



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR JJ, A)

CIVIL APPEAL NO. 241 OF 2012

BETWEEN

EDWARD WAFULA TUCHI.....APPELLANT

AND

REUBEN SIMIYU WASIKE..... RESPONDENT

(Being an Appeal from the ruling and order of the High Court of Kenya at Bungoma (Muchulele, J) given on 11th July 2012,

in

H.C.C.A. NO. 32 of 2010)

JUDGMENT OF THE COURT

This appeal is against the decision of Muchelule J, dated 11th July 2012 in which the learned Judge set aside a consent dated 3rd October 2010 allegedly made between the **appellant, Edward Wafula Tuchi (Edward)** and **the respondent, Reuben Simiyu Wasike (Reuben)** filed in **HCCA 32 of 2010**.

The High Court appeal emanated from the decision of the Senior Resident Magistrates' Court at Kimilili which dismissed Edward's suit in which he had claimed that by a sale agreement dated sometime in April 2001, he had sold one acre of land to Reuben for residential purposes. In return, Reuben was to pay him nominal rent. His complaint was that since Reuben had failed to pay the agreed rent, the sale agreement was rendered void and as a result he sought orders for Reuben to vacate the land.

Reuben denied taking Edward's property and stated that he had constructed houses on the land which he also occupied. He denied owing Edward rent, or that he was in breach of any sale agreement.

Being aggrieved by the decision of the trial Court, Edward filed an appeal to the High Court. A notice filed on 10th May 2010 indicated that Bulimo & Co. Advocates would represent Reuben.

On 2nd December 2010, a letter dated 3rd October 2010 purporting to have been signed by both parties in their personal capacities was written to the Deputy Registrar acknowledging that Edward had refunded to Reuben a sum of Kshs. 80,000/- being the purchase price he had been paid for one acre of land and had

paid to Reuben a further sum of Kshs. 98,000/- for the developments the latter had carried out on the land. In return, Reuben supposedly agreed to vacate the one acre he was occupying on land parcel Bokoli/Kitui/865 (*the suit parcel*) registered in the name of Edward's father, Peter Tuchi Namwetako (deceased). An affidavit was to be filed in 14 days following which, a hearing would be fixed to determine the date upon which Reuben would vacate the one acre.

On 3rd December 2010, Edward filed an affidavit specifying the terms of the consent, and annexed a document referred to as the Revocation of Land Agreement, and further stating that he had agreed to withdraw the appeal. The agreement was indicated to have been witnessed by one Anyona, Advocate. That consent was made an order of the court on 8th December 2010.

It is this letter of consent which provoked the application dated 8th April 2011 in which Reuben sought orders to set it aside on grounds that he had neither agreed to any settlement with Edward nor had he signed any consent letter. He further stated that the signature on the consent did not belong to him and was a forgery. He further contended that he was at all times represented by counsel, whom he had paid in full and therefore had no reason to enter a consent in person without the knowledge of his counsel.

Edward countered in reply that, Reuben had voluntarily agreed to settle the matter and signed the consent letter. He further averred that Reuben had done so in person as he had indicated to him (Edward) that he had no funds to pay his counsel.

Reuben consequently filed a supplementary affidavit where he denied that he had at any time appeared before Anyona Advocate, or that he had failed to pay his counsel. Edward also filed a further affidavit demanding that Reuben produces a hand writing experts' report to prove that he had not signed the consent letter, and that he would require Anyona Advocate to swear an affidavit either confirming or denying that he was a witness to the signing of the consent.

Upon considering the application and the submissions of the parties, the High Court came to the conclusion that the consent letter was fraudulent and a forgery and set aside the order of consent.

Aggrieved by the ruling of the High Court, Edward has filed this appeal which is before us on grounds that, the learned judge erred in finding that the consent which was executed and filed by Reuben was a forgery; that the learned judge found that Edward wrongly filed the consent yet did not state whose right it was to do so; that the learned judge failed to appreciate that Reuben had received Kshs. 178,000/- being a refund of the purchase price and the developments on the land; that the learned judge did not take into account all the issues raised in the application; that the learned judge was wrong in faulting Edward for failing to call Anyona Advocate or a hand writing expert to prove that the consent was a forgery; and that the learned judge failed to take into account all Edward's evidence.

When the appeal came up for hearing before us, Edward, who appeared in person, based his submissions on the grounds of appeal as enumerated above.

Reuben's learned counsel, **Mr. E. Sitima**, opposed the appeal and submitted that by the time the impugned consent was allegedly signed by the parties and filed in court on 2nd December 2010, Edward had already procured the services on Buluma & Co. Advocates on 10th May 2010, and as a consequence would not have signed the agreement without involvement of his counsel. It was Mr. Situma's further submission that with regard to the calling of witnesses, the only person who could verify the consent was Anyona Advocate. Yet, Edward did not call him to confirm that he had witnessed the signing of the agreement, or that he had witnessed the payment of the sum of Kshs. 178,000/- to Reuben. In addition, it was Reuben's contention that Anyona Advocate was not known to him, and that he had not at any time appeared before him to sign the agreement. Counsel concluded that the court rightly found that the burden was upon Edward to prove that the consent agreement was not a forgery, which he had failed to do.

In reply, Edward asserted that the omission was on the part of the court for failing to summon Anyona Advocate to prove the authenticity of the consent agreement.

We have considered the pleadings, the ruling of the High Court as well as the submissions of counsel, and are of the view that the issue for our consideration is whether the court was right in setting aside the consent agreement on the basis that it was a forgery.

In this regard the learned judge stated thus;

“The consent was filed by the Appellant and said to have been filed by the Respondent who at the time had an advocate. It would appear to me that the sole purpose of the purported consent was to get the Respondent to vacate from the suit land, something that the Appellant had failed to get in the lower court. The appellant has failed to call evidence from Anyona Advocate and a handwriting expert, both material witnesses, to support the consent. I accept the version by the Respondent that the consent was a forgery. It was a fraud. It is hereby set aside.”

Before the court was a consent agreement purportedly signed by both parties in person. Anyona Advocate witnessed the agreement. It was Reuben’s case that at no time did he agree with Edward to settle the matter, nor did he appear before Anyona Advocate to sign the consent letter. It was his further contention that, since he was represented, his own counsel would have of necessity recorded the settlement in court on his behalf.

Sections 107 – 109 of the **Evidence Act** make it a requirement that the burden of proving a fact lies with the person that asserts it. In this case the onus was upon Edward to prove that Reuben signed the agreement and was refunded a sum of Kshs. 178,000/- being the purchase price for the suit parcel and the developments thereon. He was further obliged to show that Reuben had agreed to vacate the suit parcel.

As observed by the learned judge, this would have been the very purpose of Anyona Advocate’s testimony. And in seeking to enforce the consent agreement, Edward ought to have obtained a sworn affidavit or *viva voce* testimony from Anyona Advocate to prove that the agreement was authentic, having been witnessed by the said advocate. Anyona Advocate would also have shed light on the refund of Kshs. 178,000/- (if any). As it were, this was not the case.

In our view, the dispute grounded on the existence of a valid agreement and the ensuing consent was clearly a case of Reuben’s word against Edward’s, and additional evidence would have been necessary to enable the court to weigh the evidence in the scales of justice, to arrive at the truth one way or the other. Without any authentication of its validity from Anyona Advocate or even a handwriting expert, the veracity of the agreement was brought into question. We therefore find that the learned judge was right in finding that it was a forgery.

In the result, we have no reason to interfere with the decision of the High Court and we dismiss this appeal with costs to the respondent.

Orders accordingly.

Dated and delivered at Eldoret this 2nd day of June, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR