



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 27 OF 2017

BETWEEN

JOSEPHINE MWIKALI KIKENYE.....APPELLANT

AND

OMAR ABDALLA KOMBO.....1ST RESPONDENT

REGISTRAR OF TITLES

ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Mombasa (Omollo, J.) dated 5th May, 2016

in

E.L.C No. 339 of 2010)

JUDGMENT OF THE COURT

1. The general rule is that a party of full age and understanding is normally bound by his signature to a document, whether he reads it or not. See *Levison vs. Patent Steam Carpet Cleaning Co Ltd [1977] 3 All ER 498*. Putting it another way, he is estopped by his/her signature thereon from denying his consent to be bound by the provisions/terms contained in that document.

2. Just like most general rules, there are exceptions to the aforementioned rule. Of relevance to this matter is the doctrine of *non est factum* which arises where a party has been misled into executing a deed or signing a document which is essentially different from that which he intended to execute or sign. See *Chitty on Contracts Vol. 1 21st Edition, para 5-102*. Basically, whenever a party raises the said defence he is saying that the document in question is not his.

3. The effect of the said defence was succinctly set out by the learned authors of *Halsbury's Laws of England Vol. 22 (2012) at para 285* thus:

“Where, however, the plea of non est factum is available, the promises contained in the document are completely void as against the signatory entitled to plead the defence, no matter into whose hands that document may come. The reason is said to be that the mind of the signatory did not accompany his signature, so that the mistake renders his consent, as represented by his signature, a complete nullity.” [Emphasis added]

4. In his own words, Lord Denning MR in *Gallie vs. Lee & Another [1969] 1 All ER 1062* while discussing the aforementioned consequences held:

“If the deed was not his deed at all, (non est factum) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document.”

5. This was **Josephine Mwikali Kikenye's** (the appellant) principal defence at the Environment and Land Court (ELC) wherein the 1st respondent sought registration of Plot No. 3155 (Original 933/13) Section III MN (suit premises) in his favour on account of a sale agreement. The germane facts to this dispute are that on 24th January, 2002 the appellant was registered as the proprietor of the suit premises having purchased the same from one Shamji Ramji Manji. It appears that she developed the same by erecting 8 residential units thereon, 7 of which she rented out for a total of Kshs. 41,000 per month.

6. Later on, she fell into financial difficulties and was introduced by a friend to **Omar Abdalla Kombo** (the 1st respondent) who was then operating as a 'shylock'. At that particular point in time, the respondent had defaulted in repayment of a loan of Kshs. 375,000 from Titus Gichangi. As a result, she borrowed a sum of Kshs. 400,000 from the 1st respondent to meet the same. She also deposited the title document to the suit premises with the 1st respondent as security for the loan amount. The terms of the loan agreement between the appellant and the 1st respondent are in contention. According to the appellant, the amount was to be repaid within a period of 6 months. Failure of which the amount was to attract a penalty of Kshs.75,000. The respondent's version was that save for the principal amount the appellant was to pay an additional Kshs.75, 000 per month for a period of four months being the interest thereon. Thus, the total amount payable was Kshs.700,000.

7. Be that as it may, the appellant claims that she paid the last instalment of the principal amount in April, 2007, about a month after the scheduled time frame. She acknowledged that she still owed the penalty of Kshs.75,000. Unfortunately, after her husband's death she was unable to pay the penalty and required more funds to undertake repairs in the suit premises. Once again, she approached the 1st respondent who agreed to lend her a sum of Kshs. 350,000. Equally, the terms of this second loan are in dispute.

8. On one hand, the appellant states that they had agreed that the second loan amount together with the penalty aggregating to Kshs.425,000 would be defrayed by the 1st respondent collecting the rental income from the suit premises for a period of one year. Consequently, she instructed Martin Wambua Mwanzia, who she had hired as a caretaker to collect rent from the suit premises and remit the same to the appellant for a period of one year as from January, 2008. Martin faithfully remitted the said rental income culminating to Kshs. 492,000. Afterwards, in the year 2009 the appellant instructed Martin to stop remitting the rental income to the 1st respondent since the loan had been fully paid. The 1st respondent disagreed with the appellant's account.

9. The appellant contended that her efforts to get the title document back from the 1st respondent were unsuccessful. It is then that she became suspicious of the 1st respondent's motive and conducted a search at the lands registry. Apparently, the 1st respondent had transferred the suit premises to himself on 7th March, 2008 on the strength of a transfer purportedly executed by the appellant on even date. She reported the matter to the Divisional Criminal Investigation Division Headquarters at Mombasa and an inquiry file no. 2/2009 was opened for purposes of investigating whether the signature on the transfer in question had been forged. Investigations were conducted and the matter was referred to the Attorney General for directions.

10. As per the 1st respondent, the Attorney General vide a letter dated 29th January, 2010 directed the file to be closed since the document examiner's report had indicated that the signature thereon was indeed the appellant's. As far as he was concerned, that was the end of the matter. However, on 1st August, 2010 he received a letter from the appellant's advocate together with a copy of postal search indicating that the suit premises had been re-transferred back to the appellant by the Registrar of Titles. After confirming that was the position, the 1st respondent filed a suit challenging the cancellation of his title and sought:

a) The transfer and the certificate of registration made in favour of the 1st defendant (appellant herein) in respect of the suit premises be cancelled and/or nullified and/or revoked.

b) There be a finding and/or order for the plaintiff to be registered as the owner of the suit premises in place of the 1st defendant.

11. His suit was anchored on the grounds that the appellant had failed to repay the loan amount advanced to her. On 24th November, 2007 the appellant indicated that she would sell the suit premises for the loan amount which then stood at Kshs. 1,100,000. Towards that end, they executed a sale agreement to that effect on even date. Furthermore, the appellant had signed a transfer to facilitate the registration of the suit premises in his favour. Any allegations of forgery had been dispelled by police investigations and recommendations of the Attorney General. As such, the Registrar of Titles had no right to re-transfer the same to the appellant.

12. In her defence, it was the appellant's evidence that she had no intention of selling the suit premises at any particular time. In point of fact, the 1st respondent presented an agreement which she believed detailed the mode of repayment through the collection of rental income. At that time she was unable to read or write and relied on the 1st respondent who not only read out but also explained the contents thereof. Convinced that what the appellant read out was contained in the agreement before her she executed the same. It turned out that she had executed the sale agreement alluded to.

13. All along the 1st respondent had misled her as to the nature of the agreement she executed hence, the defence of **non est factum** was applicable. She denied signing the transfer document relied on by the 1st respondent. Instead she averred that the 1st respondent owed her Kshs. 39,090.74 being electricity expenses which had accrued during the period he was collecting rent from the suit premises. She also filed a counter-claim seeking several orders.

14. Faced with the foregoing evidence the trial court (Omollo, J.) by a judgment dated 5th May, 2016 found in favour of the 1st respondent and dismissed the appellant's counter-claim. It is that decision that has provoked this appeal which is predicated on 7 grounds. In a nutshell, the appellant complains that the learned Judge erred in law and fact by, concluding that there was a valid sale agreement between the appellant and 1st respondent; there was a valid transfer of the suit premises; failing to give due consideration to the appellant's evidence; and finding that the defence of **non est factum** had not been established.

15. The appeal was disposed of by way of written submissions as well as oral highlights. Mr. Mutugi, learned counsel for the appellant, urged that from the onset, the 1st respondent's evidence with respect to his relationship with the appellant was that of a lender/borrower respectively. The 1st respondent had even testified that he had accepted the title document as security for the loan amount. He added that for any contract, in this case, the alleged sale agreement, to be valid it has to contain certain basic elements or what he referred to as the ABC's of the law of contract. He listed those elements to include, offer, acceptance, *consensus ad idem* and consideration.
16. In his view, it was clear that the appellant and the 1st respondent's relationship was governed by loan agreements. It was unclear how those loan agreements mutated into the sale agreement relied on by the 1st respondent. This clearly depicted the absence of *consensus ad idem* between the two. Likewise, there was no valid consideration to support the alleged sale agreement.
17. Still on the issue of consideration he submitted that the 1st respondent's evidence on the same was contradictory. To begin with, he had stated both in his pleadings and his testimony that he had purchased the suit premises for a consideration of Kshs.3, 500,000. In another breath, he testified that the suit premises was purchased at Kshs.1,100, 000 being the alleged total amount advanced to the appellant. Nonetheless, the consideration indicated on the sale agreement differed with that on the transfer document. The latter reflected the consideration as Kshs.1,100,000 while the former reflected Kshs.1,000,000.
18. Attacking the validity of the transfer, Mr. Mutugi argued that there was no evidence of payment of the requisite stamp duty rendering the transfer inadmissible. Besides, the transfer had been drawn by David M. Ongera, who at the material time did not have a valid practising certificate. Further, the appellant denied appearing before the said advocate to execute the same. According to him, the learned Judge misinterpreted the Supreme Court's decision in *National Bank of Kenya Limited vs. Anaj Warehousing Limited [2015] eKLR* by finding that notwithstanding the absence of a valid practising certificate, the transfer was valid. To him, the Supreme Court's decision was intended to aid an honest party who stands to suffer if a document is invalidated on such a ground. It was certainly not meant to aid/abet a dishonest party such as the 1st respondent.
19. In Mr. Mutugi's opinion, there was no reason for the learned Judge to disbelieve the appellant's evidence with respect to her illiteracy. She gave a clear account of the circumstances under which she signed the sale agreement. The learned Judge misapprehended the application of the defence of *non est factum*. The issue which fell for determination was not whether the appellant signed the agreement. Rather, whether she knew what she was signing and whether she knowingly signed it with the intention of selling the suit premises.
20. In conclusion, he stated that the evidence as a whole did not support the learned Judge's conclusion that there was a valid sale agreement. It is on those grounds that counsel asked us to allow the appeal.
21. Mr. Ngari, learned counsel for the 2nd respondent, supported the appeal and associated himself with the submissions made on behalf of the appellant.
22. On his part, Mr. Kenga, learned counsel for the 1st respondent, submitted that the appeal revolved around one major issue, whether the appellant had established the defence of *non est factum*. He contended that the question of whether the appellant could read and write had been properly dismissed by the learned Judge. For the simple reason that the learned Judge was alive to the fact that she had produced a transfer document with respect to her transaction with the previous proprietor, Shamji Ramji Manji. As such, she could not feign ignorance of the transfer in question.
23. As far as counsel was concerned, it was the appellant who had misapprehended the application of the said defence. It was not enough to just allege that she was illiterate. Making reference to the House of Lords decision in *Saunders vs. Anglia Building Society [1970] 3 All ER 961*, Mr. Kenga argued that the appellant had not established the essential features of the defence. In particular, she did not demonstrate that she had taken due care and/or precaution to establish, understand and appreciate the character, nature and effect of the sale agreement. Moreover, there was no evidence to suggest any coercion or inducement on the appellant to execute the sale agreement.
24. He went on to argue that the fact that the advocate who had prepared the transfer did not hold a practising certificate did not invalidate the sale agreement. In any event, a fresh transfer can be prepared and lodged at the lands registry. Finally, he urged us to dismiss the appeal.
25. We have considered the record, submissions made on behalf of the parties as well as the law. This being a first appeal, 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 the first 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 we did not have the privilege of seeing the witnesses testify as the trial court. See this Court's decision in *J. S. M. vs. E. N. B. [2015] eKLR*.
26. Our reading of the impugned judgment reveals that the learned Judge was under the mistaken impression that the appellant had admitted to executing the sale agreement and the transfer; and the defence of *non est factum* was in respect of both documents. Our understanding from the pleadings and evidence led at the trial court is that the appellant only admitted to executing the sale agreement and invoked the defence in question thereto. With regard to the transfer, her position was that she had never executed the same.
27. With that clarification in mind, it is common ground that the onus lies on the party repudiating the signed document to establish the necessary ingredients of *non est factum*. See *Norwich and Peterborough Building Society vs. Steed (No 2) - [1993] 1 All ER 330*. Did the appellant discharge this burden?
28. There are basic tenets that a party relying on such a defence ought to establish. First, he/she must establish that there is a difference with regard to the nature of the document signed from that which he/she intended to sign. See *Chitty on Contracts, 31st Edition, Vol. 1 at para 5-104*. The degree of difference which must exist will depend on the circumstances of each case. See *Cheshire Fifoot & Furmston's Law of*

Contract, 17th Edition at page 336. A mistake as to the contents of a deed or document does not give rise to the defence. This much was demonstrated in the case of *Sood vs. Sood & others* [2002] All ER (D) 07 (Jan):

“A simple lack of understanding is insufficient to establish a claim of non est factum; what must be proven is an understanding of the document’s effect that is fundamentally different from its true effect.”

Secondly, a person who signs a document may not be permitted to raise the defence where he/she has been careless or guilty of negligence in appending his/her signature. See *Gallie vs. Lee and Another (supra)*.

29. Expounding on the foregoing, Lord Wilberforce in *Saunders vs. Anglia Building Society (supra)* expressed:

“How, then, ought the principle, on which a plea of non est factum is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, i.e. more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used— “basically” or “radically” or “fundamentally” ... To this general test it is necessary to add certain amplifications. First, there is the case of fraud. The law as to this is best stated in the words of the judgment in *Foster v Mackinnon* (1869) LR 4 CP 704 at 711 where it is said that a signature obtained by fraud:

“... is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.”

In other words, it is the lack of consent that matters, not the means by which this result was brought about. Fraud by itself may do no more than make the contract voidable. Secondly, a man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect. This principle is sometimes found expressed in the language that “he is doing something with his estate” ... but it really reflects a rule of common sense on the exigency of busy lives. Thirdly, there is the case where the signer has been careless, in not taking ordinary precautions against being deceived.”

30. Applying those principles to the facts at hand, we, unlike the learned Judge, find that the appellant had established the defence. It was her uncontroverted evidence that she could neither read nor write at the time the sale agreement was executed. It was the 1st respondent who read out and explained to her the contents thereof. We note that the 1st respondent did not deny the same. From the 1st respondent’s explanation she believed that she was executing an agreement relating to the mode of the loan repayment. In real sense, she had executed a sale agreement which was substantially different in nature. The learned Judge overlooked this vital piece of evidence, we believe, because she was preoccupied with the fact that the appellant had engaged in a somewhat similar transaction when she purchased the suit premises from One Shamji. With respect, that transaction was not before the learned Judge and she was not in a position to tell how the transaction was concluded. Moreover, the appellant had not challenged that transaction but the sale agreement in question.

31. The learned Judge, perhaps imputing negligence on the appellant’s part, found contrary to the evidence before her that the appellant was given a copy of the sale agreement and failed to inquire about its nature from those she trusted. Even if the appellant was given a copy of the agreement after execution, what was pertinent to the defence was her state of mind at the time of the execution. As we have found herein above, the appellant’s mind did not go with the signature affixed on the agreement. Accordingly, the requisite consent giving life to the agreement was lacking.

32. Furthermore, we are satisfied that the appellant did not act carelessly but only executed the agreement after the contents were read out and explained by the 1st respondent. Our position is fortified by the following sentiments of Lord Wilberforce in the *Saunders Case*:

“As to persons who are illiterate, or blind, or lacking in understanding, the law is in a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases. The law ought, in my opinion, to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.” [Emphasis added]

33. We also cannot help but note that the 1st respondent’s evidence surrounding the alleged sale was all over the place. Firstly, he stated that the appellant had not made any repayment contrary to the acknowledgment notes dated 4th April, 2007 and 14th April, 2007 evidencing repayment of the first loan amount in two instalments. Despite contending that he had lent a sum of Kshs.1,100,000 he admitted that he had no evidence to support that allegation. What is more, he testified at one point that he had purchased the suit property at a consideration of Kshs. 3,500,000 yet he was unable to give an account of how he paid the said amount. To us, this cast doubt on the 1st respondent’s credibility.

34. Last but not least, we are unsure as to the veracity of the transfer in issue. While we agree with the Supreme Court in *National Bank of Kenya Limited vs. Anaj Warehousing Limited (supra)* that in certain cases a legal document would not be invalidated only on the basis that it was prepared by an advocate who did not have a valid practicing certificate, we find that the facts therein are distinguishable from this case. Firstly, the party therein who relied on that anomaly had executed the legal document in issue and sought to escape his obligations thereunder. In contrast, the appellant denied signing the transfer or even appearing before the advocate who prepared the transfer. We think that more evidence was required to establish that indeed the appellant had executed the transfer.

35. In our minds, the learned Judge should not have looked at the Attorney General's letter dated 29th January, 2010 which apparently directed the closure of the inquiry over the forgery claims in isolation. There was another letter from the Attorney General dated 16th March, 2010 calling for the resubmission of the inquiry filed. This state of affairs clearly did not, as the learned Judge found, dispel the forgery claims. In any event, the document examiner's report with respect to the signature on the transfer was not adduced at the trial court. As it stood, the 1st respondent had not established his case before the trial court.

36. The upshot of the foregoing is that we find that the appeal has merit and is hereby allowed with costs. We hereby set aside the ELC's judgment dated 5th May, 2016 in its entirety and substitute thereof an order dismissing the 1st respondent's suit and allowing the appellant's counter-claim in the following terms:

- a) A declaration is hereby issued that the appellant is the lawful and rightful owner of the suit premises and is entitled to possession thereof to the exclusion of the 1st respondent.*
- b) A declaration is hereby issued that the transfer dated 7th March, 2008 with respect to the suit premises and entered in the register of lands/titles on 13th March, 2008 is null and void.*
- c) The 1st respondent shall within 14 days of this judgment deposit the original certificate of title with the Registrar of Titles for purposes of nullification and/or rectification of the same in favour of the appellant.*
- d) A permanent injunction is hereby issued restraining the 1st respondent by himself, his agents and/or any other persons authorised by him from entering and/or remaining in occupation, alienating, disposing, leasing, mortgaging, collecting rent, interfering with the appellant's quiet enjoyment and occupation of the suit premises.*

The appellant shall also have costs at the Environment and Land Court.

Dated and delivered at Mombasa this 7th day of June, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR