IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 166 OF 2012

RAEL MWONJIA GICHUNGE ……..……..……1ST APPELLANT

PINTU AMAR SINGH ……..……..…….....…… 2ND APPELLANT

AND

FAUD MOHAMMED ABDULLA … …….…….…….... RESPONDENT

(Appeal From the Judgment/Decree of the High Court of Kenya at Meru (Kasango,J) dated 29th September, 2011

in

Meru HCC Appeal No. 17 of 2009)

****

JUDGMENT OF THE COURT

1. The dispute between the parties to this suit involves a motor vehicle whose value has been given as Ksh. 150,000/=. The parties have litigated over this vehicle from the magistrate's court to the High Court and now to the Court of Appeal. The bone of contention is the validity of a sale agreement dated 1st November, 2006 between the parties. The respondent contends that the sale agreement is genuine and valid; the appellants contend the sale agreement is a forgery.
2. The pertinent facts are that the appellants owned motor vehicle registration no. KAU 009 S Land Rover pick-up. The respondent states that by sale agreement dated 1st November, 2006, the appellants jointly and severally entered into a sale agreement for motor vehicle KAU 009 S for a consideration of Ksh. 150,000/=. The appellants deny selling the motor vehicle and insist that the sale agreement dated 1st November 2006 is a forgery.
3. The respondent filed suit against the appellants at the Chief Magistrate's Court at Meru in **CMCC No. 11 of 2006** seeking orders for specific performance and delivery up of the vehicle. The appellants filed defence to the suit and averred that the sale agreement was a forgery. Upon hearing the evidence by all parties including handwriting expert witnesses from both the appellant and the respondent, the Chief Magistrate in a judgment dated 3rd March, 2009, expressed himself as follows:

> ***"Looking at the evidence adduced by all sides in this case, I get convinced by the plaintiff on a balance of probabilities that he indeed bought motor vehicle registration***

no. KAU 009 S land rover from the defendants who are husband and wife. I therefore enter judgment for the plaintiff against the defendants as prayed for in the plaint".

4. Aggrieved by the findings of the Chief Magistrate, the appellants moved to the High Court and in their ground of appeal reiterated that the Chief Magistrate erred in failing to find that the sale agreement dated 1st November, 2006, was a forgery. Kasango J., by her judgment dated and delivered on 29th September, 2011, held that the appeal had no merit and dismissed it with costs. The learned Judge (**Kasango J.**) expressed herself on the issue of forgery of the sale agreement and made the findings following remarks:

> ***"The signature appearing on the summons of appearance filed before the lower court served on the 2nd appellant is similar to the signature on the agreement of sale dated 1st November 2005 (sic). It therefore follows that considering that finding and the evidence of Evans Momanyi … the motor vehicle registration number KAU 009 S was sold by the appellants to the respondent (Faud). Having made that finding, I find that the respondent did not forge the sale agreement nor the acknowledgement of the purchase price. The appellant's handwriting expert did not support the appellant's assertion that the respondent forged the sale agreement or the acknowledgement of purchase price".***

5. Aggrieved by the High Court **(Kasango J.)** dismissing his appeal, the appellant moved to this Court enumerating 21 grounds of appeal which can succinctly be collapsed into two issues namely: Did the Honourable Judge err in failing to find that the sale agreement dated 1st November, 2006, was a forgery? Did the Honourable Judge err in law and fact in finding that the first appellant had sold her motor vehicle registration number KAU 009 S to the respondent?
6. At the hearing of the appeal, learned counsel **Elijah Mageto** represented the appellants while learned counsel **Ken Muriuki** appeared for the respondent.
7. Counsel for the appellants submitted that the learned Judge erred in failing to find that the sale agreement dated 1st November, 2006, was a forgery. It was submitted that both the appellants and the respondent submitted expert handwriting reports that had contradictory findings. That the respondent instructed an expert witness who did not give the basis upon which he arrived at the conclusion that the signature on the sale agreement was similar to the appellants' signature on the summons to enter appearance. Counsel submitted that a document examiner's report must contain reasons as to how he arrived at his conclusions and indicate similarities and dissimilarities in accordance with his opinion. Counsel cited the case of ***Asira – v- R, (1986) KLR 227*** and ***Sakar on Evidence*** in support of this submission. Counsel submitted that in the ***Asira*** case (supra) it was held that the most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by a particular person or that the writing is so similar as to be indistinguishable. Counsel submitted that the report by the handwriting expert instructed by the respondent did not meet the principle set out in the ***Asira*** case and the learned judge erred in relying on this report to deliver the judgment. As regard ***Sakar on Evidence***, counsel for the appellant submitted that expert opinion must always be received with great caution. The appellants urged the Court to find that the sale agreement dated 1st November, 2006, was procured through forgery.
8. Counsel for the respondent in opposing the appeal submitted that the report by the handwriting expert was detailed and gave reasons why the expert believed that the signatures were the same. He further submitted that the respondent's handwriting expert gave oral testimony before the trial court and his evidence was not challenged. Counsel stated that the Honourable Judge was very alive to the danger of relying on the testimony of a handwriting expert and the judge duly cautioned and warned herself of this danger. It was submitted that the sale agreement was attested to by an advocate who gave evidence before the trial court to the effect that he attested the sale agreement and saw all parties sign the same. The advocate further testified that he saw the respondent pay the purchase price to the appellant. The respondent urged this Court to find that the appeal has no merit. In reply to the respondent's submission, counsel for the appellant submitted that the advocate who attested the sale agreement stated that he did not prepare the agreement.
9. We have considered the issues for determination in this appeal and the submissions by counsel for

all parties. We have also analyzed the judgment of the High Court and taken into account that the trial court heard evidence of witnesses for the appellants and respondent. We have considered that the report of the handwriting experts were evaluated by the trial court and re-evaluated by the High Court. The expert called by the respondent had an opportunity to testify before the trial court which examined his demeanor and tested his competence. It was stated in ***Jabane – vs- Olenja, [1986] KLR 661, 664:***

> *"**This Court will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."***

10. This Court is mandated not to give undue regard to technicalities through the overriding objectives as enshrined in ***Sections 3A*** **and** ***3B*** of the ***Appellate Jurisdiction Act*** and as stated in ***Douglas Mbugua Mungai -vs- Harrison Munyi – Civil Application No. Nai. 167 of 2010:***

> ***"We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly" As was stated in Stephen Boro Gitiha- vs- Family Finance Building Society & 3 Others, Civil Application No. Nai. 263 of 2009. "The overriding objective overshadows all technicalities, precedents, rules and actions … and whatever is in conflict with it must give way."***

11. This is a second appeal and this Court in enjoined to consider only points of law. **Section 72** of the **Civil Procedure Act** stipulates that:

Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

(a) ***the decision being contrary to law or to some usage having the force of law;***

(b) ***the decision having failed to determine some material issue of law or usage having the force of law;***

(c) ***a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.***

12. In ***Kenya Breweries Limited -vs- Godfrey Odoyo- Civil Appeal No. 127 of 2007,*** Onyango - Otieno, J.A expressed himself as follows:-

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or***

looking at the entire decision, it is preserve."

13. Both the trial court and the High Court came to concurrent findings of fact that the appellants sold the motor vehicle to the respondent. The two courts below made a finding of fact that the sale agreement was not a forgery. The High Court re-evaluated the testimony of PW 3 Evans Momanyi Advocate who attested the sale agreement and whose testimony the court found was not shaken in cross-examination. PW 3 testified that the parties brought him a typed sale agreement which he witnessed after the parties signed the same. He also witnessed Fuad pay the 1st appellant the purchase price and witnessed the 1st appellant sign the acknowledgment receipt of the purchase price. The court observed that there was no evidence brought by the appellants to show that there was any basis for PW 3 to lie.
14. The appellants urged this Court to overturn the concurrent findings of fact by the two courts below. Having examined and analyzed the judgment of the High Court, we see no reason to upset and depart from the concurrent findings of fact as established by the two lower courts.
15. The appellants in their submissions correctly state that there were two contradictory opinions of handwriting experts. The expert called by the appellants in his report states that the second page of the sale agreement was inserted. The handwriting expert instructed by the respondent states in his opinion that the signature on the sale agreement belongs to the appellant. The Honourable Judge in re-evaluating the report of the two expert witnesses stated:

> ***"The handwriting expert of the appellant did not attend court due to ill health and was not able to explain the statement in his report that page two of the sale agreement was an insertion. I have looked at the agreement of sale and I can see nothing to support the statement of the handwriting expert that the 2nd page of the sale agreement was inserted. It is material to note that the appellant's handwriting expert other than saying there was an insertion did not say that any of the appellant's signatures were forged. The expert simply stated that the 2nd page did not correspond to the 1st page in terms of the lines formed on that page.***
>
> ***The handwriting expert PW 2 Emanuel Kenga, found similarities in the signatures on the agreement and the acknowledgment of the receipt of the purchase money with the replying affidavit sworn by the 1st appellant when this case was before the lower court".***

16. The contradictions in the two expert reports raised an issue of burden of proof. If the two contradictory handwriting expert reports are to be given zero evidential weight and cancel each other, what is left is to determine who has the burden to prove that the sale agreement is a forgery. The legal adage is he who alleges must prove. The appellants allege that the sale agreement is a forgery. We are satisfied that on a balance of probability, the appellants did not discharge this legal burden. In totality, it is our considered view that the grounds contained in the memorandum of appeal raise issues of fact and do not fall within the parameters of ***Section 72*** of the ***Civil Procedure Act***.
17. The upshot is that this appeal is hereby dismissed with costs.

Dated and delivered at Nyeri this 22nd day of January, 2014.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR