



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: TUNOI, LAKHA & KEIWUA, J.J.A.)**

**CIVIL APPEAL NO. 106 OF 2000**

**BETWEEN**

**VIJAY MORJARIA ..... APPELLANT**

**AND**

**NANSINGH MADHUSINGH DARBAR  
HULASHIBA NANSINGH DARBAR ..... RESPONDENTS**

**(Appeal from a Judgment and decree of the High Court of Kenya at Nairobi**

**(Onyango Otieno, J.) dated 25th February, 2000**

**in**

**MILIMANI COMMERCIAL COURT CIVIL CASE NO. 277 OF 1998)**

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**JUDGMENT OF TUNOI, J.A.**

I entirely agree with the judgment of Keiwua, J.A. in this appeal. I am in full agreement with it both as to reasoning and conclusions.

The appellant's principal argument in this appeal is that the learned Judge erred in failing to find that the Re-amended plaint did not contain the necessary particulars of fraud and therefore was wrong to hold that the Re-amended plaint disclosed a cause of action for fraud against the appellant. The other aspect of this argument is that the learned Judge was wrong in ordering cancellation of title where fraud had not been pleaded let alone proved. The respondents, the plaintiffs in the suit, testified that they did not execute a charge or transfer of the suit property in favour of the appellant or anyone else. They disowned the Assignment dated 22nd September, 1997, and denied ever having appeared before Mr. Kimatta, Advocate, who prepared it. Naresh Darbar (PW 2), the son of the first respondent, averred that the suit plot was never sold, no agreement of sale was ever made and that the Assignment was procured through trickery.

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred

from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489. In my view the complaint by the appellant is well-merited since the plaint and the re-amended plaint were defective on their faces. The ground of appeal grounded on failure to specifically plead fraud must succeed.

The acts allegedly committed by the appellant are listed as interfering with the title documents, secretly transferring it to himself; concealing the contents of all the documents, etc. These amount to fraudulent acts which should have been distinctly alleged. They were, however, held by the learned Judge to have been proved and therefore sufficient to justify the cancellation of title. He held:

***"Under these circumstances, I cannot strike out the plaint on the question of lack of particulars for fraud as that question of fraud is only one of the issues in the matter".***

If that were so, the learned Judge was duty bound to strike out those paragraphs incorporating fraud. That he did not do so greatly prejudiced the appellant in that the issues for trial were not defined and the appellant could not know with what evidence he ought to be prepared and to prepare for trial.

An appellate court should not lightly differ from a finding of fact by a court of first instance and as a general rule should not interfere with such a finding unless it can be shown that the judge has drawn a wrong inference from the proved facts, or has misdirected himself on the facts, or has failed to take into account some material fact. The first respondent confirmed that he knows very little about the matter the subject of this appeal as he was not there. Further, he testified that he was not present when the loan was granted and when it was repaid. PW2, the prime mover in the whole transaction, testified that:

***"I convinced my father to sign those documents. I understand the implications of the sale agreement. I advised him to sign the sale agreement for my father's property - L.R. 209/9/10 - the subject matter of this suit."***

It does not appear from the judgment that the learned Judge considered the effect of the passage from PW 2 which is set above. The question is whether if he had had regard to this evidence, he could have reached a different conclusion from that he did.

The above passage confirms the validity of the Assignment of the suit property in favour of the appellant. It would appear that there was a clear and genuine intention to sell the suit property to the appellant. In my view, the learned Judge did not sufficiently consider, in the light of PW 2's admission that the transaction was valid. Had the learned Judge considered this aspect of the matter and taken into account PW 2's admission, I have no doubt in my mind that he should have reached the conclusion that the transaction was valid and above board.

The learned Judge thought that the value assigned to the suit property by the parties looked "odd and unlikely". He held that the property was undervalued in view of the valuation report prepared before the contract was executed. If the respondents knew of the proper value for their property why did they accept to let it go for Shs.5,000,000/= ? It would, of course, have been a different issue if they did not know the value of the property before the agreement.

It is inimical for courts to limit freedom of contract on the grounds of unconscionability. **Sir George Jessel, Master of Rolls, in Printing & Numerical Registering Co. v. Sampson (1875) L.R. 19 Eq. 462, 465 said:-**

***"...if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice".***

I would adopt this dictum.

In the circumstances, I would allow the appeal with costs.

As Keiwua, J.A. agrees the orders of the court shall be in the terms proposed by him in his judgment.

**Dated and delivered at Nairobi this 1st day of December, 2000.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**