



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO 297 OF 2015

BETWEEN

MBUTHIA MACHARIAAPPELLANT

VERSUS

ANNAH MUTUA NDWIGA.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

(Being an appeal from the judgment of the High Court at Nairobi (Mary Gitumbi, J.) dated 17th July, 2015

in

(ELC Case No 301 of 2011)

JUDGMENT OF THE COURT

[1] The dispute in this appeal is over a parcel of land known as L.R. No 209/7963/62 within Nairobi (suit premises) which was originally leased to **Mbuthia Macharia** (appellant) sometime in 1980 by the City Council of Nairobi with effect from 1st January, 1973. The appellant filed a suit before the Environment and Land Court (ELC) against **Annah Ndingwa Mutua** and the Commissioner of Lands, 1st and 2nd respondents respectively. The main contest was nonetheless between the appellant and the 1st respondent as the Commissioner of Lands never participated in the proceedings. The appellant claimed that he developed the suit property by constructing rental residential houses and the 1st respondent (**Annah**) became a tenant in one of the houses and with time he developed a close relationship her.

[2] The appellant does not give the specific dates regarding the time when **Annah** became his tenant or what kind of relationship he had with her. His oral evidence during the plenary hearing was equally vague. He however claims in the plaint that in the course of **Annah** visiting him in his house to help him with small household chores, she stole the original title to the suit property and transferred it to herself through fraud without his knowledge or consent. The appellant thus prayed for a judgment by way of a declaration that he was the *bona fide* lessee of the suit premises and the same should be re- transferred to him, a permanent injunction restraining the 1st respondent from transferring the suit premises to third parties, selling, alienating or dealing with it in any way. Lastly, an order directed to the 2nd respondent to nullify and/or cancel the transfer and lease registered in favour of the 1st respondent.

[3] The 1st respondent filed a defence, denying the allegations of fraud and a counterclaim seeking orders of eviction of the appellant's agents who were trespassing on the suit property. The 1st respondent stated that in the year 2000, she started cohabiting with the appellant as husband and wife at the suit premises which is in **Mathare Valley Plot F24**. They subsequently got married and they had one issue. Sometime in April, 2008, the appellant obtained consent to transfer the suit premises and did transfer the same to the appellant as a gift by a husband to a wife. The 1st respondent denied all the allegations of fraud.

[4] The matter fell for hearing before **Gitumbi J.**, with the appellant and 1st respondent giving evidence in support of their respective propositions. They did not call any witnesses. The learned Judge framed four issues for determination to wit:-

a) Whether the transfer of the suit property from the plaintiff to the 1st defendant was fraudulent and whether by the 1st defendant's counter-claim she is entitled to be declared as the duly registered owner of the suit property.

- b) Whether to issue an order that the 2nd defendant do nullify and/or cancel the transfer and issue of the certificate of lease to the suit property in the name of the 1st defendant and have the same restored in the name of the plaintiff.
- c) Whether eviction orders should be issued against any person in illegal occupation of the suit property.
- d) Whether a permanent injunction against the plaintiff, his sons and their agents and representatives should be issued restraining them from trespassing on the suit property.

[5] The learned Judge fastidiously analysed each of the aforesaid issues and dismissed the appellant's suit and entered judgment for the 1st respondent as prayed in the counter-claim. This is the judgment that has provoked the present appeal which is predicated on some four grounds of appeal that faults the learned Judge for;

- a) Finding there was no prove of fraud by 1st respondent in transferring the ownership of the suit property to herself despite filing of proceedings and judgment of the criminal case in Makadara Chief Magistrate's Court Criminal Case No 2672 of 2011 in which she was convicted for the same offence which fact she also admitted before the trial Judge.
- b) For ignoring medical opinion that the appellant was suffering from senile dementia even at the time of the alleged transaction.
- c) By denying the appellant representation by his son to whom he had given a power of attorney.
- d) Poor evaluation of evidence leading to unsatisfactory conclusions thereby depriving the appellant in his old age his property.

[6] When the appeal came up for plenary hearing, **Mr. Mugu**, learned counsel for the appellant adopted the written submissions and urged us to render judgment as prayed for in the memorandum of appeal. On the part of the 1st respondent, Mr Kibet, learned counsel for the 1st respondent relied on the written submissions and made some oral highlights which we shall advert to in the preceding paragraphs.

[7] In the appellant's written submissions, he reiterated the grounds of appeal and the prayers sought in the plaint and argued that the appellant was able to prove he was the registered owner of the suit property which he acquired in 1980; he used to pay the rates and he constructed rental houses and the 1st respondent was one of his tenants. It was in the course of the tenancy that he befriended the 1st respondent; he divulged the details of the properties he owned to her and being a frequent visitor in his house, she fraudulently transferred the suit property to herself. After sometime, the appellant realized the title was missing and upon conducting a search at the Lands Office, he learnt with utter shock that the 1st respondent had transferred the suit property to herself claiming to be his "*daughter*". The appellant denied that he had any relationship with the 1st respondent. Although the appellant did not call any witness, his son Obadiah Mwangi Mbutia had filed a witness statement in support of the appellant's claim that although his father was old in age, he was of sound mind and did not suffer from any disease that would affect his memory.

[8] Counsel for the appellant further stated that a report was made to the police regarding the fraud allegedly perpetrated by the 1st respondent, it was discovered that the 1st respondent had caused an affidavit of marriage between her and the appellant to be sworn, thus the appellant was charged with forgery and convicted and sentenced to six (6) months' imprisonment on the 17th July, 2013. Counsel for the appellant also alluded to a medical report by **Dr. Mutinda** dated 6th September, 2011 in which it was indicated that the appellant was on treatment for senile dementia that started in 2001; due to this state of his health, the appellant's son, **Nahashon Kariuki** sought to represent his father and produced a power of attorney which requests counsel contended were ignored by the learned trial Judge without giving any reasons; that explains why the appellant's evidence was jumbled up and confused. According to counsel for the appellant, the learned Judge should have been guided by the criminal proceedings as well as the fact that the appellant was ailing and allowed his son to represent him.

[9] In response to the appellant's submissions, **Mr Rono Kibet** for the 1st respondent relied on his written submissions; counsel pointed out the dichotomy in the appellant's arguments demonstrated by the fact that he filed suit in his own name on 22nd January, 2011, signed a witness statement and a supporting affidavit; the same appellant had been declared senile in September, 2011 having been under treatment from 2001; to make matters worse while in that same state of mind he donated a power of attorney to his son Nahashon Kariuki Macharia on 11th July, 2014. According to counsel for the 1st respondent, if the appellant was indeed senile he lacked capacity to make a valid power of attorney and even to file a suit. As regards the medical letter produced by the appellant's son on his mental status, counsel had a very dim view of it as in his view, it could not pass the evidential test because no evidence was adduced to show the degree of mental disorder and how it affected or impaired the appellant's ability to file and prosecute his own case. To propound this argument further, counsel cited the case of **John Patrick Machira V Patrick Kahiaru Muturi** Civil Case No 113 of 1999 where it was held:-

"Questioning one's mental health is a serious thing. He who questions another's mental well-being must demonstrate the basis of the question. Everybody is presumed to be of sound mind unless and until the contrary is shown on credible evidence. That is why there are stringent provisions in the Mental Health Act (Cap 248) setting out a laborious process by which a conclusion is to be reached concerning a person's state of mind. That process has not been embarked upon in the instant case, and no medical evidence has been furnished to the court to support any allegation putting the mental health of the defendant in doubt and to rebut the initial presumption of sanity..."

[10] Counsel further submitted that the appellant executed a transfer of the suit property in September, 2008 and also swore an affidavit confirming that he voluntarily transferred the property to the 1st respondent as a gift. Moreover, the appellant had an opportunity during the hearing to adduce evidence of his mental incapacity when the transfer was signed. Thus, a presumption that the appellant was of sound mind was never rebutted and could not, without credible evidence by a medical practitioner testifying regarding the appellant's state of mind as at the time the transfer was effected. A valid transfer cannot be upset by mere allegations, by a third party that the appellant was of unsound mind; the same was not pleaded and no evidence was adduced thereby negating the rule of evidence that whoever asserts a fact is under an

obligation to prove it. The appellant failed to prove the allegation of fraud that the transfer of the suit property was not a gift.

[11] In this regard, counsel cited the persuasive decision in the cases of; - **Robertson V Hayton** [2003] O.J. No. 4538 (SCJ) para 30 **Royal Trust Co. V Diamant**, [1953] 3 D.L.R. 102 (BCSC) **Stoppel V Loesner** [1974] Carswellman 141 (QB) And closer home, the case of the **Registered Trustees Anglican Church of Kenya Mbeere Diocese Vs The Rev. David Waweru** Civil Appeal No. 108/2002. In counsel's oral highlights, he clarified that according to the judgment from the magistrate's court, the 1st respondent was not convicted of count 1 which was, giving false information to the police as they failed to give any evidence. According to counsel, the said judgment was taken into consideration that the 1st respondent was convicted of forgery of a marriage certificate and an affidavit of marriage; however, counsel pointed out that the 1st respondent was not represented in the said criminal trial and she ended up serving the full term. Nonetheless, the said judgment had no bearing to the transfer of the suit property; it was undisputed fact that the 1st respondent had a relationship with the appellant, they cohabited as man and wife from the year 2000, and they had a child together. Counsel for the 1st respondent urged us to dismiss the appeal with costs.

[12] This is a first appeal, that being so, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See the case of; - **Selle and Another V Associated Motor Boat Company Ltd and Others**, [1968] 1 EA 123 (CAZ):

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).”

[13] Based on the above principles, and having regard to the grounds of appeal, the evidence before the trial court and the submissions made before us, we have formulated the following issues for determination in this appeal;

Whether the appellant proved the case of fraud regarding the transfer of the suit premises by virtue of the judgment in Makadara Chief Magistrates' Court Criminal Case No. 2672 of 2011.

Whether the learned Judge erred by disregarding the medical opinion that the appellant was suffering from senile dementia at the time the alleged transaction was conducted.

Whether the learned Judge erred by denying the appellant representation by his son to whom he had given power of attorney.

Whether the learned Judge properly exercised her mandate as required by law to evaluate the evidence according to the evidence and the law.

[14. We shall deal with the aforesaid issues seriatim; the appellant filed suit alleging fraudulent transfer of the suit premises by the 1st respondent who was his tenant turned into a friend and in that way, gained access to his title document and forged a transfer. On the other hand, the 1st respondent denied transferring the suit premises by way of fraud but insisted it was transferred to her by the appellant as a gift at a time when she was cohabiting with the appellant as husband and wife as they used to live together in the suit premises with the appellant after his wife died and they were blessed with one issue. The learned Judge considered the allegation of fraud and the detailed particulars and we can do no better than reproduce what the Judge concluded in her own words;-

“Has the plaintiff proved the allegation of fraud against the 1st defendant? The plaintiff claimed that his title document got lost from his house and he suspected that the document was stolen by the 1st defendant. He, however, did not indicate when the said document was stolen but he reported the lost title at Pagoni Police Station on 8th November 2004. The lost title was later gazetted in the Kenya Gazette as No. 5590 dated 22nd June, 2007 stating that the title was lost and an interim title would be issued after 90 days. The new title must have then been issued sometime in October 2007. The transfer of the suit property was done on 13th May, 2009. From the face of it, the transfer document looks proper but the plaintiff alleged that he did not sign the consent to transfer it. He claimed that that the signature appended on the transfer document was not his. He, however, did not take any steps to prove to the court that the signature appended on the document was not his by bringing a document examiner or other expert to prove that the signatures appended on the various documents used by the 1st defendant to transfer the suit property into her name were not his. Section 107 of the Evidence Act Cap 80 provides that;-

“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.”

The court cannot determine on the face of a document which signature is genuine and which is forged in order to point out which signature belongs to the plaintiff and not in the absence of such evidence I find that the plaintiff had not proved that the 1st defendant was involved in any fraudulent scheme of transferring the suit property to herself as alleged. I find that the plaintiff has been unable to link the 1st defendant to the claim of fraud made against her.

In her evidence the 1st defendant stated that the plaintiff transferred the suit property to her as a gift. From the documents in the court file it is apparent that the transfer of the suit property to the 1st defendant was done after the plaintiff had been issued with a new title document. It cannot be that the 1st defendant used the lost title document to transfer the suit property

to herself as alleged by the plaintiff. Further, there are documents that 1st defendant produced such as the affidavit to bequeath property dated 15th June, 2006, a letter signed by the plaintiff dated 24th April, 2004 and the transfer dated 3rd September 2008 all which show that the plaintiff consented to having the suit property transferred to the 1st defendant. The plaintiff did not object to these documents during the hearing and did not produce contrary evidence to rebut that evidence. In the circumstances, the plaintiff has failed to convince this court that the 1st defendant was involved in fraud in transferring the suit property to herself. To the contrary, this court finds the plaintiff is the one who transferred the suit property to the 1st defendant by way of gift and I find that the 1st defendant is the duly registered proprietor of the suit property”.

[15] Just like the learned trial Judge, we are not persuaded the appellant was able to prove the allegations of fraud regarding the transfer of suit premises to the 1st respondent. The Judge alluded to the provisions of **section 107** of the **Evidence Act**, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The **Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14:** describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(emphasis added)

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1st respondent. The appellant did not adduce any such evidence nor did he call any witness. On the other hand, the 1st respondent discharged her evidential burden by placing before court an affidavit by the appellant in which he had sworn on 24th April, 2004; that he bequeathed to the 1st respondent the suit premises and a transfer dated 3rd September 2008 in favour of the 1st respondent which displaced his claim that the 1st respondent had stolen the title as the said transfer was effected after a new title was issued.

[17] We have also considered the judgment from the Chief Magistrate’s Court in Criminal Case No. 2672 of 2011 where the 1st respondent was convicted and sentenced to imprisonment for six months. We have no mandate to delve into the merit of the said judgment which is not before us, save to point out that the 1st respondent was convicted of the 2nd count which was a charge of forgery contrary to **section 349** of the Penal Code in that she forged a certain affidavit purporting to be an affidavit of one **Mbuthia Macharia** and a 3rd count, being a charge of forgery contrary to **section 349** of the Penal Code in that she forged a marriage certificate between her and **Macharia Mbuthia**. The appellant was not charged with the offence of forging transfer, consent or the affidavit purporting to bequeath the suit premises to her. In our view, the said judgment and proceedings did not help the appellant’s case and the allegation of fraud against the 1st respondent was not at all proved.

[18] On the issue of representation of the appellant by his son whom he had given power of attorney, it seems to us, the appellant’s case mutated along the way because the issue of mental capacity was not directly in issue before the High Court. A party is bound by his own pleadings; the appellant pleaded in his plaint filed on 22nd June, 2011 that he was a male adult of sound mind. He was then represented by the firm of **J.M Waiganjo & Co**. He later on filed a notice of his intention to act in person and filed a very detailed reply to defence and counterclaim on 24th March, 2015. When did he lose his mental capacity to represent himself? This appears in the proceedings when the case came up for hearing. Counsel for the 1st appellant mentioned to the Judge that the appellant’s son wanted to represent the father but he had not obtained leave to act as a guardian *ad litem* for the appellant. It was at that juncture the court directed the appellant to appear in court personally for the court to ascertain his condition for mention on 4th March, 2015. On the said date, **Ms Kwamboka** for the 1st respondent pointed to the court that the appellant was present in court. She however told the Judge that if the appellant’s son called **Nahashon** wanted to represent his father, he could only do so after seeking leave of the court by filling a relevant application. The Judge gave directions that the hearing was to be on 13th March, 2015. We have not come across any application for applicant’s son to represent him in this record of appeal. No evidence was adduced regarding the appellant’s mental incapacity. There is a witness statement signed by **Obadiah Mwangi Mbuthia**, a son of the appellant. He stated that his father was of sound mind;

“My father, despite his old age, is of sound mind and does not suffer from any disease that would affect his memory.”

[19] There was no evidence before the court regarding the appellant’s mental incapacity; it was not pleaded or adduced in court, and consequently, this ground of appeal is without merit. Similarly, and as aforesaid, we have not come across any application by the appellant’s son seeking to represent him. Such an application would seem illogical in view of the pleadings as it would lead to an obvious question of how the appellant was able to donate power when he was incapacitated. We agree with counsel for the 1st respondent that the son of the appellant was supposed to obtain leave of the court to act as guardian *ad litem* for the appellant upon satisfying the stringent conditions set out under the provisions of the **Mental Health Act**. In the circumstances, this ground of appeal as of necessity fails.

[20] The last ground was argued that the learned Judge failed to evaluate the evidence and arrived at a conclusion that caused an injustice to the appellant. We have gone through the evidence; the testimony of the appellant was rather short and somewhat convoluted or at best confused. This is what he stated in part;-

“...The 1st defendant came to embarrass me that I have been with her. I have never stayed with her. I don’t know her name. Even right now I can’t identify her in court. I don’t know what this case is about. I am suing the 1st defendant for embarrassing me. I cannot leave my parcel of land and it is mine; that is where I live. The 1st defendant said I slept with her....”

[21] The learned Judge did her best in the face of the above evidence and the pleadings by identifying key issues which she fastidiously set out and examined the evidence against the pleadings and the relevant law. We are in agreement with the learned Judge that the appellant’s case was without merit, so is this appeal, which we order dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 29th day of September 2017.

ALNASHIR VISRAM

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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.

DEPUTY REGISTRAR