



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, GATEMBU & ODEK J.J.A.)

CIVIL APPEAL NUMBER 10 OF 2012

BETWEEN

JAMES MUTHURI MUNGANIAAPPELLANT

AND

MARGARET KAREMARESPONDENT

***(Being an appeal from the Judgment/Decree of the High Court of Kenya at Meru (Lesiit, J.)
dated 3rd November, 2011***

in

HCCC. No.45 of 2003)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court at Meru (the Honourable Lady Justice Lesiit) delivered on 3rd November, 2011 ordering the appellant to transfer the property known as ***Title Number Nyaki/Mulanthankari/100*** to the respondent and restraining the appellant from interfering with the respondent's occupation of the same.

Background

2. On 17th April, 2003, the respondent Margaret Karema, filed suit against the appellant James Muthuri Mungania in the High Court at Meru in ***High Court Civil Case No. 45 of 2003***. In that suit the respondent sought an order for cancellation of title over the property known as ***Title Number Nyaki/Mulanthankari/100*** registered in the name of the appellant. The respondent's case was that as owner of the property, she was lured by the appellant to sign a blank document; that the appellant then got her to appear before a land control board where consent to transfer the land was given under the guise of attending an 'elders' meeting; and that the appellant then had the property transferred to himself.

3. In his defence the appellant denied the respondent's claims and contended that he purchased the property from the respondent in 1983, and that the respondent voluntarily transferred the property to him after due observance of the necessary formalities. He counterclaimed for an order

of eviction.

The Evidence

4. In her testimony before the trial court the respondent stated that she was the registered owner of the property prior to February, 1983; that she was diabetic and that the appellant used to visit her in January, 1983; that the appellant informed her that he would assist her to obtain medicine and that he required the title to the property ‘*to use to get some money*’; that she gave him the title and that he would get her drugs whenever she required; that later the appellant proposed to her that she should adopt him as her son; that as she did not have children of her own she accepted to adopt him; that one day the appellant enquired from her whether she knew how to write; that she informed him that she could write her name; that the appellant then got her to write her name on plain white paper which he took away with him.

5. The respondent further testified that on one occasion the appellant told her that if she died many people would claim the property; that he would call elders so that she could declare before them that the appellant was her son; that the appellant picked her up in a vehicle and took her to a place known as Kinoru where some elders were assembled; that in accordance with a script prepared by the appellant she declared before the elders that the appellant was her son and that she was willing to give him the property and that the appellant would be taking care of her until her death; that “*when he took me to elders, Muthuri did not say that he was taking me to land control board. He told me that they were old men to whom I was to say I had adopted him so that if I die, no one will take the land from him.*” that thereafter the appellant continued to buy her medicine until 1993, when she was taken off the medicine by a doctor and advised to control her sugar level through her diet; that all was well until September 1997, when the appellant asked her to vacate the property exasperated that she had lived for too long; that it was then that the appellant claimed that she had sold the property to him; that on making enquiries at the lands office in Meru, the respondent discovered that the property had been transferred to the appellant on 7th February, 1983, the same year that the appellant had taken her to the ‘*elders*’ who turned out to be land control board; that she also learnt from those enquiries at the lands office that she had purportedly transferred the land to the appellant for a consideration of Kshs. 14,000.00. She produced as exhibits before the trial court the green card, the transfer, the land control board application and consent that she obtained from the lands office.

6. According to the respondent, she trusted the appellant who was a church elder and who requested her to treat him as her child and that she did not at any time enter into an agreement with him for the sale of the property. As she stated under cross-examination “*I gave him the land to take care of me as my adopted son but I never transferred the land to him.*” She was categorical that the appellant obtained title to the property fraudulently. In the respondent’s own words:

“Muthuri took my land through fraud and false pretences. He came pretending to be my son because he knew I had no children. He did all these things just between the two of us and that is why we have no witnesses. I rely on the particulars of fraud on the plaint. No I never negotiated the sale of the land”.

7. On his part, the appellant testified that he is a businessman in Meru where he has a petrol station; that he hails from the same place as the respondent and that he bought the property from her in 1983; that the respondent approached him with land she wanted to sell and that she had difficulty getting a buyer; that after verifying the property was registered in the respondent’s name, he took her to an advocates office but she refused to enter into an agreement stating that she wanted to go to the Land Control board; that they filled in an application for consent dated 18th January, 1983, that they both signed indicating the purchase price of Kshs. 14,000.00; that consent of North Imenti Land Control Board was obtained on the same day; that the respondent signed a transfer of the property in his favour and the property was transferred to him on 7th February, 1983; that he took over the land in 1983, and demolished the mud house that was on it and

replaced it with semi permanent house, planted trees, coffee and bananas and erected a permanent gate; that a dispute arose when the respondent refused to vacate the land whereupon he filed suit number 1243/97, in which the respondent admitted having sold the property to him; that that suit was withdrawn by consent on 25th May, 2001; that the dispute was then handled by the land dispute tribunal and the provincial land disputes appeals committee but the dispute did not end as the respondent filed suit **No. 45 of 2003** in the High Court.

8. The appellant categorically denied that he defrauded the respondent of the land. He stated that he gratuitously assisted her when she was sick. He denied that he requested her to sign a blank document or that he forged her signatures or that he exploited her circumstances or her illiteracy. He maintained that he obtained the property lawfully. He prayed for dismissal of the respondent's suit and sought an order for the respondent's eviction from the property.

9. The appellant's second witness was Gerald Mwiri a carpenter. His evidence was that he constructed a house on the property in 1985, on instructions from the appellant; and that the appellant informed him that he had purchased the property from the respondent. He also stated under cross-examination that the appellant "*never lived on that land*" and that the respondent "*lives on that land*".

10. After hearing the parties, the learned trial judge in a judgment delivered on 3rd November, 2011, was satisfied on the evidence that the respondent had proved her case and gave judgment thus:

"Having come to the conclusion I have of the plaintiff's suit and the Defendant's suit I make the following orders.

1. ***Judgment be and is hereby entered for the Plaintiff against the Defendant as follows:***
 - a. ***A declaration be and is hereby made that the Defendant has no good title in respect of land parcel No.NYAKI MULATHANKARI/100 having been obtained fraudulently and that the said land belongs to the Plaintiff.***
 - b. ***An order be and is hereby given that the Defendant be ordered to transfer back to the Plaintiff land parcel No.NYAKI MULATHANKARI/100, and in default the Executive Officer of this honourable court be and is hereby empowered to sign all the necessary relevant documents to facilitate the transfer of the said land back to the plaintiff.***
 - c. ***An order be and is hereby given over permanent injunction restraining the Defendant, his servant, agent, assignee and/or anybody else's acting on his behalf from interfering with the Plaintiff's quiet and actual occupation of the Land Parcel No.NYAKI/MULATHANKARI/100.***
 - d. ***The Plaintiff will have the costs of this suit with interest at court rates.***
2. ***(a) The Defendants counter claim be and is hereby dismissed in total.***
 - b. ***The Plaintiff shall have the costs of the defendants counter claim."***

11. Aggrieved by that judgment, the appellant lodged the present appeal complaining that the learned trial judge erred in: holding that the fraud on the part of the appellant was proved; the interpretation of section 3 of the Law of Contract Act; failed to address the appellant's counterclaim; in adopting the respondents submissions and disregarding the appellant's submission and in misunderstanding the issues before her.

Submissions by counsel

12. At the hearing of the appeal before us, the parties were represented by learned counsel. Mr. A. Anampiu appeared for the appellant, while Mr. N. Nyaga appeared for the respondent.

13. Mr. Anampiu submitted that the trial judge erred in allowing the claim as the respondent did

not prove fraud; that the appellant admitted having given the title to the property to the appellant as well as having attended the land control board; that the finding by the judge that the transfer of the property was forged was not supported by evidence as the respondent admitted that the signatures on the transfer and on the application for consent to transfer were hers; that beyond her own testimony the respondent did not call other evidence to support her case; that no hand writing expert was called to prove the signatures on the transfer and on the application for consent were forgeries.

14. Citing the decision of this Court in **Gabriel Makhoha Wamukota vs. Sylvestre Nyongesa Donati Civil Appeal No. 6 of 1986**, Mr. Anampiu submitted that the judge erred in failing to uphold the sale on the basis that there was no contract of sale in writing as required under section 3 of the Law of Contract Act when that requirement was cured by the fact that the appellant paid the purchase price and taken possession.

15. Counsel for the appellant submitted that the learned judge failed to consider the appellant's counterclaim and gave no reasons for rejecting it; and that the learned judge adopted the submissions of the respondent while ignoring those of the appellant. With that, counsel for the appellant urged us to allow the appeal.

16. Opposing the appeal, Mr. Nyaga for the respondent submitted that there was sufficient evidence before the trial court that the appellant obtained the respondent's title over the property fraudulently; that the appellant exploited the respondent's circumstances and misled her into giving consent to the transfer; that it was not until the appellant asked the respondent to vacate the property in 1997 when she 'smelt a rat' and made enquiries at the lands office only to discover that the appellant had transferred the property to himself; that there was clear evidence of fraud and the trial judge arrived at the right decision; that the respondent did not sell the property to the appellant.

17. Regarding the complaint that the trial judge erred in holding there was no contract for sale in writing, Mr. Nyaga submitted that the trial court was right in its decision as the appellant has never been in possession of the property and the case of Gabriel **Makhoha Wamukota vs. Sylvestre Nyongesa Donati**, cited by counsel for the appellant does not apply.

18. Counsel concluded by saying that all the evidence before the lower court was considered and that the decision of the trial court should be upheld.

Determination

19. As is our duty as pronounced in **Selle and Another vs. Associated Motor Boat Company Ltd and others [1968] EA 123**, we have re-evaluated and re-examined the evidence as a whole and subjected it to a fresh examination in order for us to form our own independent view of the case. In doing so, we appreciate that we do not have the advantage that the trial court had of hearing the evidence first hand and observing the demeanour of the witnesses.

20. There are three issues for our consideration in this appeal. The first is whether fraud was proved and whether the learned trial judge can be faulted in her finding in that regard. The second issue is whether the learned trial judge was right in holding that there was no agreement satisfying the requirements of the ***Law of Contract Act***. And finally whether the learned judge considered the appellant's counterclaim.

21. We start with the question of fraud. The particulars of fraud were pleaded in the plaint. The particulars are that the appellant pretended he was assisting the respondent by using her title to the property to get medicine for her diabetes; that the appellant got the respondent to write her name on a blank paper that he later used to forge her signature to transfer the property to himself; that he held himself out to her as a church elder and generally exploited her circumstances to have the property transferred to himself.

22. The standard of proof for fraud is higher than on a balance of probabilities. In ***Gudka -vs.- Dodhia - Civil Appeal No. 21 of 1980***, Law, JA held,

“The respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved more than on a mere balance of probabilities”.

23. The learned trial judge was alive to the requirement that allegations of fraud must be strictly proved. She quoted the decision of ***Mutsonga v Nyati, [1984] KLR425*** in that regard. After carefully reviewing the evidence and submissions made before her the learned judge had this to say:

“I do find on a standard higher than the balance of probabilities that the Plaintiff has proved that she did not sell the suit property to the Defendant; that the Defendant through fraud and false pretences as pleaded in the plaint obtained the title deed to her land and signature from her, and by fraud had the land transferred to her. I find that the Defendants title to the land was obtained by fraud, that the consent by the Land Control Board was in the circumstances invalid and it was based on a transaction tainted with fraud and false pretences. The Defendant’s title deed to the suit land is illegal, null and void, and cannot stand”.

24. In our view, the learned judge came to the right conclusion. The facts in this case reminds one of the children’s fable *“The Gingerbread Man”* where a fox, described as a sly old fox offered to assist a little boy to cross the river. The story goes that the fox asked the boy to jump onto its tail in order to be taken across the river. The little boy trusting the fox jumped onto the fox’s tail. The fox then began to swim across the river. Soon after it began to swim across the river the fox turned his head and said to the boy that he was too heavy for the tail and ‘concerned’ that boy would get wet, the fox asked him to jump onto his back. And so the little boy jumped onto the fox’s back. The fox swam a little further out into the river. The fox turned his head again and told the boy that he was too heavy for his back and if he could jump onto the fox’s nose to avoid getting wet. And so the boy did. Soon the fox reached the other side of the river and as soon as his feet touched the bank of the river, he tossed the little boy into the air; the fox opened his mouth and swallowed the boy.

25. There are parallels to be drawn between that fable and the facts of this case. The respondent trusted the appellant. She considered him her adopted son. He was good to her. He took the trouble to look after her by getting her medicine whenever she needed it. She presented him to the ‘elders’ at his request as his son only that the ‘elders’ turned out to be the Imenti North Land Control Board where unknowingly she consented to the disposal of the property to the appellant. She trustingly signed a blank piece of paper that would later turn out to be her undoing. The learned judge methodically reviewed and analysed all the evidence including the evidence contained in the proceedings of the tribunals that had heard the matter; there was for instance the evidence of one Mr. Naaman Mwirichia, a member of the Land Control Board at which the respondent allegedly consented to the transfer of the property in favour of the appellant who was recorded as having stated that the respondent was clear that she had no intention of selling the property to the appellant and that the respondent had told the board that she was only giving the appellant the property as a gift, in exchange of which he was to take care of her.

26. We are for those reasons unable to agree with the appellant that the learned trial judge erred in holding that fraud was proved.

27. The next issue is in relation to the absence of sale agreement. In that regard, the learned judge had this to say:

“What the defendant does not have is a sale agreement and proof of payment for the suit land. S. 3 of the Law of Contract Act provides that the Contract of Sale of Land must be in writing”.

And later;

“In the instant case the Defendant had no Sale Agreement and no proof of payment. In addition he has never taken possession of the suit property. Even if we accept as the Justices in Wamukota Case held that lack of an Agreement could be cured by possession and payment of purchase the price, that position does not assist the Defendant as he does not meet the set requirement”.

28. It is common ground that there was no agreement in writing. In the lower court the appellant argued that an agreement was not necessary given that there was land control board consent to the alleged transaction; that in any event possession cured the absence of a written sale agreement.

29. Before us, the appellant faulted the learned judge regarding the finding that the appellant was never in possession of the land and could therefore not rely on part performance as excusing absence of a memorandum or note in writing.

30. **S. 3** of the **Law of Contract Act**, which was in operation at the material time provided as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- i. Has in part performance of the contract taken possession of the property or any part thereof; or***
- ii. Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract”.***

31. Based on our own review of the evidence the allegation by the appellant that he paid Kshs. 14,000.00 as the purchase price is not supported by any evidence; there is also no evidence of the appellant having taken possession of the property. The evidence of the appellant’s witness Gerald Mwiri was discredited having been found to be contradictory. The proviso to **Section 3(3)** of the **Law of Contract Act** does not in our view assist the appellant.

32. The final complaint was that the learned judge did not consider the appellant’s case. There is no merit in this complaint. The learned judge reviewed and analysed the evidence as presented by both parties as well as the submissions by counsel for both parties. Having found, correctly in our view, that the transfer of the property to the appellant was fraudulent and having rejected the appellant’s case that he purchased the property, the counterclaim was for dismissal.

33. For those reasons, the appeal has no merits. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 18th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. OTIENO-ODEK (PROF.)

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR