



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 23 OF 2014

BETWEEN

ABDULATIF AHMED YUNUS.....APPELLANT

AND

HUSSEIN MOHAMED ABDULKADIR.....1ST RESPONDENT

DISTRICT LAND REGISTRAR, LAMU.....2ND RESPONDENT

(Being an appeal against the judgment and order of the High Court of Kenya at Malindi (Angote, J.) dated 28th February, 2014 in H.C. E.L.C. Case No. 26 of 2011)

JUDGMENT OF THE COURT

This is an appeal arising out of a judgment delivered by **Angote, J** on 28th February, 2014.

Briefly, the appellant herein **Abdulatif Ahmed Yunus** filed a suit against **Hussein Mohamed Abdulkadir** (*the 1st respondent*) and the **District Land Registrar, Lamu** (*the 2nd respondent*) on 7th November, 2011. In the plaint, the appellant averred that he was the owner of 4/15 shares on **Plot No. Lamu /Block 1/714 (the suit land)** situated within Lamu Township; that on 28th June, 1991, he entered into a sale agreement with the 1st respondent for the latter to buy the suit land; that the 1st respondent paid him Kshs.50,000/- and as agreed took possession of the suit land and finally that the two respondents fraudulently caused the suit land to be transferred to the 1st respondent before payment of the full purchase price. His prayers were:

- i. “A declaration that the transfer of 4/15 shares on Plot No. Lamu/Block 1/714 Lamu to the 1st defendant by the 2nd defendant was null and void.
- ii. An order directing the 2nd defendant to cancel the fraudulent certificate of title issued on 17th September, 2009 to the 1st defendant with respect to 4/15 shares on Plot No. Lamu/Block 1/714 Lamu and restore the registration of the title into the plaintiff's name
- iii. Alternatively the 1st defendant be directed to pay Kshs.300,000/- together with interest from 25th June 1991 until payment in full.

iv. *Costs of and incidental to this suit.*

v. *Any other or further relief as this Honourable court may deem fit to grant.*”

The 1st respondent in a defence filed on 24th May, 2011 averred that he had paid a total of Kshs.285,000/- to the appellant; that the appellant had arranged for the transfer of the suit land to him by the then registered owner **Salim Abeid Awadh Hajar** (Awadh) now deceased; that the transfer in his favour was signed by Awadh on 17th July 1991; that he filed **Lamu SRMCC No. 2 of 2011** when he learnt that the appellant had registered the suit land in his favour in 1992 in spite of the sale of the suit land to him in 1991; and that the court ordered the cancellation of the title in the name of the appellant. The 1st respondent denied the allegation of fraud levelled against him.

The matter proceeded to hearing on 30th July, 2013. The appellant testified that he bought the suit land from Awadh and he produced a copy of the transfer dated 26th May, 1992 executed by Awadh in his favour. He later sold the plot to the 1st respondent vide an agreement dated 28th June, 1991 for a total sum of Kshs.300,000/-. He stated that apart from Kshs.50,000/-, the 1st respondent never paid him any other money, and that the 1st respondent was not to take possession of the suit land until full payment was made. He was however aware that the 1st respondent had built a godown on the suit land.

The 1st respondent testified as well as his brother **Sheikh Mohamed Abdulkarir (DW2)**. They reiterated the averments in the 1st respondent's statement of defence.

The 2nd respondent did not take part in the proceedings in the lower court nor in this Court. Suffice to state that when the matter was pending before us, the parties opted to dispose the appeal by way of written submissions. The appellant filed his submissions on 12th November, 2014 and the 1st respondent on 17th November, 2014. On 27th November, 2014, the respondent's and appellant's counsel appeared before us and opted not to highlight their submissions. It is against this background that this Court proceeded to write its judgment.

This appeal being a first appeal from the trial court, we have an obligation to reconsider and evaluate the evidence which was adduced in the trial court and come to our own conclusion bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses (see **Selle & Another vs Associated Motor Boat Co. Ltd [1968] EA 123**). In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on wrong principles in reaching the findings he did (see **Chemagong vs Republic [1984] KLR 611**). (See **Martin v Glyneed Distributors Ltd (t/a MBS Fastenings), The Times of March 30, 1983**).

From the evidence, it is undisputed that the appellant and the 1st respondent entered into an agreement for sale/purchase of the suit land. This was on 26th May 1991 although the agreement acknowledging receipt of payment of Kshs.50,000/- by the respondent is dated 28th June, 1991. The appellant had bought this suit land from Awadh. It was also not in dispute that the agreed purchase price was Kshs.300,000/-. However what was at variance was that in his evidence during the trial, the appellant's position was that the 1st respondent was not to take possession of the suit land until after full payment. This was in contradiction to the appellant's averment in his plaint. In paragraph 6 of the plaint, he averred as follows:-

“ 6. *The plaintiff avers that it was agreed between him and the defendant that the defendant shall take possession after paying the initial instalments of Kshs.50,000/- and shall continue to have possession but shall not transfer the suit property into his name until he pays the entire purchase price of Kshs.300,000/-*”

From the above, it is clear that the appellant was being untruthful on the issue of when the 1st respondent

was to take possession.

There was also evidence of payment by the 1st respondent's brother (Sheikh Mohamed Abdubakar) of Kshs.235,000/- vide a receipt dated 2nd July, 1991 to the appellant. The receipt indicated that the sum of Kshs. "two hundred and thirty five thousand" was received from Sheikh Mohamed being payment of sect... of Plot No. 714 /1". The receipt was signed by the appellant. However, according to the appellant, this was receipt of a business deal, although he did not disclose the nature of this business deal. Again, the appellant was not being truthful as the receipt indicated that the sum of Kshs.235,000/- was in respect of Plot No. 714/1. We are therefore of the view that the appellant entered into a sale/purchase agreement of the suit land for a sum of Kshs.300,000/-. The initial payment made by the 1st respondent to the appellant was Kshs.50,000/-. The appellant allowed the 1st respondent to move onto the suit land. The 1st respondent built a godown on the suit land. The sum that remains unpaid is Kshs.15,000/- and although in the plaint the appellant had an alternative prayer to the effect that:-

"... the 1st defendant be directed to pay Kshs.300,000/- together with interest from 25th June, 1991 until payment in full,

We find that the appellant had been paid a total of Kshs.285,000/- and the trial court could not have entered judgment for Kshs.300,000/- It would appear that in this alternative prayer, the appellant failed to take into consideration the admitted payment of Kshs.50,000/- paid to him at the time of signing the agreement. Again, we find that the appellant was being economical with the truth. How could he be asking for Kshs.300,000/- when in his own admission he was paid Kshs.50,000/- at the time of the sale agreement?

It is also not disputed that the 1st respondent filed Lamu SRMC Misc. Appl. No. 2 of 2001 and obtained orders against the appellant. The appellant acknowledges the filing of this suit as in paragraph 3(iii) of the Memorandum of Appeal he contended that:

*"The alleged proceeding in **Lamu SRMC Misc Application No.2 of 2001** were a nullity as the appellant was not served and was not aware of such proceedings and therefore the appellant was denied the opportunity to defend his claim having been intentionally locked out of the proceedings."*

It may well be the case that the appellant was unaware of the institution of the case against him, but unless and until the orders issued in **Lamu SRMC Misc. Appl. No. 2 of 2001** are set aside, the same are binding on the persons named in the application as parties. The suit had been necessitated by the fact that the appellant had registered the title of the suit land in his name on 26th May, 1992. The order made in the suit and which is yet to be set aside was to the effect that:

*"...The entry registered in favour of **Abdulatif Ahmed Yunus on the Plot No. Lamu/Block 1/714 dated 26th May, 1992, be cancelled forthwith and be replaced with the name of the applicant Hussein Mohamed Abdulkadir**".*

Suffice to state that the court ordered that the suit land be registered in the 1st respondent's name and that the name of the appellant be expunged from the register. We too like the learned Judge find that unless and until the order vesting the suit land in the 1st respondent is set aside, the order is binding on the appellant. The appellant has not endeavoured to set aside the said proceedings. On our part, there is no way we can disregard the order of the Court.

Again, the learned Judge found that the Transfer in favour of the appellant was fraudulent as it was purportedly made in pursuance to a transfer signed on 4th May, 1992 as Awadh (the original registered owner) had died on 20th December, 1991. We too, find that it is indeed impossible for the deceased to have signed the transfer on 4th May, 1992 when he died on 20th February 1991.

One more issue deserves mention. In the submissions filed by the appellant on 12th November, 2014 he attached an affidavit of the 1st respondent dated 15th March, 2001. On our part we hasten to add that there is no provision in this Court's Rules that permit further evidence by including an exhibit in one's submissions. This was clearly irregular and the same is expunged from the record.

The upshot of the above is that we find no merit in this appeal. It is dismissed with costs.

Dated and delivered at Mombasa this 12th day of March 2015

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL