IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. 106 OF 2000

VIJAY MORJARIA ..... APPELLANT

AND

NANSINGH MADHUSINGH DARBAR

HULASHIB NANSINGH DARBAR..... RESPONDENTS

(Appeal from Judgment of the High Court of Kenya at Nairobi (Onyango Otieno, J) dated 25th February 2000 in Nairobi

in

H.C.C.C. NO.277 OF 1998)

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JUDGMENT OF KEIWUA J.A.

This is an appeal by the appellant from the decision of the superior court, Onyango Otieno J, delivered on February 25, 2000 in HCCC No. 277 of 1998 by which the learned Judge held that the transfer of the suit property to the appellant was improper because the debt had been repaid before the end of the six months of the sale agreement's completion date and that the suit property belonged to the 1st respondent Nansingh Madhusingh Darbar and that the purported transfer to the appellant was wrong and constituted a conversion. The learned Judge also ordered that the transfer be cancelled and that no damages were payable by the appellant to the 1st respondent. The learned Judge finally dismissed the appellant's counterclaim.

Broadly speaking, the grounds of appeal were that the learned Judge erred in not finding that the respondents' pleadings which culminated in the re-amended plaint were filed without leave of the court and accordingly it was not properly before the court, in which regard, the re-amended plaint did not disclose any cause of action. The re-amended plaint did not disclose the particulars of fraud and the learned Judge erred in holding that the same disclosed a cause of action for fraud against the appellant and he erred in not finding the suit had not been filed by the respondents but by Nakesh Darbar without the authority from the respondents in which case the pleadings were a nullity. The learned Judge has also erred in holding that the subsequent steps taken by the 1st respondent gave life to the suit. There was variance between the pleadings regarding the agreement of sale and the 1st respondent's evidence and in that event, the 1st respondent could not have proved his case as pleaded in the re-amended plaint. The letter of offer to borrow money by the 1st respondent was a forgery by the said Nakesh Darbar. The learned Judge had erred in ignoring the evidence of the plaintiff's witness Javir Rao Darbar to the effect that that letter of offer had been forged. The case of the 1st respondent had been based on an alleged agreement of December 13, 1995 and not a subsequent one.

The transaction between the appellant and the respondents was not a money lending one and no money had been repaid by Nakesh Darbar. The orders made in the suit in favour of the respondents contravened section 23 of the Registration of Titles Act (CAP 281)

in the absence of any plea of fraud or proof thereof. The doctrine of escrow had not been proved or given rise to by the transfer and sale agreement therein. The prayer for retransfer of the title had not been sought in the re-amended plaint. The basis of the counterclaim had been shown by the overwhelming oral and documentary evidence to support it.

On May 21, 1998, the appellant had applied for the re-amended plaint to be disallowed and to be struck out along with the suit for non disclosure of any cause of action and also that it had been filed without leave of the court and is null and void because the respondents were not entitled to file further pleadings without leave of the court. That application was heard by Mulwa, J. who in his ruling had stated that Mr. Oyatsi for the respondents conceded that no leave of the court for the amendments embodied in the re-amended plaint had been obtained. The learned Judge drew attention to rule 2(2) of Order 6A of the Civil Procedure Rules, as authority for dealing and conversely allowing an amendment of a pleading if the application for leave had been made under rule 3 of the Rules. With respect to the learned Judge, the matter before him did not involve an application under rule 2(1) in so far as the re-amended plaint was concerned. That is because the re-amended plaint had been re-amended outside the period allowed under rule 1(1) of Order 6A. That can be seen from the fact that there is an amended plaint which presumably must have been so amended within the provisions of rule 1(1) of the Rules. The reference in the application to rule 2(1) must be in relation to the amended plaint only, in respect whereof if its amendment had been made in terms of rule 1(1), then the only way to challenge that amendment is as provided for by rule 2(1) and for which the converse situation alluded to by the learned Judge could have been relevant.

The learned Judge should have appreciated that the application was not under rule 2(1) in so far as the re-amended plaint was concerned. The Judge had an admission on behalf of the respondents that the re-amendment was without leave, which being an amendment not catered for by rule 1(1), must in the first place have to have sanction of the court. On the face of the inapplicability of rule 1(1) aforesaid, it follows that rule 2(2) would not have any relevance and the converse situation referred to by the learned Judge in his ruling had no application to the re-amended plaint. In that case, the learned Judge had no choice but to strike out that portion of the re-amended plaint, thus brought in or introduced, for lack of leave. I am aware that the decision of Mulwa J. was not given at the time the decision appealed from was given. But because of the muddled manner that learned Judge applied the rules, I felt duty bound to put the position of the rules straight and beyond doubt, not necessarily for the success or otherwise of this appeal.

The other complaint is that the re-amended plaint did not disclose the particulars of fraud which is a mandatory requirement of rule 8 of Order 6 of the Civil Procedure Rules. The re-amended plaint in paragraph 8B had contended that the registration of the suit premises in the name of the appellant was fraudulent because the appellant knew at the time of registration that the loan had been repaid. That knowledge had been denied and consequently the fraud had also been denied. The appellant had also denied advancing money to the respondents but the money the appellant had paid to the respondents was strictly a consideration for the purchase of the suit premises. The appellant had in his amended defence and counterclaim contended that the plaint disclosed no cause of action for lack of particulars regarding fraud. It is a mandatory requirement of the law that any allegation of fraud must be particularised. This requirement cannot be met by a mere allegation that the registration of the suit premises in the name of the appellant was fraudulent because the appellant knew that the money had been fully repaid. The appellant had denied advancing the money, thereby denying that the suit premises had been given as security. On the other hand, the appellant had stated that the Kshs.5 million he paid the respondents was paid as consideration for purchase of the suit premises. The respondents on their part had not shown that they had repaid the so called loan and in those circumstances, the knowledge imputed to the appellant in the re-amended plaint falls by the wayside and leaves the allegation of fraud not only unsubstantiated but with no attempt to particularise it. That is contrary to rule 8 of Order 6 of the Civil Procedure Rules.

With respect to the learned Judge, the charge of fraud in the re-amended plaint was the cause of action. The respondent did not plead having left their title and other document with the appellant for safe keeping. They alleged, without proof, that the title had been given to the appellant as security for a loan pursuant to an agreement pleaded at paragraph 3 of their re-amended plaint. That agreement had not been shown to exist. The respondents did not also show that the Kshs.5 million had been repaid. Accordingly, as I have found elsewhere in this judgment, the appellant had shown that the title and other documents had been passed to him pursuant to a sale agreement which he had proved its existence. In those circumstances, there cannot possibly have been any other cause of action which was independent of the allegation of fraud. This, as well, disposes the other issue of the validity of the contract posed by the learned Judge.

The respondents had pleaded an agreement made on December 13, 1995 which at the close of their evidence was not proved. In fact one witness called by the respondents, admitted that that agreement did not exist and that meant, the respondents' case founded on that agreement, disappeared. I therefore accept the evidence of the appellant that the transaction between these parties was one of the sales of the suit premises, which is fortified by the admitted agreement dated December 30, 1995. A party is bound by his or her pleadings and must either succeed or fail within those pleadings. He is in law forbidden from shifting his case from that he had set out in his pleadings.

The other matter which was for determination before the learned Judge, was whether the suit was improperly before the court because the person who had instituted it did not have authority to do so. The learned Judge had accepted that argument because it was Nakesh Darbar who instructed an advocate to institute this suit. The learned Judge had properly found that the power of attorney which Nakesh Darbar had from his father did not authorise him to institute the suit. Having found that, the learned Judge was in law, bound to strike out the suit, having, from the beginning, been a nullity and life could not subsequently be breathed into it as the learned Judge attempted to suggest. That was not a mere defect in the authority but a complete lack of it, and there was nothing to be ratified thereafter by the 1st respondent.

The respondents had also contended that the documents of title to the suit premises which formed an integral part of the agreement of sale dated December 30, 1995, as opposed to the ill-pleaded agreement of December 13, 1995, were delivered to the appellant and that delivery constituted an escrow. That argument and the eventual finding to that effect by the learned Judge are a misdirection. It had never been part of the respondent's case that the agreement of December 30, 1995 ever existed or formed part of their case. It is impossible to see how the doctrine of escrow can evolve in the circumstances of this case. The respondents had in their re-amended plaint pleaded an agreement completely unconnected with the agreement of December 30, 1995 which the respondents sought to take advantage of and the learned Judge based the judgment on. As I understand the law, the doctrine of escrow, can only be founded upon what is pleaded and it has therefore to be part of a party's pleading. The agreement for sale dated December 30, 1995 having not formed part of the respondents* case, cannot in my judgment be prayed in aid to espouse that doctrine of escrow.

Counsel for the respondents, in answer to the appellant's argument, that the orders made in the suit, in favour of the respondents contravened section 23 of the Registration of Titles Act (this was because fraud had not been particularised or proved), stated from the bar that the suit premises was not registered under that Act but under the Government Lands Act (Cap 280). We had no reason to doubt that statement coming from counsel, who, no doubt must have been duly instructed to that effect. In that event, it seems that the suit and the appeal have been instituted and prosecuted contrary to the provisions of section 136(1) of the Government Lands Act which bars the institution of actions not commenced within one year after the cause of action arose. But in the event that this section does not apply, I would agree with the appellant that in the absence of proved fraud on the part of the appellant, the orders made by the learned Judge contravened section 23 of the Registration of Titles Act. I also see and accept that the basis of the counterclaim by the appellant had been shown and proved.

Accordingly, those being my views of the matter, I would allow the appeal with costs and dismiss the respondents' suit with costs in the superior court. I would allow with costs the appellant's counterclaim in

the superior court and remit the assessment of mesne profits to the superior court to be heard and determined by another Judge other than Onyango Otieno, J.

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

M. KEIWUA

JUDGE OF APPEAL