



**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: WAKI, NAMBUYE & KARANJA JJ.A.)
CIVIL APPEAL NO. 178 OF 2007**

BETWEEN

ESHA SAID SALIM..... APPELLANT

AND

SALIM KIBWANA HAMISI.....1ST RESPONDENT

MARGARET ADEA ORERO.....2ND RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court at Mombasa

(Sergon J.) dated 15th June, 2007

in

HCCC NO. 248 OF 2004)

JUDGMENT OF THE COURT

ESHA SAID SALIM hereinafter referred to as “the appellant”, was the plaintiff in **Mombasa H.C.C.C. No. 248 of 2004**. **SALIM KIBWANA HAMISI** and **MARGARET ADEA ORERO** hereinafter referred to as “the respondents” were the defendants.

By a Plaint dated 21st October 2004, the appellant sought 4 main orders from the High Court as hereunder:-

(i) “A declaration that the sale and transfer of Plot Nos. 2688/III/M.N, 2689/III/M.N and 2692/III/M.N is fraudulent and a nullity.

(ii) An Order cancelling the registration of Plot No. 2688/III/M.N, 2689/III/M.N and 2692/III/M.N in favour of 2nd Defendant and the registration therefore in favour of the Plaintiff.

(iii) General damages.

(iv) Costs of the suit and interest thereon.”

In their separate statements of defence, both defendants denied the plaintiff’s claim and urged the court to dismiss the suit against them.

The plaintiff testified and called two other witnesses in support of her case. On their part, both defendants testified but called no witnesses. The High Court considered the evidence presented before it along with

the written submissions of learned counsel **Mr. Khatib** and **Mr. Mulwa** for the parties. Having done so, the learned Judge found that the plaintiff had failed to prove her case against the defendants and dismissed her suit with costs to the defendants.

It is that dismissal that prompted the plaintiff to file this Appeal. Mr. Khatib learned counsel for the appellant has proffered 5 grounds of Appeal which we replicate hereunder:-

1. ***“That the learned Judge erred in his evaluation of the evidence and hence came to a wrong conclusion.***
2. ***That the learned Judge erred in law in his finding that the 1st Respondent could sell the properties to the 2nd Respondent when the 1st Respondent had already exhausted his share of the properties.***
3. ***That the learned Judge erred in law in disregarding the Appellant’s evidence without assigning any particular reasons.***
4. ***That the learned Judge erred in law in believing the 1st Defendant’s testimony yet the 1st Defendant was evasive in answering questions during cross examination.***
5. ***That the learned Judge’s findings had no basis considering the evidence tendered by the Appellant.”***

He asks this Court to allow the Appeal and set aside the judgment of the High Court and in its place enter judgment for the appellant as prayed in her Complaint, and also award her the costs of this appeal.

This being a first Appeal, it is incumbent upon us to reconsider the evidence, re-evaluate it and draw our own conclusions while bearing in mind that we have neither seen nor heard the witnesses as they testified nor assessed their demeanor and therefore give due allowance for that. (See **SELLE – VS – ASSOCIATED MOTOR BOAT COMPANY (1968) E. A. 123** at page 126; and **JIWANJI – VS – SANYO ELECTRICAL COMPANY LIMITED (2003) KLR 425**. We therefore recapitulate the evidence adduced before the trial court as follows:-

The plaintiff filed the suit in her capacity as the administratrix of the estate of her brother one **NASSIR SAID SALIM** who died on 22nd June, 2000. She told the court that sometime in 1993, her late brother had entered into an agreement of sale with one **MOHAMMED SHEIKH ALI KENNY** who was said to have been acting on behalf of the 1st respondent’s family to purchase some three plots measuring 50X80 ft each in Mombasa. She produced as exhibit a copy of the said agreement of sale dated 15th November, 1993.

She told the court that Mohammed Kenny had a ‘Power of Attorney’ which authorized him to sell the said plots. The said ‘Power of Attorney’ is dated 14th March, 1994. We shall revisit that issue later in this judgment.

As at the time the appellant’s brother died, the transfers in respect the said plots had not been executed but the deceased had been given the original Deed plans.

Sometime in 2003, the 1st respondent is said to have sold the plots to the 2nd respondent after swearing a false affidavit to the effect that the original Deed plans were lost.

According to the appellant, as at the time the 1st respondent sold the plots in question to the 2nd respondent, the same belonged to her late brother. Her prayer is that they should be transferred to her as the administratrix of his estate. She nonetheless conceded that she did not have the transfer between her late brother and the sellers or owners of the property. She also conceded on cross-examination that the land in dispute was agricultural land and that she was not sure whether the necessary consent from the Land Control Board had been obtained. She was nonetheless not in possession of any consent from the

Land Control Board. The only document she was relying on to support her claim was the agreement of sale between her late brother and Mohammed Kenny. The said Mohammed Kenny is said to have died and was not therefore availed as a witness before the trial court. We note that he was a crucial witness in the case as he is the one who transacted over the parcels of land in question on behalf of the said vendor.

On his part, Salim Kibwana Hamisi (1st respondent) stated in his defence that the said Mohammed Sheikh Ali Kenny is a stranger to him and the estate of **Kibwana Hamisi Tabibu** and that he had no authority whatsoever to sell any of the plots in question to any person.

He also maintained that in order for the sale transaction to have the sanction of the law, the appellant needed to have the consent of the Land Control Board which consent was never obtained. He submitted therefore that if appellant has any claim in respect of that land, the same lies in a claim for damages or refund of the purchase price from the said Mohammed Kenny.

The 2nd respondent's defence was that she is a *bona fide* purchaser for value and a stranger to the appellant's claim which she says would lie against the 1st respondent for damages but not for the cancellation of her Title Deeds. She says that she has good Title to those plots and so the claim against her was rightly dismissed.

The learned Judge of the High Court considered this evidence along with the submissions of both counsel. He found that the 'Power of Attorney' which was a crucial document in support of the plaintiff's case was not produced as exhibit and so there was no nexus established between **Mohammed Kenny** and the 1st respondent or the properties in question. He also found that the said Kenny had not testified and that that was fatal to the appellant's case. He further found that there was no consent of the Land Control Board as required under **Cap 302** of the **Laws of Kenya** and the said transaction was therefore unenforceable. The learned Judge consequently found the appellant's case not proved to the required standard and dismissed it with costs to the respondents.

Being aggrieved by the said dismissal, the appellant filed this Appeal and proffered 5 grounds as earlier stated.

In his submission Mr Khatib learned counsel for the appellant urged that the 1st respondent knew Mohammed Ali Kenny very well and that it was the 1st respondent and his siblings who had allowed the said Kenny to sell the plots in question on their behalf. He submitted further that the 1st respondent was a dishonest person in that he had sold the plots in question after he had already exhausted his share of 4 plots which were his inheritance from his late father. He had also lied that the original Deed plans were lost while knowing very well that the same were in the custody of the appellant. Learned counsel's thrust was that the 1st respondent should not be allowed to benefit from those illegalities. He relied on the case of **KENYA PORTS AUTHORITY Vs KUSTRON (K) LIMITED 2009 E.A 212** for that proposition. He therefore urged the court to find in favour of the appellant and allow this appeal.

Mr. Nduya, counsel for the respondents urged this Court to dismiss this appeal. He submitted that the 'Power of Attorney' in question was not registered; it had not been signed by all the donors; and no stamp duty had been paid on it. He urged us to find that the same was invalid and it could not therefore have been used to transfer the properties in question. He also reiterated that there was no Land Control Board's consent as mandated under the Land Control Act (**Cap 302** of the Laws of Kenya). He urged us to dismiss this appeal.

We have re-evaluated and considered this evidence afresh. Having done so, we are of the considered view that the pivotal and most important point for decision is whether the 'Power of Attorney' in question was a document that was capable of donating to Mohamed Kenny the power to dispose of the property in question to any third party. It is conceded that the so called "Power of Attorney" was not registered; no stamp duty had been paid on it and further that it had not been signed by all the listed donors. (It is noted that one **Omar Kibwana Khamis** did not sign). We have considered carefully the contents of the 'Power of Attorney'. We have observed that indeed the same is dated 14th March 1994.

Even assuming that it was a legally compliant and valid document, it could only be effective from 14th March 1994 and not before as it cannot operate retrospectively.

The agreement of sale between the said **Mohammed Kenny** and the appellant's late brother on which the sale transaction in question was grounded was entered into on 15th November 1993. As at the time the said **Mohammed Kenny** sold the said plots to the appellant's husband therefore, he had no authority from either the 1st respondent or any of his siblings to act on their behalf. The 'Power of Attorney' could not operate retrospectively. This fact therefore renders the entire transaction a nullity. It would not even have made any difference whether there was consent from the Land Control Board to transfer the said plots as required by law.

Moreover, as rightly observed by the learned Judge of the High Court at page 4 of his judgment; there was indeed no consent from the Land Control Board and that also rendered the transaction null and void and thus unenforceable.

According to counsel for the appellant, the transaction between the 1st respondent and 2nd respondent was fraught with fraud and the 1st respondent should not therefore be allowed to benefit from it. Even if this Court were to so find, that would still not validate the appellant's claim. If for instance the 1st respondent committed fraud by selling plots which he knew belonged to his other siblings then that is between him and such siblings and they would be at liberty to pursue any cause of action they would deem fit against him. Similarly, if the 1st respondent lied about the original Deed plans, that still would not benefit the appellant or assist her in her appeal at all.

As rightly submitted by Mr. Nduya learned counsel for the respondents, the appellant's recourse lies in a claim for damages and/or refund of the purchase price which had been paid for the plots.

In sum, we find that none of the 5 grounds in the memorandum of appeal have been proved. We also find no fault with the judgment of the Honourable Judge of the High Court. We find as the Honourable Judge did that the appellant did not prove her case beyond on a balance of probability and as regards fraud to a higher standard short of reasonable doubt as by law required. We see no merit in this appeal. The same must therefore fail. We dismiss it with costs to the respondents.

Dated and delivered at Mombasa this 16th day of March, 2012.

P. N. WAKI
.....
JUDGE OF APPEAL

R. N. NAMBUYE
.....
JUDGE OF APPEAL

W. KARANJA
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR