



**Sing'Oei v Busienei (Civil Appeal 26 of 2019)  
[2024] KEHC 402 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 402 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL 26 OF 2019  
AC MRIMA, J  
JANUARY 29, 2024**

**BETWEEN**

**PHILLIP KIPYEGON SING'OEI ..... APPELLANT**

**AND**

**LABAN KIPKEMBOI BUSIENEI ..... RESPONDENT**

*(Being an Appeal arising out of the judgment and decree of Hon. P. K. Mutai (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Civil Case No. 428 of 2016 delivered on 15th May, 2019)*

**JUDGMENT**

**Introduction:**

1. The Appellant herein, Phillip Kipyegon Sing'oei, was the Plaintiff in Kitale Chief Magistrates Civil Case No. 428 of 2016; Phillip Kipyegon Sing'oei v Laban Kipkemboi Busienei (hereinafter referred to as 'the suit'). The Respondent was the Defendant in the suit.
2. The Appellant was dissatisfied with the dismissal of the suit and lodged an appeal which is the subject of this judgment.

**The Appeal:**

3. A Memorandum of Appeal was both dated and filed on 12<sup>th</sup> June, 2019. The appeal raised ten grounds disputing the findings of the trial Court.
4. The Appellant faulted the dismissal of the suit and contended that the trial Court did not consider material evidence and the law. He further contended that the contents of the contract were not properly taken into account, that the fact that there was no land to be leased to the Appellant was ignored, that



- Court failed to find that the contract was void, that there was no counterclaim by the Respondent and that the principles of natural justice were not considered.
5. On the basis of these grounds, the Appellant prayed that his appeal be allowed by setting aside the dismissal order and substituting it with an order allowing the suit as prayed.
  6. He further prayed for costs of the present appeal.
  7. The Appellant filed written submissions in support of his plea. The submissions were dated May 20, 2021.
  8. In reiterating and buttressing the grounds of appeal, the Appellant challenged the finding of the Court emphasizing that since there was no land capable of being leased to him, the Respondent's defence could not stand and that his suit ought to have been allowed.
  9. The Respondents opposed the appeal. They filed written submissions dated September 7, 2021.
  10. He principally submitted that the evidence did not support the cause of action. He also posited that the case was not proved as required in law since the Appellant was offered the land, but he without any justification, refused to take possession. He averred that the weight of evidence was clearly against the Appellant's case.
  11. In the end, the Respondent urged this Court to dismiss the appeal with costs.

**Analysis:**

12. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & ano. v Associated Motor Boat Co. Ltd* (1968) EA 123).
13. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).
14. To enable this Court, to ascertain the issues for determination and their discussion, it is imperative that the parties' cases in the suit be revisited. To that end, this Court will begin with the Plaintiff's case in the suit and who is the Appellant in the instant appeal.

**The Plaintiff's case:**

15. The Plaintiffs' case was precise. The Plaintiff and the Defendant (now Respondent) were friends. They were both athletes and had known each other for some time. Sometimes in November 2014, the Defendant approached the Plaintiff and asked him to join him to lease a parcel of land in Trans Nzoia County for maize farming. The Plaintiff further informed the Defendant that he had acquired a 138-acre farm out of which he was intending to pay for 90 acres. He requested the Plaintiff to lease the remaining 48 acres at the rate of Kshs. 9,000/= per acre.
16. The land in issue was known as Plot Nos. 947, 948, 949 and 950 within Chepchoina Phase II Settlement Scheme (hereinafter referred to as 'the land').
17. The Plaintiff agreed and paid a total of Kshs. 432,000/= through a bank deposit of Kshs. 360,000/= and cash payment of Kshs, 72,000/=.



18. It was the Plaintiff's case that he later found out that the Plaintiff was neither the owner or the beneficial owner of the land and that the Defendant had induced the Plaintiff to enter into the lease agreement by fraudulent misrepresentation.
19. The Plaintiff demanded for a refund of the sums of money he had paid in vain, hence, instituting the suit.
20. The Plaintiff called one witness. He was one Andrew Kimaru Martin (PW2). He confirmed being present when the Plaintiff paid Kshs. 72,000/= in cash to the Defendant.
21. The Plaintiff's case was closed by production of documents as exhibits by the consensus of the parties.
22. The Defendant opposed the suit. He denied ever having misrepresented anything to the Plaintiff. He averred that he told the Plaintiff that he was not the owner of the land, but was intent in leasing. That, they agreed that the Plaintiff would lease 48 acres of the land and that he fully paid the lease charges.
23. It was the Defendant's case that the Defendant entered into a lease agreement with a third party leasing the entire land. That, he prepared his 90-acre portion, but the Plaintiff did not. Efforts by the lessor to accommodate the Plaintiff to the next season were unfruitful since the Plaintiff remained adamant that the Defendant was not the owner of the land.
24. The Defendant stated that the Plaintiff reported him to the police and that he was subsequently charged in a criminal case in Kitale Law Courts. That, the criminal case was later withdrawn and the Plaintiff advised to pursue a civil claim.
25. The lessee testified as the Defendant's witness. He was one Peter Barasa Chakali (DW2).
26. DW2 corroborated the Defendant's testimony. He confirmed that he entered into the lease with the Defendant for the land. He clarified that he was not the owner of the land, but had arrangements with the owners that he gets people interested in leasing through him. According to DW2, that is exactly what he did with the Defendant. He confirmed having received all the lease charges from the Defendant.
27. DW2 reiterated that the 48-acre plot that was to be occupied by the Plaintiff was always available and that it was the Plaintiff who refused to carry out the farming. That, the portion remained vacant for the whole of 2015.
28. He further averred that he had, on humanitarian basis, offered the Plaintiff to cultivate during the next season, but the Plaintiff refused.
29. DW2 was categorical that the issue of the ownership of the land did not hinder the Plaintiff from taking possession of the land since none of the owners complained about the lease. Further, he wondered why the Defendant successfully planted his portion.
30. Both the Defendant and DW2 pressed for the dismissal of the suit.
31. By a judgment rendered on May 15, 2019, the suit was dismissed with costs. It was that judgment that yielded the instant appeal.
32. Having carefully perused the pleadings, responses, proceedings, parties' submissions and the decisions variously referred to, this Court fully appreciates the matter at hand.
33. Flowing therefrom, the following issues fall for determination: -
  - a. Whether there was fraudulent misrepresentation by the Respondent.



- b. If the answer in (a) above is in the negative, then whether the Appellant was availed the part of the land for cultivation.
  - c. Reliefs, if any.
34. The issues will be dealt with in seriatim.

**Whether there was fraudulent misrepresentation by the Respondent:**

35. The gist of the Appellant's claim as pleaded in the suit was based on the tort of fraudulent misrepresentation on the part of the Respondent.
36. The *Black's Law Dictionary* (Eighth Edition) defines 'fraudulent misrepresentation' as: -  
A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it.
37. Over time, case law has settled 6 elements for proof of the tort of fraudulent misrepresentation. (See *Derry v Peek* (1889) 14 App Cas 337). The elements are as follows: -
- i. A representation or statement was made by the Defendant.
  - ii. The representation was false.
  - iii. The Defendant knew or did not care to know whether the representation was false.
  - iv. The Plaintiff relied on the representation.
  - v. The representation was made with the intention of influencing the Plaintiff.
  - vi. The Plaintiff suffered a material loss.
38. The Court will now apply the above elements to this case: -

**Whether the Defendant made a representation or statement:**

39. It is on record that the Defendant/Respondent indeed informed the Appellant/Plaintiff about leasing the land.
40. The statement was that the Respondent would lease the land from a third party and that he would utilize 90 acres whereas the Appellant would have the remaining 48 acres.
41. The representation is, hence, proved.

**Whether the representation was false:**

42. According to the Appellant, the statement was false in that he later found out that the Respondent had leased the land from a person, DW2, who was not the owner. The particulars of fraudulent misrepresentation in paragraph 9 of the Plaint attested to the averment.
43. On his part, the Respondent stated his position to wit that he made it clear to the Appellant that it was him who would lease the land and the Appellant would get his portion for farming. He denied any falsity in his statement.
44. DW2 also confirmed the Respondent's position. He stated that the Respondent leased out the land and fully paid the lease charges. He also stated that the Respondent took over possession of the land and went ahead to cultivate the 90-acre portion, but the Appellant declined.



45. According to the Respondent and DW2, the issue of ownership of the land was a non-issue since DW2 had separate arrangements with the owners and that DW2 leased the land to the Respondent on that basis.
46. The suit was a civil claim based on the tort of fraudulent misrepresentation. Like other civil disputes, its conduct is generally governed by the Constitution and the law. For instance, the Evidence Act applies to matters generally relating to evidence.
47. The Evidence Act is clear on its application to civil cases in Section 1 thereof. The provision provides as follows: -
1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
48. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows: -
- 107 ...
- (1). Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
49. The issue of the burden of proof has two facets. They are the legal burden of proof and the evidential burden of proof. The foregoing provisions of the Evidence Act brings out what is referred to as the legal burden of proof. That burden remains on the Plaintiff throughout the case.
50. Reinforcing that the legal burden of proof in constitutional Petitions [and in all cases as well] rests on the Petitioners throughout, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR stated as follows: -
- Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.



51. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 *Suleiman Kasuti Murunga v IEBC & 2 others* (2018) eKLR as under: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.
27. The principle of ‘evidential burden of proof’ is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in *Singh v Mota Singh & another* (2008) 1 KLR 1 stated that an election is a matter of public importance not to be lightly set-aside and in the case of *Jeet Mohinder Singh v Harminder Singh Jassi*, AIR 2000 SC 258 the Supreme Court of India stated that ‘the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law...’.
28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
  - (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
  - (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....
29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which



may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.

52. Apart from the burden of proof, there is also the standard of proof required for a case to succeed.
53. The *Black's Law Dictionary*, (9<sup>th</sup> Edition, 2009) at page 1535 defines 'the standard of proof' as  
[t]he degree or level of proof demanded in a specific case in order for a party to succeed.
54. In many jurisdictions and decisions world over including Kenya, the standard of proof in civil cases is on the 'balance of probabilities.' (See the Supreme Court in Presidential Petition No. 1 of 2017 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR). A Claimant, therefore, is always under a duty to prove its case on a balance of probabilities for it to succeed.
55. In this case, the Appellant enumerated the particulars of fraudulent misrepresentation in paragraph 9 of the Plaint as follows: -
- i. Telling the plaintiff that the defendant was the lawful and/or beneficial owner of the land a fact which the defendant knew was false.
  - ii. Purporting to lease to the plaintiff land of which the defendant was not the lawful and/or beneficial owner.
  - iii. Asking for, receiving and appropriating rent from the plaintiff in respect of the land of which the defendant was not the lawful and/or beneficial owner.
56. The Respondent filed a Statement of Defence wherein he denied the particulars and put the Appellant into strict proof.
57. The Appellant was, therefore, put in sufficient notice that he had to prove what he alleged. In other words, the Appellant was under an obligation to prove what he stated in his Plaint.
58. The agreement between the Appellant and the Respondent was never witnessed by any other person. PW2 only witnessed the payment of Kshs. 72,000/= long after the two had talked and agreed. Whereas the Appellant alleged that the Respondent told him that he was the owner of the land, the Respondent denied as much and contended that he fully disclosed that he was to lease the land from a third party.
59. The Respondent produced a lease agreement for the land between himself and DW2.
60. During cross-examination, the Appellant stated as follows: -  
... Laban [the Respondent] had not told (sic) who owns the land..... He told me he had found the land. It means the land did not belong to Laban.
61. On his own admission, the Appellant confirmed that he knew that the Respondent was looking for the land to lease and that the land did not belong to the Respondent.
62. Therefore, the Appellant seems to have shot himself on the foot. His testimony did not prove any of the particulars of misrepresentation in paragraph 9 of the Plaint.
63. Given the state of affairs, and in view of the evidence of the Appellant, the Respondent and DW2, it comes out that the Respondent told the Appellant that he was to look for land to lease. The land did not belong to the Respondent, but to third parties. The Appellant did not, hence, prove that the statement by the Respondent was false.



64. In sum, the statement by the Respondent was not false.

**Whether the Respondent knew or did not care to know whether the representation was false:**

65. In view of the above discussion that has yielded that the statement by the Respondent was not false, this element can only fail.

66. In other words, the Respondent knew that the statement was true and the trial Court as well as this Court has proved it as much.

**Whether the Appellant relied on the representation:**

67. It is the position that the Appellant relied on the true statement by the Respondent.

**Whether the representation was made with the intention of influencing the Appellant:**

68. The true statement was made in good faith. The Appellant likewise acted on it in good faith.

**Whether the Appellant suffered any material loss:**

69. The lease was entered into and the Respondent took possession of and cultivated his 90-acre portion or part thereof. The Appellant held onto the issue of ownership of the land.

70. According to the evidence by the Respondent and DW2, the Appellant's portion remained vacant for the whole of 2015. Further, the Appellant declined an offer to occupy his portion in 2016.

71. The Appellant's contention that there was no land for cultivation was not proved. He ought to have adduced evidence to that end. No witness testified to the issue. There was also no documentary evidence to support the allegation. As such, the averment remains hollow and unproved.

72. The upshot is that the Respondent did not expose the Appellant to any loss. If anything, the Respondent and DW2 moved to mitigate any loss on the part of the Appellant. DW2 offered the Appellant to cultivate his portion in the next season, but the Appellant refused.

73. There is, therefore, no evidence that the Appellant suffered any material loss over his dealings with the Respondent. If any loss occurred on his part, then it was out of the Appellant's own volition.

74. It is now the finding of this Court that none of the elements of fraudulent misrepresentation was proved by the Appellant as against the Respondent.

75. This Court, therefore, affirms the decision by the trial Court in dismissing the suit.

**Disposition:**

76. In the end, the appeal is determined as follows: -

- a. The appeal is hereby dismissed.
- b. The Appellant shall shoulder the costs of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 29<sup>TH</sup> DAY OF JANUARY, 2024.**

**A. C. MRIMA**

**JUDGE**



Judgment virtually delivered in the presence of:

Miss Mukamo for Mr. Ambutsi, Learned Counsel for the Appellant.

No appearance for Mr. Chebii, Learned Counsel for the Respondent.

Duke – Court Assistant.

