IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WAKI, KARANJA &KOOME, JJ.A)

CIVIL APPEAL NO. 91 OF 2016

BETWEEN

FILIPO FEDRINI.....APPELLANT

AND

IBRAHIM MOHAMED OMAR.....RESPONDENT

(An appeal from the judgement of the Environment and

Land Court at Malindi (Angote, J.)

dated 23rd October, 2015

in

ELC No. 107 of 2009)

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JUDGMENT OF THE COURT

1. A contract is a voluntary obligation and the law places a high value on ensuring parties have truly consented to the terms that bind them. The law also grants parties broad freedom to agree on the content of the agreement whose terms are incorporated through express promises. Those terms, in case of a disagreement are interpreted by the courts to seek out the true intention of the parties, from the perspective of an objective observer and, in the context of the parties' bargaining environment. See ***Abdul Jalil Yafai vs. Farid Jalil Mohammed [2015] eKLR***. This is the task that was placed before the learned Judge (Angote, J.) by the parties herein to interpret the terms of an oral agreement.

2. The salient facts are that **Filippo Fedrini** (the appellant) was introduced by a friend to **Ibrahim Mohamed Omar** (the respondent) to assist him in identifying and purchasing suitable properties in Malindi. The appellant ended up purchasing not one but three apartments for his son and it seems a friendship was struck between the two which lasted over five years. As would be expected, mutual trust developed between the two which led the appellant not only to entrust the respondent to oversee construction of a house on his behalf on a parcel he had purchased in Malindi but also invite him to Italy to attend his son's wedding.

3. Sometime in February, 2008 the respondent informed the appellant of the sale of Plot Nos. 2155, 2156, 2157, 2158, 2159 & 2160 (suit properties) situated at Casuarina, Malindi. He advised the appellant that the properties were going for a total of €368,000 which was inclusive of stamp duty and other legal outgoings. The appellant became interested and disbursed a total amount of €208,000 between February and April, 2008 to the respondent. Further and at the instance of the respondent he deposited the balance of €160,000 into the bank account of one Rupert Nicholas Bullen Speicer (Rupert), a director of Chanoni Estates Limited, the vendor.

4. In his amended plaint the appellant averred that the terms of the oral contract were that the respondent would carry out the transaction and have the properties registered in the appellant's name. However, in his witness statement and even in his testimony before the trial court, the appellant admitted that they had agreed he would purchase the suit properties and the same would be sold to Mr. ~~Matello~~, Marcello? a purchaser who had already been identified by the respondent for a profit of €100,000. Upon the sale he was to recover the principal amount and the profit was to be shared on 50/50 basis with the respondent.

5. Be that as it may, in April, 2009 after pressing the respondent to avail the title documents over the suit properties, he learnt that the respondent had misrepresented the purchase price and had also registered the properties in his name as opposed to the appellant's.

Apparently, the indentures for the suit properties indicated that each of the six plots had been purchased at Kshs.2, 500,000 aggregating to a total of Kshs.15,000,000. The respondent had falsely indicated the purchase price plus other incidentals as amounting to €368,000 which at the time was equivalent to Kshs. 36,800,000 hence the respondent had retained Kshs.21, 800,000. The appellant believed that was the amount the respondent had instructed him to deposit into Mr. Rupert's account. On the basis of those misrepresentations the appellant believed that the respondent was not entitled to benefit under the oral agreement. He insisted that the respondent held the suit properties in trust for him.

6. Thereafter, he asked the respondent to transfer the suit properties to his name but he refused to do so prompting him to file suit in the Environment and Land Court (ELC) seeking *inter alia*:-

> ***a) A declaration that the defendant (respondent herein) held the suit properties in trust for the plaintiff.***
>
> ***b) An order of mandatory injunction requiring the defendant to deliver unto the plaintiff the said deeds together with appropriate instruments of transfer in the plaintiff's favour within 7 days of the Honourable Court's order and in default thereof, the Registrar of the Honourable Court be at liberty to execute the transfers in the plaintiff's favour and the costs be borne by the defendant.***
>
> ***c) In the alternative and without prejudice to the foregoing, a declaration that the plaintiff is entitled to a refund in the sum of € 368,000 paid to the defendant for the purchase of the suit properties.***
>
> ***d) Damages.***

7. In his defence the respondent gave a similar account of the terms of the oral contract as was given by the appellant in his testimony save that they had agreed the properties be registered in his name since the appellant was ordinarily resident in Italy. As far as he was concerned, he had always been upfront with the appellant and never made the alleged misrepresentations. He stated that he had identified Mr. Marcello as a potential purchaser and updated the appellant of the same. Unfortunately, Mr. Marcello backed out due to economic recession a fact which was within the appellant's knowledge. They both agreed he would look for another purchaser.

8. Even so, when the appellant returned to Malindi in December, 2008 they both agreed that he would donate a power of attorney over the suit properties to the appellant pending their sale. For reasons only known to the appellant he reneged on that agreement and instead wanted the respondent to transfer the suit properties to him. He declined to do so because the appellant did not put forth any agreement or proposal to secure his interest in the sale profits. In his view, the suit was premature because he had always been willing to comply with the terms of the oral contract and was in the process of looking for a purchaser. The respondent also filed a counter claim seeking enforcement of that oral contract.

9. Upon weighing the evidence before him Angote, J. in a judgment dated 23rd October, 2015 dismissed the appellant's suit and found in favour of the respondent by allowing his counter claim. He issued the following orders:-

> ***a) The defendant to sell plot numbers 2155,2156,2157,2159 and2160 Malindi and upon the said sale to pay to the plaintiff the sum of 368,000 Euros and the excess amount after the sale to be shared between the plaintiff and the defendant in the ratio 50:50.***
>
> ***b) The plaintiff to pay the costs of the counter-claim.***

10. It is that decision that gave rise to the appeal before us which is anchored on 11 grounds which are longwinded and contain arguments best left to submissions. The ***Court of Appeal Rules*** are quite clear as to what a proper memorandum of appeal should be. In respect of civil appeals, ***Rule 86(1)*** states as follows;

> ***"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."***

11. In a nutshell the appellant complaints are that the learned Judge erred by failing to address himself on the contradictory evidence regarding the purchase price of the suit properties; appreciate that the respondent had not given any consideration and/or had breached the terms of the oral contract thus could not benefit from the same; and find that a resulting trust had arisen.

12. Mr. Murage, learned counsel for the appellant, submitted that the learned Judge's findings were not in consonance with the evidence on record. By way of illustration he argued that the learned Judge's sentiment to the effect that the appellant having paid €160,000 to Mr. Rupert could not claim the entire amount of €368,000 which he disbursed as purchase price from the respondent was contrary to the respondent's evidence acknowledging receipt of the entire amount.

13. The learned Judge was faulted for failing to address his mind on the glaring contradictory evidence by the respondent regarding the purchase price of the properties in that the respondent claimed he had paid the vendor the entire purchase price of Kshs.36,800,000 but the indentures bore a different story. It followed that the respondent had failed to account for the balance of Kshs. 21,800,000 and the learned Judge should have directed him to do so. Mr. Murage added that the misrepresentation and failure to pay the requisite stamp duty over the transaction tainted the respondent's claim with illegalities. As such, the learned Judge erred in allowing the counter claim. In that regard, the Court was referred to ***Mistry Amar Singh vs. Kulubya [1963] EA 408*** wherein its predecessor expressed that-

> ***" Ex turpi non oritur action. This old and well known legal maxim is founded in good sense and expresses clear and well***

recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the plaintiff pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist."

He went on to add that the learned Judge failed to address himself on the issue of fraud.

14. Counsel made reference to the definition given in terms of what amounts to consideration in ***Chitty on Contracts ,Vol. 1, 29th Edition para 3-004*** thus,

"The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasized that these statements relate to the consideration for each promise looked at separately. For example the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price."

It was contended that the respondent had not provided any consideration to entitle him to a share of the sale profits. Equally, the respondent could not claim commission as an estate agent for the reason that he was not registered as one. It was only equitable for the learned Judge to find that the respondent held the suit properties in trust for the appellant because he had solely contributed the entire purchase price.

15. Mr. Murage contended that the learned Judge's decision as a whole validated the respondent's impunity by allowing him to share in the profits yet he had retained a colossal amount of what the appellant had advanced as purchase price. On those grounds, counsel urged us to allow the appeal.

16. Opposing the appeal, Mr. Kiarie, learned counsel for the respondent, begun by submitting that the learned Judge's decision could not be faulted on any ground, it being based purely on the evidence adduced by the parties. He claimed that the respondent did not enter into the oral contract as an estate agent thus the provisions of the ***Estate Agents Act*** were not applicable in the circumstances. In his view, the appellant had not pleaded fraud in his plaint and had also failed to establish it as against the respondent. He urged that the suit properties were purchased for the purpose of reselling them at a profit and not to be retained by the appellant therefore there was no question of a resulting trust in favour of the appellant.

17. We have considered the record, submissions made on behalf of the respective parties as well as the law. Pursuant to our role as the first appellate Court in the matter before us, we are bound to revisit the evidence on record, evaluate it and reach our own conclusion in the matter. In doing so, we appreciate that as an appellate Court we ordinarily ought not to interfere with findings of fact by the trial court unless they are based on no evidence, or on a misapprehension of it or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. We also take into account that unlike the trial court, we did not have the privilege of seeing the witnesses testify.

18. Conscious of our role, we, like the learned Judge, find that the terms of the oral contract between the parties were that the suit properties were being purchased for resale at a profit which was to be shared equally. Ordinarily, consideration is an essential ingredient in a valid contract and without it a contract is rendered a bare promise which cannot be enforced in a court of law. See ***Halsbury's Laws of England Vol. 22 (2012) 4 Para 308***.

19. In our view, the consideration given by the respondent to the contract was that he identified the suit properties and he was to scout for a buyer for the same. As to whether this was adequate consideration compared to that of the appellant who paid the entire purchase price, all we can say is that a Court is not concerned with the adequacy of consideration in a contract but that one exists. See ***Birmingham City Council vs Forde [2009]1 W.L.R 2732*** . The learned authors of ***Halsbury's Laws of England(supra)*** best put it at para 316-

"Quite early, the courts decided that they would not audit the bargain made between the parties; the consideration necessary to support a promise need not be adequate but it must be of some value, albeit nominal."

20. Similarly, we concur with the learned Judge that a further term of the oral agreement was that the properties were to be registered in the respondent's name. In particular, we agree with the following observations: -

"The payment of what he was told to be the purchase price without signing the sale agreement or meeting the vendor clearly shows that the plaintiff's intention was to have the suit properties registered in the name of the defendant so as to facilitate the oral agreement that they had."

Consequently, a resulting trust as suggested by the appellant could not arise in such circumstances. It is trite law that the intention of the parties to create a trust must be clearly determined before a trust is implied. see P N N v Z W N [2017] eKLR.

21. As to whether that contract was vitiated by fraud we cannot help but note, as was equally conceded by the appellant's counsel, that the appellant never pleaded or particularized the allegations of fraud. In ***Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR*** 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. <u>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</u>."*** *Emphasis added.*

We find the learned Judge was entitled to make no finding on fraud which was never pleaded.

22. With regard to misrepresentation of the purchase price the respondent's position that he utilized the entire amount sent by the appellant towards the purchase of the suit properties was unshaken. The suspicion by the appellant that the amount he deposited in Rupert's account was what the respondent fraudulently withheld was not proved. Besides, as we have addressed ourselves herein above fraud was never pleaded and therefore was not an issue for determination before the trial court. As it stood, the oral agreement was valid and the learned Judge did not err in directing enforcement of the terms thereunder as he did by allowing the counter-claim.

23. In the end, we see no reason for interfering with the learned Judge's decision. Accordingly, the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 8th day of February, 2018.

P.N WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>