



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, OKWENGU & KIAGE, J.J.A.)

CIVIL APPEAL NO. 278 OF 2006

BETWEEN

FREDRICK CHEGE NDOGO APPELLANT

AND

BERNARD NJOROGE MBUGUA.....1ST RESPONDENT

MARGARET MUKAMI NJOROGE2ND RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nakuru (Ondeyo, J. as she then was)
dated 15th November, 2002*

in

HCCC No 497 of 1999

JUDGMENT OF THE COURT

This first appeal emanates from the judgment of the High Court (Ondeyo, J.) dated 15th November, 2002. The gist of the suit before the trial Court as can be gathered from the Complaint dated 23rd November, 1999, is a complaint of fraud leveled against the appellant (the defendant before the trial Court) by the respondents herein (1st and 2nd Plaintiffs before the trial Court). The incident of fraud allegedly occurred during the course of selling all that parcel of land known as *Elburgon / Arimi Ndoshwa Block 3 / 11 (Turi)* ('the suit land'). Aside from fraud, consent to enter into the said sale transaction is said to have been lacking on the part of the 1st respondent, as pleaded by the 2nd respondent before the trial Court. In response to the allegations of fraud and want of consent, the appellant herein filed a Statement of Defence in which he reiterated that the 1st respondent sold him the suit land on his own volition at a consideration of Ksh 250, 000, which amount was duly received.

In his defence, the appellant averred that the 1st respondent duly procured and signed all the requisite documentation with a view to completing the sale of the suit land and that the sale of the suit land, vesting ownership in the 1st respondent absolutely was proper, that he did not receive a proposal for a refund of

the purchase price of the suit land from the respondents; or receive Ksh 100, 000 by way of a bankers cheque. Furthermore, the appellant contended in his defence that he had received a title to the suit land upon presenting transfer documents which had been duly executed by the 1st respondent. Finally, the appellant denied committing any act of trespass upon the suit land, maliciously destroying any crop planted thereon, or erecting a temporary structure on the suit land without the knowledge of the respondents. After dispensing with a preliminary objection, and several interlocutory applications, the trial court finally set the suit down for hearing, leading to the judgment now the subject of the present appeal. The grounds upon which the appeal is anchored are that the learned Judge erred by-

- ***Finding that the appellant's registration as the proprietor of the suit land was fraudulent;***
- ***Finding that the transfer document was fraudulent, whereas she had already found that the said document was signed by the 1st respondent;***
- ***Cancelling the appellant's title whereas there was overwhelming evidence that the registration was lawful;***
- ***Acting on evidence of the 1st respondent, whom the trial Judge had already found that he was an incredible (sic) witness;***
- ***Rescinding an agreement which had been entered by two willing parties;***
- ***Considering extraneous matters in arriving at her judgment;***
- ***Holding that the agreement was rescinded whereas, there was overwhelming evidence that the decision to rescind the agreement by the first respondent was made after he had signed all conveyancing documents and that after he had relinquished his rights and interest in the said land;***
- ***Finding that the suit before her had merit whereas there was no evidence to support these finding (sic);***
- ***Failing to find that the 2nd respondent had no cause of action in the suit before the Court.***

At the hearing of the appeal, Mr. Kahiga, learned counsel for the appellant, condensed the dozen grounds of appeal into six main themes namely:-

- ***Fraud***
- ***Evidence***
- ***Contract***
- ***Extraneous matters***
- ***Credibility of witnesses; and the***
- ***2nd respondent's cause of action.***

Counsel submitted that the Respondent's claim for the suit land was hinged on fraud as pleaded in paragraph 5 of the Complaint and the trial Court was wrong to find that there was fraud on the appellant's part given the definitions of fraud in:-

- i. Halsbury's Laws of England, Third Edition, vol 26 at p 818;***

ii. Black's Law Dictionary at p 685.

Mr. Kahiga contended that no evidence was led to show that any party was misled into entering the sale agreement, and that the appellant's sole duty was to pay the purchase price, which he did in full. Moreover, the appellant rejected an attempted refund, which amount is still held by the Respondents. According to learned counsel, the claim of fraud arose because of the appellant's refusal to re-transfer the suit land to the respondents yet there was produced a Transfer Form signed by the 1st Respondent which he acknowledged in testimony. The trial court was faulted for finding and holding that the transaction was tainted with fraud, with counsel asserting that such a claim cannot be based merely on a party's change of mind. Turning to the standard of proof for fraud, Mr Kahiga submitted that it was much higher than just a balance of probabilities. He cited the case of **URMILA w/o MAHENDRA SHAH Vs BARCLAYS BANK INTERNATIONAL LTD-NAIROBI CA (1976-80) 1 KLR 1168**, where this Court held per Madan and Law JJA that ***"a standard of proof one approaching proof is required to establish fraud"*** which, in this case was not attained.

On the question of evidence, Mr. Kahiga, learned counsel submitted that the trial court overlooked the sale agreement; that the balance of the purchase price for the suit land was paid and received voluntarily and that the appellant took possession thereafter having been granted the same by the respondent.

He submitted that the first claim of impropriety came vide a letter dated 22nd October, 1999 written by Messrs Lawrence Mwangi & Co Advocates, addressed to the District Land Registrar. Therein, the respondents raised several complaints notably: - the absence of the consent of the Land Control Board, a duly executed transfer, and the irregular manner in which the title to the suit land was issued to the appellant. Counsel termed the foregoing allegations as an afterthought coming long after title to the suit land was issued in the name of the appellant. It was also submitted that Mr. Karanja Mbugua, Advocate testified that he represented the appellant and the respondents herein in the sale transaction, that no formal notice of rescission issued, that he witnessed the transfer form being signed by all parties. This evidence was improperly disregarded by the trial court which also failed to appreciate the weight of the documentary evidence tendered. The appellant faulted the trial court for attempting to re-write the contract for the parties. He relied on **HUSAMUDDIN GULANHUSSEIN POTHIWALLA & EBRAHIMJI POTHIWALLA Vs KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY LTD & 31 OTHERS [2009] eKLR** to say that parties should contract on their terms, as opposed to having their contract re-written. He cited the case of **RICHARD AKWESERA ONDITI vs KENYA COMERCIAL FINANCE COMPANY LTD [2010] eKLR** in support of his submission that it was inappropriate for the trial court to have allowed the contract to be rescinded at the instance of a party changing his mind.

The learned Judge was next faulted for veering into extraneous matters which were not before her. Notable in this regard was the theory propounded by the trial court in a bid to explain how the Transfer Forms were signed, thereby creating an escape route for a party who was not able to discharge his burden. Mr. Kahiga then castigated the evidence tendered by the Respondents which, counsel contended, kept shifting and was littered with lies and contradictions. They were not credible witnesses, especially when they came up with the fiction that the land was held in trust for the family. He charged that the respondent was "lying at will". Learned counsel finally submitted that the 2nd respondent's claim over the suit land was baseless as she had not registered any interest against the title and that her claim ought to have been against her husband. Any alleged trust was inchoate and that the appellant was an innocent purchaser for value without notice whose right should not have been defeated.

On his part, Mr. Gekong'a, learned Counsel for the Respondents submitted that following the demise of the 1st respondent and in the absence of an application to have him substituted as a party to this appeal, no appeal could lie against him. In response to the claims of fraud, he submitted that the same commenced at the point of transferring the suit land in the name of the appellant not at the time of entering into the sale agreement. He asserted that the Transfer Form was fraudulently prepared. Because even though the 1st respondent signed the said form, it was not to be presented for registration. Indeed, there were two Transfer Forms in existence, one dated, and the other undated, with the transferor in both sets of forms being the appellant. Accordingly, the suit land had not been transferred to the buyer. Counsel submitted

that the precise nature of fraud was that the seller signed as the transferee and not the transferor and that irregularity in completing the transfer form amounts to fraud.

On the question of the consent of the Land Control Board, learned Counsel submitted that the 1st respondent never attended a Land Control Board meeting nor did he instruct an Advocate to appear on his behalf; and in particular Messrs Karanja Mbugua & Co Advocates. He did however concede that the seller did sign the application for the consent of the Land Control Board. He submitted that parties to an application for consent of the board ought to appear in person but was unable to furnish authority in support of that submission.

Counsel argued that by 22nd October, 1999, the agreement between the appellant and the 1st respondent herein had been cancelled. There was an attempt to opt out of the contract to which Messrs Karanja Mbugua & Co Advocates demanded a refund of Ksh 250,000, being the purchase price of the suit land plus interest thereon of 10%, being a penalty for breach of the agreement. In the circumstances, learned Counsel queried how a Transfer Form could be dated 22nd October, 1999. Counsel further submitted that vide a letter dated 1st November, 1999, the appellant's advocates wrote to the Vendor's advocates expressing their displeasure with their action of drawing a cheque for the sum of Ksh 100, 000 in the names of the appellant, as opposed to that of the firm of Karanja Mbugua & Co Advocates. The said cheque was rejected and returned thereby rescinding the sale agreement. Learned Counsel submitted that the title which issued on 26th October, 1999 was questionable, as a complaint had been lodged with the Land Control Board prior to the grant of consent of the board, to no avail. Moreover, the Transfer Form was dated 26th October, 1999, the date appearing on the title deed, which Counsel termed 'abnormal'.

In conclusion Mr. Gekong'a submitted that the appellant never took possession of the suit land, as he was to take it in January, 2000 but 1st respondent was said to have entered upon the suit land on or about 10th November, 1999. Counsel stated that the respondents are currently in possession of the suit land following the judgment of the trial court in obedience to which the appellant moved out of the land. In his brief reply, Mr. Kahiga, learned Counsel for the appellant contended that the appellant was in possession of the suit land following the grant of a stay order against the judgment of the trial court. He also submitted that there was no legal requirement for personal attendance at meetings of the Land Control Board. He urged that the mistake on the Transfer Form was duly explained by the Advocate who drew it as an error in description and not a fraud which is why it was subsequently accepted at the Lands Office.

Our role in this first appeal is to analyze and re-assess the evidence on record in a fresh and exhaustive manner with a view to arriving at an independent conclusion. While at it, we bear in mind that unlike the trial Court, we did not see the demeanour of the witnesses as they gave their respective testimonies. See **SELLE VS ASSOCIATED MOTOR BOAT CO [1968] E.A. 123** and **MWANASOKONI VS KENYA BUS SERVICES (1982-88) I KAR 870**. Due deference is paid to the trial court's findings and conclusions, noting that the same are not to be interfered with lightly. See **PETERS VS SUNDAY POST LTD [1958] E.A. 524**. Accordingly, we are of the considered view that this appeal turns on the following issues:-

- ***Whether the sale agreement between the appellant and the respondents was effectively rescinded;***
- ***Whether spousal consent is a condition precedent to the sale and transfer of land.***

Black's Law Dictionary, Ninth Edition defines rescission as:-

“A party's unilateral unmaking of a contract, for a legally sufficient reason such as the other party's material breach or a judgment rescinding the contract Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre-contractual positions”.

The question whether a rescission has been effected is frequently one of considerable difficulty, for it is

necessary to distinguish a rescission of contract from a variation which merely qualifies the existing rights and obligations. See **ROYAL EXCHANGE ASSURANCE V HOPE [1928] CH 179** and **CHITTY ON CONTRACTS, VOLUME 1 GENERAL PRINCIPLES, SWEET&MAXWELL, PAGE 1153**. If a rescission is effected the contract is extinguished. If only a variation, it continues to exist in an altered form. The intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances plays a part in making the determination. See **UNITED DOMINIONS TRUST (JAMAICA) LTD V SHOUCAIR [1969] 1 A.C. 340**. We shall revert back to the subject of rescission shortly.

We first deal with the question of whether or not the sale of the suit land was tainted by fraud as alleged. This question is of some importance and ought to be answered conclusively as it occasioned the stalling of the transaction between the appellant and the 1st respondent in the first instance.

Fraud is defined by the Black's Law Dictionary, Ninth edition as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”.

In **RATILAL GORDHANBHA PATEL VS LAJI MAKANJI [1957] E.A.**, the predecessor to this Court set the standard of proof for fraud thus;

“Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probability is required”.

Applied to the rival arguments before the trial Court, the existence of fraud is negated by the concession by the appellant and the 1st respondent that they signed blank forms for application for Land Control Board consent and transfer, before handing them over to their common Advocate Messrs Karanja Mbugua & Co Advocates, who had the mandate to obtain the consent and effect transfer on their behalf. This must be the reason why the 1st respondent recanted in cross-examination his earlier assertion that his signature appearing on the said forms had been forged. We are equally convinced that the absence of forgery was the principal reason why the appellant was not charged and prosecuted, even after the 1st respondent made a report to the Police and the Criminal Investigations Department.

Another exculpatory factor so to speak, is the testimony of **Charles Birundu (PW 2)** who was the Land Registrar Nakuru, at the material time. PW 2 conceded under cross-examination that **exhibits D3 (application form for Land Control Board Consent) and D4 (consent)** were genuine. Confirming **Karanja Mbugua Advocate's** testimony that the application for land control board consent and transfer had been duly executed in blank by the appellant and the 1st respondent. He was not controverted in his assertion that he had the instructions of the appellant and the 1st respondent to act on their behalf in the sale of the suit land. In addition, there is also the evidence of **Habil Oluchiri (DW 3)** who conceded under cross-examination that copies of the transfer documents filed at the Land Registrar's office had discrepancies and should not have been acted upon. Not a scintilla of fraud can be inferred from the said discrepancies, however. The learned trial Judge failed to consider the discrepancies on the transfer form, alongside the correct details in the sale agreement, application for Land Control Board consent form and land control board consent produced by DW 2. Had the learned trial Judge applied her mind to the totality of facts as we have, she would have certainly arrived at a different finding, namely that the discrepancies on the transfer form were curable defects. They were neither fraudulent nor of the type to call for rescission of the sale transaction.

In view of the foregoing analysis, the contract between the appellant and the 1st respondent could be termed as extinguished. Contracts are meant to be honoured and we echo the sentiments of this Court in **HUSSAMUDDIN GULAM HUSSEIN POTHIWALLA ADMINISTRATOR, TRUSTEE AND EXECUTOR OF THE ESTATE OF GULAMHUSSEIN EBRAHIMJI POTHIWALLA V KIDOGO BASI HOUSING CORPORATIVE SOCIETY LIMITED & 31 OTHERS [2009] eKLR** that:-

“The law will not allow a party to wriggle out of an agreement freely entered into..... That a court of law cannot re-write a contract between the parties. The parties are bound by their contract unless coercion, fraud or undue influence are pleaded and proved..... save for those special cases where Equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of Equity’s function to allow a party to escape from a bad bargain”.
(See NATIONAL BANK OF KENYA VS PIPE PLASTIC SAMKOLIT & ANOTHER [2001] KLR 112.

In the absence of coercion, fraud or undue influence as we find and hold, the administrator of the estate of the 1st respondent will not be permitted to resile from the contract. He must therefore honour the sale agreement dated 3rd September, 1999 without further delay.

This judgment would be incomplete without a finding whether spousal consent was a condition precedent to the sale and transfer of land at material time and whether the 1st respondent held the suit land in trust for the 2nd respondent and his family by extension as was urged before us. **Section 28 of the Registered Land Act- Cap 300** (now repealed) states as follows:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee” (emphasis ours).

Going by the said proviso, a trust could have come into existence through one of two ways: - express noting against the title, proof of which would have simply been production of the title document; or by implication, proof of which would have been by tendering evidence to that effect. The trial Judge had little to go by, other than the 1st respondent’s testimony that his wife (the 2nd respondent) who never testified, and their children were opposed to the sale; and that the appellant accompanied the 2nd respondent and her father-in-law to the Elburgon District Officer’s office in relation to their objection on the sale, but nothing came of it. The onus of proving the claim of the existence of a trust equally lay with the 2nd respondent, which burden she did not discharge. Finally, the 1st respondent’s testimony in this regard did little to establish or fortify the 2nd respondent’s claim. We conclude this limb of the appeal by stating that the requirement for spousal consent is a recent development in Kenya attributable to the enactment of the **Land Registration Act of 2012** and the **Land Act of 2012** by parliament. It had no application whatsoever to the sale of the suit land which predated the statute.

In the premises, we find merit in this appeal and allow the same. The High Court judgment is accordingly set aside and substituted with an order dismissing the respondents’ suit at the High Court with no order as to costs. The appellant will have costs of the appeal.

Dated and delivered at Nakuru this 16th day of June, 2016

R.N. NAMBUYE

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR