IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, GATEMBU & KANTAI, JJ.A.)

CIVIL APPEAL No. 146 Of 2010

BETWEEN

MARY WAMBUI MBUCHUCHA .....APPELLANT

VERSUS

DAVID KITHINJI MUGAMBI .....1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Ang'awa, J.) dated 2nd *May, 2007* **in H.C.C.C. No. 865 of 2002)**

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JUDGMENT OF THE COURT

The appellant, **Mary Wambui Mbuchucha,** filed suit at the High Court of Kenya at Nairobi against the 1st respondent, **David Kithinji Mugambi** and the 2nd respondent, **Kenya Commercial Bank Limited**. It was alleged in the plaint that the appellant was the registered proprietor of a parcel of land known as **L.R. No. Ruiru East/Block 5/202** (the suit property) and that a title had been issued to her on 12th January, 1988. It was further stated that in the month of June 2001 the appellant visited the suit property and found that the 1st respondent had entered the said land, trespassed on it and erected structures on the same. Further, that a search was conducted over the said title at the relevant Registry of lands and it was found that the 1st respondent had been registered as proprietor of the suit property on 14th January 1997. Various particulars of fraud were set out to show that the 1st respondent had procured registration wrongfully. It was further stated that on the 24th April, 1997 the 1st respondent had fraudulently caused a charge to be created over the suit property to secure a loan granted by the 2nd respondent of **Kshs1,900,000/=.** Various particulars of fraud were again set out against the 2nd respondent. It was therefore said that the appellant had suffered loss and damage and that the respondents should be restained through a permanent injunction from occupying the land; various declarations were sought as were mesne profits and general damages. There was an accompanying application for temporary injunction but the same was not heard the court ordering that issues in the application be determined in the suit.

Both respondents delivered separate defences. The 1st respondent denied factual allegations in the plaint and at paragraph 6 of the defence stated that:

> ***"The 1st defendant further states that by an agreement for sale dated 20th December, 1996 the plaintiff agreed to sell and the 1st* defendant agreed to purchase the suit property at a consideration of kshs.250,000/= upon payment of which the plaintiff acknowledged, the plaintiff lawfully and validly transferred to the 1*st defendant the said suit property. And the 1st defendant shall at the hearing hereof refer and rely on the said sale agreement, Land Control Board consent to transfer, transfer document and the title deed of the said suit property for therein (sic) full tenor, meaning and effect."***

The 1st respondent therefore stated that he had purchased the suit property for valuable consideration and he had no knowledge of any fraud, neglect or default on the part of any party, stating instead that the transaction between him and the appellant was good in law.

The 2nd respondent in the defence denied the allegations of fraud made against it stating that it had carried out necessary due diligence and after establishing that the 1st respondent was the legal owner of the suit property it had advanced to him a loan with the suit property as security for the same.

A hearing took place before **Ang'awa, J.** who in a judgment delivered on 2nd May, 2007 found no merit in the appellant's suit and dismissed

it with costs. Those orders provoked this appeal which is premised on the Memorandum of Appeal drawn for the appellant by her advocates where 12 grounds of appeal are raised. It is said in the grounds that the Judge erred in failing to record the full account of the proceedings at the hearing; that the Judge erred in denying the appellant the right to an interpreter notwithstanding that the appellant could not fully understand Kiswahili or English; that the learned Judge found that no sale agreement had been produced yet held that there was a transaction involving the said land; that the Judge erred in disregarding the provisions of **Section 3 (3)** of the **Law of Contract Act** in finding that there was a sale agreement when none was produced; that the Judge erred in finding that there was a sale of the suit property when the appellant had denied that any transaction had taken place; that the Judge should have found that no two legitimate title documents could exist over the same property; that the Judge erred in finding that the appellant was represented by her son who perpetrated a fraud with the 1st respondent; that the Judge erred in holding that if there had been a fraud the appellant should have reported the same to the police; that the Judge was wrong to conduct proceedings from 8.30 a.m. to 6.30 p.m. without a break and taking the appellant who was 80 years old through that process and finally that the Judge erred in disregarding documentary evidence and in holding in favour of the 1st respondent. We are asked to allow the appeal and issue the orders that were set out in the plaint.

When the appeal came up for hearing before us on 3rd July, 2018 all parties had filed written submissions and lists of authorities. The parties were represented by **Mr. R.N. Munyalo** for the appellant and **Mr. D. Makori** for the 2nd respondent. We were satisfied on perusing a hearing notice that the 1st respondent's advocates had been served for the hearing. The two advocates present did not wish to highlight written submissions and left the whole matter to us.

We have perused the whole record and the submissions made and we have considered the same. This is what we think of this appeal.

This is a first appeal and it is our duty to re-examine and re-evaluate the evidence and reach our own findings on the same. We are aware that the trial Judge had the avatange of hearing and seeing the witnesses as they testified – an advantage that we don't have as we must rely on the record. We should therefore be slow to disturb findings of fact as made by the Judge unless we find those findings not to be backed by the evidence or find them to be perverse; findings that a reasonable tribunal properly exercising its mind would not reach – See, for judicial pronouncement on the duty of a first appellate court the celebrated case of **Selle v Associated Motor Boat Company Ltd & Others [1968] EA 123.**

The appellant testified before the Judge stating that she had been a member of a women's group which purchased a parcel of land and each member was allocated a parcel; that she was allocated the parcel of land subject of the suit after a balloting process had been conducted. She produced various receipts as evidence of payments to the land buying group. She was duly registered as the owner of the land and was issued with a title deed. She did not reside on the land and several years after purchasing the same she found upon paying a visit that the 1st respondent had occupied the land and was building on it. She denied that she had sold the land to anyone and stated that she did not know the 1st respondent. That was a totality of her evidence given in support of her case and no witness was called in support of her case.

The 1st respondent testified stating that he had met the appellant in 1996 when he met her with her son. They discussed the issue of sale of the suit property and visited the land with the appellant and her son; that they agreed on purchase price at **Kshs.250,000/=.** They visited a lawyer and an agreement was drawn. He paid the purchase price after which they appeared before the **Thika Land Control Board** and consent to transfer was duly given. Registration thereafter took place and he obtained a title to the property which he produced into evidence in addition to other documents including Certificate of Official Search showing that he was the registered owner of the land. He also testified on how he had charged the property to the 2nd respondent to obtain a loan to develop the land. Further, that he had freely moved into the suit property, occupied and developed the same.

In cross-examination he stated that he first met the appellant's son (who was deceased at the time of the hearing) who introduced him to the appellant and the discussions on the sale of land began. He stated that he went to the Land Control Board with the appellant and her son and the transaction proceeded as required in law. He was surprised that the appellant had filed the suit in 2002 when, according to him, he had purchased the land in the year 1996 and moved and occupied the same.

No evidence was called by the 2nd respondent, its advocate finding no need to do so as the appellant did not lead any evidence against the 2nd respondent at all.

The trial Judge found that although the appellant had initially been registered as the owner of the property she later transferred the same to the 1st respondent for consideration which was paid. According to the Judge the plaintiff who was alleging fraud should have reported the matter to the police for the fraud to be investigated and the fraudster charged in a criminal court.

The appellant complains in the Memorandum of Appeal, amongst other complaints, that the Judge relied on a sale agreement which was not produced as an exhibit in the case. Although the record is not very clear and, with due respect, there is obviously no elegance in the way the Judge maintained the record, it is recorded at pages 210 – 213 (inclusive) that on 25th April, 2007 the Judge conducted a pre-trial conference where all counsel representing the parties were present. It was recorded by consent of the parties that various documents which are numbered "J" and then "1 (a) to (f)" and then "(2) to (9)" be produced without the need to call their makers. Those documents were then admitted into evidence and the Judge relied on them in reaching her findings.

From the record, amongst other documents is an agrement for sale dated 20th December, 1996 made between the appellant and the 1st respondent. It identifies the suit property as **Ruiru East/Block 5/202** as a freehold property within the then Thika District measuring approximately **0.0488** of a **hectare**. Consideration is stated to be **Kshs.250,000/=** and it says at Clause 2:

> **"The purchaser (sic) price is Kenya Shillings Two Hundred and Fifty Thousand Kshs.250,000/= only receipt whereof the veindor hereby acknowledges."**

It has a signature against the name of the appellant and that of the 1st respondent and the signatures are witnessed by an advocate Chacha Muita Advocate of P.O. Box 74864, Nairobi.

There is a title deed in respect of the said property issued by the District Land Registry on 14th January, 1997 in favor of the 1st respondent. Amongst the documents produced by the parties by consent was a Green Card and documents evidence of transfer and consent of the relevant land control board.

It was the testimony of the 1st respondent that he was approached by the appellant through her son to purchase the suit property and that they entered into agremeents; that he paid the purchase price agreed and that the necessary consent of the relevant land board was obtained. It was after that that the transaction was completed.

Sections 97 and **98** of the **Evidence Act** prohibits a court from accepting extraneous evidence where the transaction alleged is in writing. The court is to rely on the four corners of the agreement unless it can be shown that the agreement is invalid or that it was entered through fraud or illegality that would otherwise vitiate a contract.

An agreement for sale was produced before the learned Judge. It identified the parties to the same, the property being transacted, the consideration for the same and it was duly executed and witnessed as required by the Law of Contract Act. Although the Judge went into an unnecessary expedition in holding that without reporting a fraud to police the appellant could not rely on the same, the judge reached the correct conclusion that there was a valid sale agreement where the appellant had sold the property to the 1st respondent. The agreement on record met the requirements of the law on sale of land and there was evidence that all steps necessary for transfer of land had been followed leading to the 1st respondent acquiring the land.

In any event, the appellant was relying on fraud in support of her case. It has been held that a party alleging fraud must prove it and the standard of proof is above a balance of probabilites. In the case of **Central Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** it was held:

> **"The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspriacy to fraud are very serious allegations. The onus of prima facie proof was much higher on the appellant in this case than in an ordinary civil case."**

In the latter case of **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** it was obsrved:

> **"It is trite that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] 1 KLR wherein the court stated that:**
>
> **'We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases namely proof upon a balance of probabilites, but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases …..'"**

Although serious allegations of fraud on the part of the 1st and 2nd respondents were made in the plaint no attempt was made to prove any of the allegations at all. The evidence does not show a serious challenge to the 1st respondent's case that he was approached and agreed to purchase the parcel of land.

On the grounds of appeal to the effect that the trial was conducted outside the official court working hours we cannot find any evidence of that in the record. We cannot also find any complaint made by the appellant or her advocate to support those allegations. The appellant also says that proceedings were conducted in English, a language she did not understand. The record shows that the appellant testified on 25th April, 2007 when she was sworn and testified in Kiswahili language. She said in the course of the proceedings:

> **"……. I can read Kiswahili. *I am not fluent in Swahili* nor English….."**

There is no record of any application made for provision of an interpreter to any other language and we find no merit in this complaint.

We agree with the final findings of the Judge that the 1st respondent purchased the suit property from the appellant in a valid transaction that met the tenets of the law. We find no merit in this appeal which we dismiss with costs to the 2nd respondent. The 1st respondent having not attended the hearing of the appeal is not entitled to costs.

Dated and delivered at Nairobi this 28th day of September, 2018.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR