**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)**

**CIVIL APPEAL NO. 48 OF 2014**

**BETWEEN**

**ABDUL JALIL YAFAI ……APPLICANT**

**AND**

**FARID JALIL MOHAMMED ……...……..RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nairobi (Angote, J.) delivered on 22nd September, 2014*

*in*

***CIVIL SUIT NO. 15 OF 2013***

***AND ELC NO. 14B OF 2013 (CONSOLIDATED)***

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**JUDGMENT OF THE COURT**

The appellant moved to the United Kingdom in 1969 at the age of 17 years, where he is now settled. The respondent who is his nephew is engaged in deep sea sport fishing at Watamu.

In 2004 when the appellant visited Kenya the respondent took him along to one of those fishing excursions which drew the appellant's interest and culminated in the two agreeing to establish a joint venture which would involve developing of a fishing club and/or cottages in Watamu area for tourists. It was mutually agreed that the appellant would provide the funds. Because the arrangement was informal and verbal, there is no consensus on certain aspects. For instance, while the appellant insists that he was to provide funds for the purchase of the land where the development would be put up and for the construction of the structures, the respondent maintains that he had already purchased the land which was to be his contribution towards the business venture. It was further the appellant's case that they agreed that the respondent would be entitled to 50% of the profit generated from the business only on account of his role in supervising the construction and the business while 100% of the ownership of the entire business remained with the appellant. The respondent on the other hand claimed that the business and the land were jointly owned in equal shares.

Pursuant to the mutual agreement, it is conceded by both that the appellant upon returning to the United Kingdom remitted in instalments Kshs. 9,000,000 into their joint bank account they had opened with Standard Chartered Bank. This amount, in the appellant's pleadings and testimony, is the proceeds of a loan advanced to him by Lloyds TSB, London (the U.K. Loan).

According to the appellant, the respondent sent to him photographs of the plot he had purchased, copies of the building plans and later on photographs of the construction works. At the same time, the respondent would sent to him copies of the bank statements to update him on the status of the account. Suddenly, the appellant asserted, these updates stopped and his persistent requests to the respondent to do so went unheeded. Because of this failure the appellant became apprehensive and as a result it was clear their relationship was headed for turbulent times ahead.

Indeed, when the appellant next visited Kenya and toured the site he was not satisfied that the funds had been put to proper use. When he asked for the title deed for the property purchased he learnt with consternation that it was in his name jointly with that of the respondent. To exacerbate the situation, the respondent demanded to be paid Kshs.20,000,000 (later reduced to Kshs.10,000,000) as his share of the business before he could surrender the title deed to the appellant. At the same time the property had been used by the respondent as security for a loan from First Community Bank.

But in order to forestall the anticipated disagreement and family disintegration, the two entered into a written agreement on how to settle the accounts and terminate the oral terms. However, that did not happen as the written agreement was to become the bane of the parties as we are about to demonstrate. In summary, the agreement dated 18th December, 2008 drawn by Eric M. Busieka of Mulongo Busieka & Company Advocates and executed by both parties, provided, *inter alia*, that the two being joint *"registered proprietors"* of Plot No. 374 JIMBA in Watamu agreed, that:

i. The entire property *"with the developments thereon"* be sold to a purchaser at a price agreed upon by both parties.

ii. Either of the parties would not act unilaterally in the disposition of the property.

iii. All the relevant costs, fees and charges including outstanding loan facility extended to the appellant would be deducted from the purchase price.

iv. The balance after the above deductions be divided and equally shared by the parties.

v. Before the sale of the property none of the parties would subject the property to any form of *"encumbrance"* or wastage, and

vi. The parties agreed to covenant in good faith to facilitate the successful disposal of the property.

To the agreement was annexed a schedule of the U.K loan repayment, showing the anticipated date for final settlement as 31st December, 2015 and the instalments.

It will also become clear shortly why we have highlighted the words *"registered proprietors"*, *"with the developments thereon"* and *"encumbrance"*.

Suffice however to emphasis that the agreement was in reference to a parcel of land known as PLOT NO. 374 JIMBA. The appellant stated in his evidence in court and pleaded in both the plaint and witness statement that he discovered that he had been duped; that infact there were two properties involved in the matter, the aforesaid PLOT NO. 374 JIMBA and KILIFI/JIMBA/992 (No. 992); that whereas the latter was registered and title deed issued in the joint names of the parties, the former was unregistered. It occurred to him that PLOT NO. 374 JIMBA alone was not suitable for the purpose of the aforesaid agreement. With that information, it became necessary to revisit the agreement. The appellant travelled to Kenya and approached their advocate, the same Eric M. Musiega who on 15th July 2009 effected some amendment to the agreement that has provoked this dispute. The advocate on the instructions of the

appellant included No. 992 after No. 374 effectively implying that the two parcels were to be sold and the proceeds dealt with in the manner explained earlier. The amendment was countersigned by the advocate.

Following the amendment, the advocate swore an affidavit which was annexed to it, stating that the amendment was effected in the presence of both parties and that the amendment formed part of the original agreement.

The respondent objected to the amendment and maintained that he acquired parcel No. 992 with his resources and expended money in cleaning the bushes, fencing it, paying workers and squatters and as such it could not be available for the purpose of the original agreement. He instead offered to refund Kshs. 9,000,000 to the appellant.

Following this statement brought about by the inclusion of parcel No. 992 in the agreement, the appellant brought a suit in which he claimed that the respondent through fraud registered parcel No. 992 in the joint names when he (the respondent) had made no contribution towards its acquisition; that the respondent then fraudulently proceeded to charge to the bank parcel No. 992; that the respondent had also failed to account for all the funds remitted by the appellant to him for the entire project. As a result, the appellant contended, he suffered loss for which he sought compensation by way of general damages for breach of contract, an order directing the respondent to pay one-half of the loan obtained in the UK, failing which he would be deemed to have renounced his interest in the property, and an order that the property be valued and sold with the parties retaining the option to purchase the net share of the other. The appellant also prayed for costs and interests.

The respondent denied having committed any fraud and instead blamed the appellant for the collapse of the project. He insisted that by the time the appellant was remitting the funds, he had already acquired the two properties; that the appellant's only contribution was the Kshs. 9,000,000 in question; that he (the respondent) cannot be drawn into settling a loan which he was not aware of or a party to. He insisted that the appellant in collusion with the lawyer secretly and without any notice to him changed the terms of the original agreement by inserting parcel No. 992 to form part of the agreement.

From the evidence, it was apparent that the respondent filed an originating summons being HCCC No. 15 of 2013 (O.S) against the appellant. But he was unable to serve it on the appellant on account of the fact that the latter lived abroad. So that by the time the appellant brought his plaint he had no knowledge of the existence of the originating summons. The two suits were duly consolidated and heard together.

The trial court considered the evidence presented by both sides and found on the question of ownership of the two parcels of land, that both the respondent and the appellant had failed to produce evidence of the amount they paid to purchase the two parcels or even how much was spent on the construction. The learned Judge concluded that:

> **"In a nutshell, none of the parties placed before this court documentary evidence to show their actual contribution in the buying of plots 992 and 374 and the developments on the said plots. In fact, no valuation report was produced to show the value of the land and the development thereon."**

In construing the amended agreement, the learned Judge said:

> **"The amendment of the agreement of 18th December, 2008 by Mr. Busieka at the behest of the plaintiff was improper……it is trite law that changes to a written agreement can only be amended (sic) by the parties who signed it and not by any other person or by one party. The changes which were made by Mr. Busieka in the agreement on 18th December, 2008 introducing plot No. 992 in the agreement are therefore inconsequential ….It is trite law that courts cannot re-write contracts for parties and the court cannot start speculating about the intention of the parties to the contract."**

In his construction, the words *"registered proprietors", "developments"* and *"encumbrances"* used in the agreement did not necessarily imply that the property envisaged by the parties was No. 992, thereby dismissing the appellant's argument that these terms could not apply to parcel No. 374 as it was not registered.

Ultimately, the learned Judge held the view that, in accordance with the terms of the agreement the property the parties intended to sell to off-set the U.K. loan was plot No. 374 and not No. 992. He nonetheless went ahead and ordered:-

a. the appellant to sell parcel No. 374 and to utilize the proceeds to liquidate the U.K. loan and the balance, if any, to be shared equally between him and the respondent;

b. the appellant and the respondent to jointly sell parcel No. 992, after valuation and share the proceeds equally between themselves; and

c. both parties to share the cost of valuation and each party to bear own costs of the suit.

Only the appellant was aggrieved by the decision. The respondent appeared satisfied with the order to sell No. 374 to offset the U.K loan because in any case that is what he had maintained all along to be his intention. He also appears to have had no problem with the order that the sale proceeds in respect of parcel No. 992 be shared equally. The appellant, for his part, has challenged the decision arguing, *inter alia*, that the learned Judge failed to give due regard to the evidence an independent witness, in the person of the advocate who drew and subsequently amended the agreement; that the learned Judge erred by implying he (the Judge) was being asked by any of the parties to re-write as opposed to interpret the agreement; that contrary to the evidence the learned Judge erroneously held that none of the parties had called evidence to establish their respective investment in the two plots; that in the absence of any evidence, the learned Judge erroneously held that the respondent, by virtue of being engaged in deep-sea fishing business contributed in the development of the two plots, and finally that the learned Judge failed to see that the respondent, by his conduct and demeanour was a dishonest person.

It is our duty in this appeal, being a first appeal, to evaluate afresh the evidence on record in order to draw our own independent conclusions on the matters in controversy while at the same time we bear in mind that we have not seen or heard the witnesses. See **Selle vs. Associated Motor Boat Co. Ltd** [1968] EA 123. It is common ground that the parties entered into an oral arrangement over some investment in which the appellant intended to engage. It is equally conceded that the appellant remitted Kshs.9,000,000 for this purpose. The respondent does not deny having received the funds but asserts that he used them in preparing the two parcels of land in readiness for constructing some structures, putting up a wall around parcel No. 374 and paying the contractor.

While the appellant was able to demonstrate by documentary evidence that within a short period between January and August 2004 he had remitted equivalent of Kshs. 9,000,000 to a joint account operated solely by the respondent, there is no evidence of the cost of the two parcels. There is no evidence from whom and when they were purchased. No sale agreement was presented in evidence. Likewise the respondent made no attempt to account for the Kshs. 9,000,000 he readily admitted having received. The respondent claimed that he purchased parcel No. 992 before the oral agreement, but he does not state when and from whom he purchased it, or even the consideration. It is equally puzzling how the title deed in respect of that parcel was issued on 27th July 2001, yet the funds were sent in 2004!, and yet again the two parties are registered in entry No. 4 as co-proprietors of the parcel.

But even before the dispute was contemplated and while giving evidence before the then Land Disputes Appeal Committee – Coast in a dispute involving him and one Elina Stephen Ngumbao over the ownership of parcel No. 374, which parcel appears to be adjacent to parcel No. 992 the respondent stated that he purchased it from one Mohammed Abbas the original owner at Kshs.800,000. After this, he went on to explain, some squatters invaded the land and only left after he paid them Kshs.200,000.

He also stated that during this period parcel No. 992 was already registered in his name jointly with the

appellant and he had a title deed issued on 27th July, 2001. We have no explanation how the appellant became a joint proprietor three years before they discussed the venture. Two things are however clear to us. The appellant and respondent are jointly registered as owners of plot No. 992 in equal shares. Secondly, parcel No. 374 did not feature throughout the entire period leading to the institution of the suits, until it was included in the original agreement. For instance in HCCC No. 15 of 2013 (O.S) the respondent only asked the court to declare that parcel No. 992 was jointly owned by the parties; that an order be issued for its subdivision in equal portions or in the alternative that it be sold and the proceeds thereof shared equally between the parties; and that the respondent be allowed to pay/or refund to the appellant Kshs. 4,500,000 being half of Kshs. 9,000,000. In the entire originating summons there is no mention of parcel No. 374. In his statement of defence in this matter, parcel No. 374 is only mentioned in relation to the disputed agreement, while in his statement made pursuant to **Order 3 Rule 2 (c)** of the Civil Procedure Rules there is absolutely no mention of parcel No. 374. On the other hand it is apparent from the appellant's entire pleadings and testimony that he expected the respondent to purchase one parcel of land upon which the structures for the business would be built. His only surprise was the joint registration. It is also a common factor that when the parties began to scout for a buyer there was consensus that it was parcel No. 992 that was to be sold.

The respondent confirmed in his statement that he forwarded by e-mail all the documents of title to a prospective purchaser one Patrick Smith a resident of the United Kingdom. Reference to documents of title could only be in respect of parcel No. 992 which is the only registered parcel. When testifying before the trial court, the respondent said the following regarding parcel No. 374;

> **"Plot No. 374 does not have a title……They altered 374 to 992 in the agreement….I bought plot No. 374 from the squatters. They said I must buy the whole land. I have an agreement for plot No. 374…. Mr. Abdul is aware of the agreement for plot No. 374….. I did not want to sell plot No. 374 because it did not have a title deed…….. I invested the money that was sent to me on both plot No. 374 and 992. I cleared plot No. 374 and put a wall around it and put up a small structure on plot No. 374."**

Finally, the Land Disputes Appeal Committee, Coast in upholding the decision of the Land Disputes Tribunal found that:

> **"The disputed land (374) belongs to the respondent, Mohammed Farid Jalil."**

The award was duly filed in the magistrate's court pursuant to **section 7** of the Land Disputes Tribunals Act (repealed), a judgment entered and decree accordingly issued on 29th December, 2008. There is no suggestion that that decision was ever challenged in the High Court. It is clear from this that the respondent was declared the rightful owner of parcel No. 374 in 2008 before the dispute arose. We turn to relate these facts to the agreement in contention. The original agreement, we reiterate, only related to the sale of parcel No. 374. Although the appellant and Busieka Advocate initially maintained that the respondent was consulted over the amendments, at the trial they admitted that this was not so. To this extent, we, with respect, agree with the learned Judge that the amendment of an agreement involving the parties could not be effected in the absence and without the concurrence of one party.

Having made a finding that the amendment was ineffectual and by so finding retaining only parcel No. 374 in the agreement, on what basis did the learned Judge then order that parcel No. 992 also be sold and proceeds shared by the parties? This was despite having made an express finding that there was no evidence of the actual contribution of the parties in its purchase. His explanation was that it was registered in both names of the appellant and respondent. That explanation is circuitous, removing parcel No. 992 with one hand and restoring it with another. The reason cannot be that simply explained.

A contract being a voluntary obligation the law places a high value on ensuring parties have truly consented to the terms that bind them. The law also grants parties broad freedom to agree on the content of the agreement whose terms are incorporated through express promises. Those terms, in case of a disagreement are interpreted by the courts to seek out the true intention of the parties, from the perspective of an objective observer and, in the context of the parties' bargaining environment. Where

there is an obvious gap, courts typically imply terms to fill those gaps without, of course re-writing the agreement for the parties. It is a misnomer to describe this filling of the gaps as "*re-writing*" the agreement. Where there is evidence of fraud, misrepresentation or mistake, the contract will be set aside as was explained by this Court in **National Bank of Kenya Ltd. v. Pipleplastic Samkolit (K) ltd & Another** [2002] EA 503 as follows:-.

> **"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."**

No doubt the appellant did not do due diligence throughout his engagement with the respondent. Within a span of only seven months, he had remitted to the respondent Kshs. 9,000,000. He did this despite not having seen the property he was purchasing or even documentary evidence of the purchase. Things were not made better by their advocate who likewise was quick to append signatures on the agreement before ascertaining the status on the ground. Either due to his naivety and/or trust in the respondent the appellant believed that he had land on which construction of the project was on-going, at least from the photographs initially sent to him by the respondent. To his mind the property on which the construction was being undertaken belonged to him, even if later, to his disappointment, he discovered he co-owned it with the respondent.

We are satisfied with the explanation that on the ground it was not easy for one who did not know the area well to know which property was parcel No. 374 and which one was 992 as the two were adjacent to each other. But the respondent, we have no doubt, knew the details and taking that advantage supplied parcel No. 374 to be inserted in the agreement, despite his knowledge that it was unregistered and was not suitable for the purpose of the agreement.

The agreement as initially drawn, when construed holistically and from the conduct of the parties, leaves no doubt that the parties intended parcel No. 992 to be the subject matter of the agreement. In his own originating summons the respondent readily sought to be allowed to sell parcel No. 992 and share the proceeds with the appellant. It is the same parcel that was offered for sale to one Patrick Smith, a resident of the United Kingdom.

The terms used in the agreement suggest that the parcel the parties had in mind was a registered property. In terms of **sections 3** and **27** of the repealed Registered land Act, under which parcel No. 992, was registered, "*proprietor*" and "*registered*" convey the meaning of a person in relation to land or a lease who is named in the register of land as the owner thereof, or in the case of a charge or a lease, the person named as the person in whose favour the charge is made. It is in such a person that the land vests as an absolute owner. We do not see how the appellant and the respondent would have been described in the agreement as the "*joint registered proprietors*" of parcel No. 374 which was not registered and which was in dispute during this period. The decree issued by the magistrate's court following the award by the Land Disputes Tribunal described the respondent and not the appellant as the lawful owner of parcel No. 374.

The property the parties intended to form the subject matter of the agreement was envisaged to have "*developments thereon*". In our own understanding, the word "*development*" is not a term of art. It merely entails making the land more useful and productive. This may involve, among other activities, building of structures, including a wall and all others assets put on land to improve it. Or briefly put in terms of **Article 60** of the Constitution, when land is held, used and managed in a manner that is, *inter alia*, productive. In this case, although parcel No. 374 could be described as developed because of the wall only, we are of the firm view, taking into account what we have said earlier, that that is not the type of development the parties had in mind. It's the substantial development which formed the core of the project and involved building of the cottages. Such construction was on parcel No. 992.

The parties also undertook not to subject the property to "*any encumbrances*" or wastage. In respect to land, the term "*encumbrance*" is a term of art. For instance, **section 26 (1)** of the Land Registration Act provides that a certificate of title issued upon registration or upon transfer or transmission is only *prima*

*facie* evidence that the person named on it as the proprietor is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained in the certificate. **Section 25** of that Act also makes reference to encumbrances in relations to the right of a proprietor which cannot be defeated and are to be held only subject to leases, charges and other encumbrances and conditions and restrictions, if any, shown in the register.

We, once more do not see what form of encumbrance would be envisaged in parcel No. 374. But because parcel No. 992 was registered, there was reasonable grounds, in view of the evidence that the respondent had obtained a facility on the security of that parcel, to impose such a condition. The learned Judge, with respect took a very simplistic and narrow approach to these questions.

Whereas the conduct of the respondent did not amount to outright fraud upon his uncle, there was proof that the respondent was guilty of material misrepresentation of facts that led to the project collapsing. According to him, he purchased parcel No. 992 at Kshs. 800,000 and had it transferred in 2001. He put up some structures on it whose value he did not give the trial court. The only evidence in this regard was the appellant's expression of shock and disappointment at the low level of construction *vis- a -vis* the funds disbursed.

The uncontroverted evidence is that part of the building material meant for the project was diverted by the respondent to his own construction of a warehouse. He then went ahead and mortgaged the property without the appellant's consent and knowledge. When the respondent agreed to settle the misunderstanding, he deliberately supplied the parcel number which he knew was not suitable for the purpose for which the agreement was drawn.

All these go to show that the respondent deliberately withheld material information and made false presentations which led to the collapse of the project. He may have contributed the land-parcel No. 992, and we so hold, but in view of the purchase price of Kshs. 800,000 which he allegedly paid shortly before the period in question, it would be unconscionable to let him keep the parcel with all the developments and a get away which unaccounted Kshs. 9,000,000. That is why we think that the High Court was in error for failing to properly construe the terms of the agreement, taking into consideration the respondent's conduct and the intention of the parties. The only basis for making the order in relation to parcel No. 374, which was neither jointly owned by the parties nor developed with cottages was the fact that part of the funds in question was used on it to clear the bushes, build a perimeter wall and some other structures. The appellant was only entitled to recover the value of the wall these structures, and not ½ the proceeds of its sale.

Regarding the UK loan, the respondent cannot be heard to complain that he was not privy to it. He may not have been informed initially about the source of funds, but we are satisfied he was subsequently made aware. The details of loan repayment was subsequently expressly made part of the agreement. It was a term that the loan be settled in the first instance before the balance could be shared out. A schedule of the loan repayment was annexed to the agreement thereby incorporating it in the agreement.

With the foregoing, we find no difficulty in reaching the following conclusions. That by reason of registration, parcel No. 992 was owned jointly by the parties and that the respondent had all along in his originating summons, statement of defence and in his oral testimony agreed to have both parcels sold and the proceeds shared equally. In reaching that decision he certainly must have appreciated that part of funds remitted by the appellant also went into developing parcel No. 374. His only complaint with the agreement was the term requiring the sharing of the proceeds from the sale of the two parcels to await the settlement of the UK loan. That concern was without basis in view of our finding that that is what he agreed to by signing the agreement. With full facts regarding parcel No. 374 the respondent was to keep parcel No. 992 as the appellant struggled to realize his financial contribution from the sale of an unregistered parcel No. 374. It would be unconscionable to allow him to do that.

Accordingly, and for the foregoing reasons, we allow the appeal and substitute the orders issued by the High Court with the following orders:-

i. Parcel No. Kilifi/Jimba/992) be valued by a valuer mutually appointed by the two parties within 30 days from the date of this judgment.

ii. The value of the developments on parcel No. 374 including the perimeter wall and any other structures on the land be similarly determined and paid over to the appellant.

iii. Should any party fail to participate in the appointment of a valuer, the party who is ready will be at liberty to appoint one and the other party shall be bound by the valuation,

iv. Once valued parcel No. KILIFI/JIMBA/992 shall be sold and the proceeds in respect thereof shall first be applied in settling the loan granted to the appellant by Lloyds TSB, United Kingdom.

v. The balance, if any, from the proceeds of that sale shall be shared equally by the parties.

vi. The cost of valuation of the parcels shall be borne equally by both parties.

vii. Each party will bear his own costs of this appeal and those in the High Court.

***Dated and delivered at Malindi this 30th day of October, 2015***

**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**