completion of the payment of the purchase price.

The **Evidence Act** provides in **section 107**, that the burden of proof lies on;

(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.

The appellant claimed in his plaint that the documents held by the respondent were fraudulent. Similarly, the respondent averred in his defence that the appellant obtained his title documents irregularly. This Court has pronounced itself on the issue of pleading of allegations of fraud in ***VIJAY MORJARIA V NANSINGH MADHUSINGH DARBAR & ANOTHER [2000] eKLR*** as follows;

“It is well established that fraud must be specifically pleaded and that 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. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

The foregoing, renders the pleadings of both parties incompetent to the extent that neither specifically pleaded the particulars of the others fraud. Since both parties did not adhere to the well-known principles of law, with regard to fraud, the learned judge ought to have adjudicated the whole suit on the evidence adduced before her, on a balance of probabilities. This was well captured in ***JAMES MUNIU MUCHERU V NATIONAL BANK OF KENYA LIMITED [2019] eKLR***

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party's version of the story is more believable.”

The court is obligated to make a finding based on which party's version of the story is more believable. Hence the learned judge did not have authority to go out on a limb to create her own version of events not based on, but extrapolated from, the evidence before the court. On this, we respectfully find that the learned erred because not only did she essentially make out a case for the respondent, she went ahead and made inferences on issues not argued by the respondent. She posed questions that were clearly detrimental to the case of the appellant without according the appellant an opportunity to respond in violation of the essence of a fair trial as envisioned by **Article 50 of the Constitution**. With respect to the learned judge some of the inferences made appear biased as she totally disregarded contrary evidence tendered by the appellant. She also found that the appellant had acted fraudulently due, merely, to the position he held in KCB as a former employee. Such a conclusion was not specifically pleaded and neither was it proved, so she had no basis for it. We find that the learned Judge committed a reversible error in the prejudicial conclusion that the appellant had committed fraud considering that fraud is quasi-criminal and can only be established by satisfactory evidence to a degree higher than a balance of probabilities, though not reaching beyond a reasonable doubt. In **KINYANJUI KAMAU V GEORGE KAMAU NJOROGE [2015] eKLR**, this Court pronounced itself as follows;

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

‘It is well established that fraud must be specifically pleaded and that 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. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.’

In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry.”

Similarly in **EMFIL LIMITED V REGISTRAR OF TITLES MOMBASA & 2 OTHERS [2014] eKLR**, it was found that;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”

The second issue was whether the learned judge erred by granting orders in favour of the respondent that were not sought for; and whether the same was a violation of the appellant's right to a fair trial. From the record, it is clear that the respondent had only made one prayer which was for the plaint to be struck out with costs yet the learned Judge issued orders of cancellation of the appellant's title and declared the validity of the respondent's title. The learned judge also went ahead to order that the register in respect of the suit property be rectified and restored to the name of the respondent. None of the foregoing were sought for by the respondent and they were made fortuitously in uncommon magnanimity.

The appellant's Counsel argued, and not idly, that the court exceeded its jurisdiction by turning a suit filed for vacant possession into a contest over the legitimacy of the titles that were presented before it. On the other hand, the respondent's Counsel defended the court's finding contending that its jurisdiction stemmed from **Article 23 of the Constitution** which provides that a court can grant appropriate reliefs for redress *suo motu*.

The pertinent question to answer is whether the court exceeded its jurisdiction in giving orders not specifically sought for by the respondent in what would have been a counterclaim. **Order 7 Rule 3 of the Civil Procedure Rules** states as follows;

A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.

This position is supported by Halsbury's Laws of England, Fourth Edition, vol. 42, which defines and illustrates a counterclaim as follows:-

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”

“Any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim. Thus not only claims for money but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim.”

It is our view that the only way for a defendant to claim any relief against a plaintiff in any suit is through the mounting of a counterclaim. Having failed and or neglected to file one, the respondent was not entitled to any substantive reliefs from the court.

On the issue of the court having jurisdiction under **Article 23 of the Constitution**, this Court settled the issue in **KENYA AIRPORTS AUTHORITY V MITU-BELL WELFARE SOCIETY & 2 OTHERS [2016] eKLR**

“In considering the issue of abdication of judicial functions, we remind ourselves the provisions of Articles 23 (3) and 159 (2) (c) of the Constitution. Article 23 (3) allows the High Court in any proceedings brought under Article 22 to grant appropriate relief. Article 159 (2) (c) enjoins courts in Kenya to promote alternative dispute resolution.”

Because this was not a case for the enforcement of the bill of rights, the trial court did not have jurisdiction under **Article 23** of the **Constitution**. The Article does not donate to the High Court power to grant to parties before it remedies and reliefs at large not prayed for in the case. We are persuaded that the trial court erred in arrogating itself jurisdiction it did not have and the orders it made did not lie.

Finally we turn to the fundamental question of whether the near mysterious Mr. Shigali could transfer title to the respondent. The learned judge also held that Mr Shigali had property to pass to the respondent as KCB authorized him to sell the suit property to the respondent. According to her this was borne out by the correspondence between the respondent and the bank and the fact that KCB allowed the respondent to stay in the suit property without paying any rent.

Before us, learned Counsel for the respondent acknowledged that Mr Shigali did not have complete title to the suit property, but that, he had, as he had to, a bid document.

We note that the respondent by his own admission in his defence and in his witness statement stated that he bought the suit property from Mr Shigali. In support of that assertion, the respondent attached a sale agreement dated 24th November 2001 that was purportedly entered into between himself and Mr Shigali. What we must then satisfy ourselves on is that the set of facts were adequate to establish that Mr Shigali had good title or rather any title to pass to the respondent.

We find it rather odd that the learned Judge laid much emphasis on correspondence between the KCB and Mr Shigali purportedly authorising him to sell the property yet there was no power of attorney produced as proper evidence that Mr Shigali had authority and capacity to sell the suit property on behalf of KCB. Looking at the sale agreement, it clearly shows that Mr Shigali purported to sell the suit property in his personal capacity. Nowhere in that agreement does it state that he did so on behalf of KCB. Unlike the appellant who produced an entry of the transfer of title on the RLA title of the suit property to himself, the respondent failed to produce registration documents as per **section 85, 108 and 109** of the repealed Registration of Lands Act.

The fatality of the respondent’s questionable evidence was coupled with the letters written by KCB dated 6th October 2014 denouncing the agreement entered into between Mr Shigali and the respondent, and 8th June 2012 to the Commissioner of Lands Nairobi clearly indicating that it never sold the suit property to the respondent, lead to the irresistible conclusion that Mr Shigali did not have title to pass. Nor did he have authority from KCB to sell the suit property on its behalf.

In contrast, the appellant showed correspondence from KCB which acknowledged that Mr Shigali had ceded his rights over the suit property to him. There is more evidence of KCB receiving part of the purchase price from him and having entered into an agreement of sale with him. On a balance of probabilities there was sufficient proof that he is the authentic and effective owner of the suit property.

On our own evaluation of the evidence in totality, we have no difficulty holding that the learned judge erred in her evaluation of the evidence presented before her, misdirected herself and made erroneous findings and conclusions. In the result the appeal succeeds. The judgment of the High Court is set aside in its entirety and substituted with an order allowing the suit as prayed in the plaint. The appellant shall have the costs of the appeal.

DATED and delivered at Kisumu this 3rd day of October, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR