IN THE COURT OF APEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.

CIVIL APPEAL NO. 83 OF 2015

BETWEEN

KAHIRO KIMANI.....……APPELLANT

AND

FATUMA ABDALLA.....….RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court at Malindi, (Angote, J.) dated 12th June 2015 In ELCC No. 25 of 2012)

JUDGMENT OF THE COURT

The appellant, ***Kahiro Kimani,*** an advocate of the High Court of Kenya, is aggrieved by the judgment and decree of the ***Environment and Land Court at Malindi (Angote, J.)*** in which the learned judge declared null and void the transfer of ***LR No. 303, Lamu (the suit property)*** to the appellant and further ordered him to return the original documents of title to the respondent, ***Fatuma Abdulla***.

Although the background to the suit, which culminated in this appeal, is fairly straightforward, it once again demonstrates the challenges that arise when an advocate chooses to act for both the vendor and the purchaser in the same transaction. Such an advocate bears a heavy responsibility to ensure that none of the parties suffers any prejudice. He or she is called upon to act with great circumspection, rectitude and candour, and in particular to avoid any conflict of interest that may compromise the rights of any of the parties.

On 16th December 2009, the respondent, described as an old lady aged more than 70 years old, entered into an agreement for sale with a company known as ***Regina Coeli Trading Company Ltd***. The respondent agreed to sell and the company agreed to purchase the suit property, measuring in area approximately 112 acres, for Kshs 10 million. Upon the signing of the agreement, the company paid to the respondent Kshs 1 million, being 10% deposit of the purchase price. The completion date was to be 30th January 2010 ***"or such other date as the parties may agree in writing."*** By ***clause 3.1.2*** of the agreement, it was agreed as follows:

> ***"The balance of the purchase price shall be paid to the vendor on completion and in any event within seven (7) days of the successful registration of the transfer in favour of the purchaser or its nominee."***

The appellant was the advocate for both the respondent and the company in the transaction.

Subsequently, the respondent handed over the original documents of title to the appellant to enable him transfer the suit property to the company. As it later transpired, the appellant, claiming that the company was his trust company and that it had constituted him its nominee for the purposes of the transaction, transferred the suit property to his own name.

On 28th February 2012, the respondent filed ***Malindi ELCC No 25 of 2012*** seeking a declaration that the transfer of the suit property to the appellant was null and void and an order for the appellant to return to her the original documents of title. Her claim was based on the grounds that she had entered into the sale agreement with the company rather than the appellant and that neither the company nor the appellant had paid the balance of the purchase price as agreed in the sale agreement or at all.

On 29th March 2012, the appellant filed a defence and counterclaim, which on the face of it was full of inconsistencies and contradictions. For instance, he denied that the appellant was the owner of the suit property or that he had acted for her in the transaction. He further pleaded that the balance of the purchase price was only payable to the respondent within 90 days of her pointing out to him the beacons or replacing the missing ones and erecting a perimeter fence, which she had failed to do, and by reason thereof the balance of the purchase price was not due or payable. In the same breath the appellant pleaded further that the balance of the purchase price was in fact paid to the respondent and whatever amount was due and owing was "not more than 2 million."

As regards the relationship between him and the company, the appellant pleaded in paragraph 9 of the defence that the company was his trust company; that its two directors and shareholders were his employees; and that the suit property was transferred to him as the nominee of the company.

In the counterclaim, the appellant pleaded that the respondent was in breach of the agreement as a result of which he had suffered loss and damage of Kshs 10 million, made up of Kshs 8 million that he had paid to the respondent and Kshs 2 million of miscellaneous expenses. Lastly he pleaded that it was common understanding between the parties that the appellant was purchasing the suit property with a view to re-selling it for profit. On account of the respondent's breach, the appellant alleged, he had lost the opportunity to sell the land at a profit and suffered loss of bargain amounting to Kshs 168 million. He therefore prayed for those sums, punitive, aggravated and general damages and costs of the suit.

At the hearing of the suit, the respondent adduced evidence in support of her claim as pleaded in the plaint. She testified that she was paid only Kshs 1 million as deposit after which the appellant refused to pay the balance of the purchase price. She detailed her efforts to recover the balance, including reporting to the Criminal Investigation Department, after which the appellant paid to her a further Kshs 2 million which she acknowledged in writing. Thereafter the appellant refused to pay the balance of the purchase price or to return the original documents of title to her.

The appellant did not adduce any evidence. Neither him nor his advocate appeared in court for the hearing of the suit at 10.30 a.m. on 25th November 2015, in circumstances that we shall advert to shortly.

By the judgment dated 12th June 2015, the learned judge found in favour of the respondent, declared the transfer of the suit property to the appellant null and void and ordered him to return the original documents of title to the respondent. He also awarded her costs of the suit. As regards the counter-claim, he rightly found, in our view, that it was not proved and dismissed the same. Aggrieved by the judgment, the appellant filed this appeal.

In his memorandum of appeal in this Court, the appellant raised four main grounds which his learned counsel, Mr. Kimani, elaborated in his oral submissions. Firstly it was contended that the learned judge erred by ignoring the evidence on record. That evidence, it was submitted, included an affidavit sworn by the respondent and her sisters on 10th August 201, in which they deponed that the transaction between the respondent and the appellant was genuine and that the disagreement between the parties to the agreement had been resolved amicably. In addition, the appellant cited a document titled "acknowledgement" dated 25th June 2011 and signed by the respondent in which she acknowledged receipt of Kshs 2 million from

the appellant and agreed that the balance of the purchase price was to be paid upon erection of beacons and fencing of the property.

Secondly, it was submitted that there was evidence on record in the form of correspondence showing that the beacons in respect of the suit property were missing and that a Settlement Scheme called ***Hindi Magogoni*** had encroached upon the suit property. Had the learned judge taken the above evidence into account, it was contended, he could not have found in favour of the respondent.

Thirdly, Mr. Kimani submitted that the trial court erred by denying the appellant the right to be heard when it proceeded with the hearing of the suit in his absence. The ruling of this Court in ***Dr. Alfred Mutua v. The Ethics & Anti-Corruption Commission & 4 Others, CA No. Nai. 31 of 2016 (UR 22 of 2016)*** and of the High Court in ***Bernard Muia Tom Kiala v. The Speaker of the County Assembly of Machakos & Others, Misc. App. No. 113 of 2014 (Machakos)*** were cited to make the point that parties must be given a reasonable opportunity to be heard.

Lastly, Mr. Kimani argued that the order issued by the trial court for the return of the original documents of title to the respondent was unenforceable because the suit property had already been transferred to the appellant. Relying on the decision of the High Court in ***Mutuku Kivuthi & Another v. Umoa Bus Services, HCCC No. 64 of 2009 (Machakos)*** counsel submitted that courts do not issue orders in vain and in particular will not issue the orders that are incapable of enforcement. He accordingly urged us to find merit in the appeal and to allow the same.

Mr. Khatib, learned counsel for the respondent opposed the appeal submitting that the appellant, as the advocate for both parties owed a duty of care to the respondent; that he was in breach of that duty by failing to disclose that for all intents and purposes he was the company; that there was no deed of nomination by the company constituting the appellant its nominee for the purposes of the agreement for sale; and that even if the appellant was so nominated, he had failed to pay to the respondent the balance of the purchase price.

It was the respondent's further submission that the appellant did not file a witness statement and as such there was no evidence properly on record to controvert that of the respondent and that the trial court was justified to find that the respondent's case was proved on a balance of probabilities.

As regards the contention that the appellant had been denied the right to be heard, Mr. Khatib submitted that in the morning of 25th November 2014 the appellant made an application for adjournment of the hearing of the suit, which was heard and dismissed by the trial court. The court directed the suit to be heard at 10.30 a.m. At the appointed time, neither the appellant nor his counsel, who was aware of the order made by the court, bothered to appear in court. In counsel's view, the appellant was afforded an opportunity to be heard but declined to take it up.

Subsequently, it was submitted, the appellant filed an application for review, which was dismissed on 5th June 2015. To the extent that the appellant did not appeal against that ruling, it was urged, he was precluded from raising the issue in this appeal. Counsel relied on the decision of this Court in ***George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015*** in support of that proposition and urged us to dismiss the appeal.

Since this is a first appeal, we are enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witness or witnesses, hearing them and observing their demeanor and giving allowance for that. (See ***Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR 384.***

We shall first dispose of the argument that the appellant was denied an opportunity to be heard. The record shows that on 31st July 2014, Angote J. set down the suit for hearing on 3rd November 2014 in the presence of counsel for the respondent but in the absence of counsel for the appellant. The learned judge directed a hearing notice to be served on counsel for the appellant. Come 3rd November 2014, only the

respondent's counsel was in court with one witness. The record shows that although the appellant's counsel was duly served with the hearing notice, he did not attend court. The learned judge directed the hearing to commence at 10.45 a.m. but at that time, he decided to adjourn the suit to 25th November 2014 and directed the appellant's advocate, once again, to be served with the hearing notice.

On 25th November 2014, the respondent's advocate was in court and ready for the hearing. ***Mr. Kimani*** appeared for the appellant and applied for adjournment of the hearing on the basis that the appellant was indisposed. The respondent strenuously opposed the application for adjournment and after considering the application, the learned judge rejected it and directed the hearing to proceed at 10.30 a.m.

When the court convened at 10.30 a.m., neither the appellant nor Mr. Kimani, who had earlier in the morning appeared for him, was in court. Accordingly the hearing proceeded in the absence of the appellant. The respondent gave her evidence, closed her case and the learned judge reserved judgment to a date to be notified to the parties.

On 14th November 2014, before delivery of the judgment, the appellant filed an application in which he sought an order to arrest the judgment and a further order for review of the ruling of 25th November 2014 declining his application for adjournment. The application was heard and dismissed by Angote, J. on 5th June 2015, after he found that the reasons advanced for review of the order were the same reasons he had rejected when the application for adjournment was made. He however allowed the appellant to file written submissions, if he wished, before delivery of the judgment. The appellant did not utilize the opportunity and subsequently the trial court rendered its judgment.

In the circumstances of this appeal and from that background, we are satisfied that there is no merit in the appellant's contention that he was denied an opportunity to be heard. The application for adjournment was dismissed in the presence of his advocate who well knew that the hearing would proceed at 10.30 a.m. but chose not to appear. There was nothing to stop the appellant's advocate from appearing at the appointed hour and cross-examining the respondent and therebefore or thereafter renewing the application for adjournment. The appellant declined to avail himself even the opportunity offered by the court to file submissions.

Secondly the appellant did not appeal against the ruling of 5th June 2015. The notice of appeal on which this appeal is grounded relates only to the judgment and decree dated 12th June 2015, which did not address the issues raised in the ruling of 5th June 2015. In ***George Owen Nandy v. Ruth Watiri Kibe*****, *(supra),*** this Court stated that an appellant who had filed an appeal against the final judgment and decree of the High Court could not challenge in that appeal an earlier order of the High Court permitting the respondent to file a defence out of time, because the appellant had not appealed against that order.

As regards the contention that the trial court did not consider the evidence on record, with respect, we agree with counsel for the respondent that the trial court did not err. The evidence cited by the appellant was not produced before the learned judge. It appears to have been adduced by affidavit and purely for purposes of earlier interlocutory applications, which were heard and determined. Admission of evidence in interlocutory applications is governed by different considerations from admission of evidence in a trial. The evidence referred to by the appellant was not adduced and produced at the trial, either by consent of the parties or by order of the court. It was never subjected to cross-examination. In our view, it had no probative value and the learned judge properly refused to take it into account. Finally, on this ground, the appellant also failed to utilize a rare window opened by the trial court to file submissions.

We find that the agreement for sale between the respondent and the company did contemplate the transfer of the suit property to the company or its nominee. That notwithstanding, the appellant who was acting for both the company and the respondent (an old, barely literate lady) ought to have been more candid and forthright, and in view of his duty as an advocate, should have disclosed in writing from the outset that he was indeed the nominee of the company. Nevertheless, there is satisfactory evidence that the respondent indeed accepted the appellant to be the company's nominee. That evidence includes the respondent's own testimony on the efforts she made, including reporting to the police, to recover the balance of the

purchase price from the appellant and her acceptance and receipt of Kshs 2 million from the appellant towards the balance of the purchase price.

The last contention that an order for return of the original documents of title to the respondent is incapable of enforcement is, with respect, an exercise in sophistry, granted the circumstances of this appeal. All we understand the respondent to be saying is that since the appellant has failed to pay the balance of the purchase price, the suit property, which is now registered in his name, should revert back to her name. We cannot fathom how the order of the trial court is unenforceable.

Ultimately we are satisfied that the respondent proved on a balance of probabilities that she was entitled to the prayers set out in the plaint. Clause 3.1.2 of the agreement was explicit that the balance of the purchase price was to be paid to the respondent ***"in any event"*** within seven days of the registration of the transfer in favour of the appellant. It made time of the essence, (see ***Aida Nunes v. J. M. N. Njonjo & C. Kigwe [1962] EA 89)*** and the appellant was in fundamental breach of the agreement for sale. We accordingly find no merit in this appeal and the same is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR