IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 106 OF 2000

VIJAY MORJARIA……..APPELLANT

AND

NANSINGH MADHUSINGH DARBAR…...……RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi Milimani Commercial Courts (Hon. Mr. Justice Onyango Otieno) dated 25th February, 2000

In

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

JUDGMENT OF LAKHA, J.A.

This is the defendant's appeal from a judgment of the superior court (Onyango Otieno, J.) given on 25 February 2000 whereby he declared that the property **Land Reference Number 209/9/10** Nairobi (the suit property) is the property of the plaintiff and ordered that the transfer and registration of the suit property in favour of the defendant be cancelled and vacated; he also dismissed the defendant's counterclaim for delivery of possession of the suit property and mesne profits.

I will set out shortly the facts as they appear on the pleadings and documents and as they were found by Otieno, J. The learned judge rejected almost the whole of the defendant's evidence on the vital issues and accepted that given on behalf of the plaintiff.

At all material times the plaintiff was the owner of the suit property, which was registered in his name. His son needed financial assistance and requested the plaintiff to give the suit property by way of security. Not unnaturally the plaintiff demurred but was over-persuaded to sign a sale agreement which he did only after the defendant had assured him that he would not transfer the suit property. The loan was to be repaid within six months and the interest payable was 60% per annum. Pursuant to the said agreement the plaintiff delivered to the defendant the said documents of title as an escrow together with a duly executed agreement of sale and an assignment on condition that the defendant would hold them pending repayment of the loan of K.Shs. 5 million which the defendant advanced to the plaintiff. Although the plaintiff had repaid the loan with all interest due, the defendant refused to return to the plaintiff the documents of title. On or about 4 May 1998 the plaintiff discovered that on 3 October 1997 the defendant registered a transfer of the suit property to himself without any notice to the plaintiff. The defendant's case was that he had bought the suit property from the plaintiff for K.Shs.5 million although the suit property was valued, to the knowledge of both the parties, at K.Shs. 16.5 million in November, 1995.

The suit came on for hearing before Onyango Otieno, J. between May 1999 and January 2000 and

was heard on thirteen days when the plaintiff testified and called six witnesses while the defendant also testified but called no witness. The learned judge in a considered judgment running into some thirty-four fullscap sheets considered the evidence and analysed the same with care and caution and found for the plaintiff. He concluded his judgment in the following critical paragraphs when he said:-

"In this case, as I have stated above, the surrounding circumstances ..... plus other circumstances I have stated hereinabove leave me with no doubt that the documents of title plus sale agreement were all executed by the plaintiff and left with the defendant on condition that if the plaintiff defaulted in paying the loan advanced to him then the property would be transferred into the name of the defendant.

I am also satisfied from the evidence before me - particularly detailed evidence of PW2 that the loan of K.Shs. 5,000,000/= advanced on 30th December 1995 was duly paid in the month of May, 1996 plus interest as required by the defendant.

Thus I find that the transfer of the suit property to the defendant was not proper as the debt had been repaid before the end of six months as sale agreement completion date was first stipulated. I declare that property Land Reference Number 209/9/10 Nairobi is the property of the plaintiff, Nansingh Madhusingh Darbar and that any purported transfer of the said property to the defendant was wrongful and constituted a conversion.

I order that the said transfer and/or assignment and registration of the said property in the defendant's name be cancelled forthwith. "

The defendant appeals to this Court against the judgment and/or order of the learned judge and although the Memorandum of Appeal sets out 22 grounds of appeal, Mr. Kariuki, advocate for the defendant, argued before this Court only 6 grounds of appeal being as follows:-

THAT the learned judge erred in law:

(1) in failing to find that the plaint, amended plaint and re-amended plaint were filed without leave and no particulars given of fraud.

(2) in failing to recognise the sanctity of TITLE under section 23 of the Registration of Titles Act Cap. 281 as no fraud was alleged or proved.

(3) in failing to hold that PW2. had no locus standii to institute the suit as the power of Attorney did not so authorise.

(4) in issuing a decree in favour of the plaintiff on a basis which was not pleaded.

(5) in shifting the burden of proof to the defendant.

(6) in finding that the sale agreement and the Transfer delivered by the plaintiff to the defendant was in escrow in the absence of an instrument in writing deposited with a neutral party and further erred in taking into consideration subsequent events in finding an escrow.

It is convenient at this stage to emphasise that counsel for the defendant did not seek to challenge the judge's finding of fact, but contended that his conclusion was wrong in law. His main argument may, I think, fairly be summarised as follows: The Transfer and Assignment must be regarded as having been properly executed by delivery as well as signature and each of them was executed free from any condition which would render the instrument as escrow. It follows that the legal estate passed under the Transfer and/or assignment.

I will endeavour to deal with the defendant's contentions before this Court as set out above in the

six grounds of appeal in the same order.

(1) The first complaint was that the plaint, the amended plaint and the re-amended plaint were all filed without leave of the Court. But this is an appeal from the judgment of Onyango Otieno, J. delivered on 25 February 2000. Long before he heard the main suit the plaintiff applied for leave of the Court to amend the plaint as per the draft re-amended plaint and the defendant had applied to have the re-amended plaint to be struck out. Mulwa, J. in his ruling delivered on 24 July 1998 held:

"I decline to disallow the amendment andinstead allow the re-amended plaint filed on 7May 1998 to be deemed to be properly filed andserved. The plaintiff shall pay to the Defendant/applicant the costs of this application in any event."

These issues relating to the pleadings accordingly were never before Onyango Otieno, J. The defendant filed no separate appeal but the ground of appeal on this point taken in the Memorandum of Appeal in this appeal specifically stated to be against the judgment of Onyango Otieno, J. given on 25 February 2000. This seems to be somewhat unfairly critical of Onyango Otieno, J. since he never decided nor could have decided those matters at all. I find no sign in the judgment of Onyango Otieno, J. given on 25 February 2000 which is the subject of this appeal nor in the submissions before him that this point formed any part of the argument of the defendant's case before him. In my judgment, in these circumstances, this argument is not open to the defendant in this appeal.

(2) It was contended that since fraud was neither pleaded nor proved the defendant's newly acquired title cannot, in view of section 23 of the Registration of Titles Act, Cap. 281., be cancelled or set aside. This point was not taken in the Court below and it is a fundamental principle, now long established, that it is not open to a party to take a new point on appeal (save with leave of the Court) if it had not been raised in the court below; see: TANGANYIKA FARMERS ASSOCIATION LTD. V. UNYAMWEZI DEVELOPMENT CORPORATION LTD. 1960 E.A. 620 and ALWI ABDULREHMAN SAGGAF V. ABED ALI ALGBREDI 1961 E.A. 767. No leave of this Court was sought to argue this new point and none was obtained.

There is a further consideration referred to by Lord Birkenhead, L.C. in NORTH STAFFORDSHIRE RAILWAY CO. V. EDGE 1920 A.C. 254 at p. 263:-

"The appellate system in this country isconducted in relation to certain well-knownprinciples and by familiar methods. Theissues of fact and law are orally presented bycounsel. In the course of the argument it isthe invariable practice of appellate tribunalsto require that the judgments of the judges inthe courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

It is further sufficient to say that there is nothing in the material before this Court to show that the Registration of Titles Act, Cap. 281 applies as is relied upon or at all or that the suit property is governed by the provisions of that Act. (3) It is true that the suit was not filed by the plaintiff. It was in fact filed by his son (PW2) ostensibly under the Power of Authority which did not donate any authority to file a suit. But the learned judge, relying on *CHITALAY &. RAO* on Indian Code of Civil Procedure, 6th Edition (1956) Vol. 2 at p. 2098 held that:-

" It has been held that even where there is no authority originally to do an act, it could be given subsequently by the principal ratifying the unauthorized act."

He went on to hold that "the plaintiff has himself ratified the institution of the suit both by action and by accepting that he is the plaintiff and that his son PW2 had authority to institute these proceedings and by giving evidence as the plaintiff".

I have not found any case nor was any brought to my attention to constrain me to hold that the commencing of an action without the authority of the purported plaintiff is a matter which admits of no validation by subsequent ratification of the act of the person concerned. So to hold would be to introduce, as I see it, an entirely new doctrine into the ordinary law of principal and agent, and to make a new exception to the general rule that every ratification relates back, and is deemed equivalent, to an antecedent authority. In the absence of any decision compelling me to do so, I, speaking for myself, decline so to hold. In view of the possibility of ratification of the attorney's act by the plaintiff after action is brought it is perhaps impossible or incorrect to argue, as Mr. Kariuki did, that proceedings instituted without authority are, in the technical sense of the word, a nullity. The learned judge decided this point in favour of the plaintiff and, in my judgment, he was clearly right in doing so. (4) It was contended and strenuously urged that the plaintiff (to whom I shall henceforth refer as the respondent) was disabled from obtaining relief by the form and language of his pleadings. I shall deal first with the point taken by the appellant that the respondent was not entitled to succeed as he had failed to establish the case which was made on the pleadings. In his re-amended plaint the respondent alleged that the contract on which the claim was made was 13 December 1995. The evidence adduced did not disclose any such contract of that date. In the course of the evidence, however, all the witnesses (including the appellant himself) gave evidence that the contract in respect of the transaction was made on 30 December 1995 and evidenced in writing in EX 1. The learned judge, however, did make a specific finding when he held that *"I will accept that the two entered into some agreements through discussions on 13 December 1995 and these were confirmed on 30 December 1995"*

The question is whether the case on which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a contract on 13 December 1995; but the way the evidence came out it became immaterial when the contract was made. The facts on which the respondent succeeded before the superior court were in effect the facts as alleged by the appellant as set out in the preceding paragraph. Although this finding was to some extent a variation or modification of the respondent's case on record, it was based on the same ground of the same contract and it related to the facts as found by the learned judge on evidence properly before him. There was not, in my view, such a radical departure from the case averred on record as would justify this Court in absolving the appellant from liability.

Counsel for the appellant has not, in my view properly, complained that the appellant has been prejudiced in his conduct of the defence. I fail to see how he can have been in any way prejudiced when the facts on which liability was established are those averred in the defence and spoken to by the appellant himself in evidence. One must test the appellant's submission in this way. If the allegation of the contract date had been made on the pleadings in the first place, namely allegations based on the facts as they have now emerged, would the appellant's conduct of the preparation of the case and of the trial and its presentation have been any different? The answer to that is undoubtedly 'NO'. In my judgment, this is just a variation or a modification or a development of what is averred and is not something new, separate and distinct to disentitle the respondent to relief and to do injustice to a large scale - to deprive him of his property valued at K.Shs. 16.5 million in return of a loan for K.Shs. 5 million only.

It follows, so it seems to me, that the question for decision in this case is whether the material facts have been set out in the pleadings as required by Order VI rule 3 of the Civil Procedure Rules. In my judgment the pleadings did set out all the material facts sufficient to justify the legal result which the learned judge has adjudged follow and with which I agree. (5) Criticism was made of the learned judge's comments that a certain witness was not called on behalf of the appellant and certain questions were not put to the respondent in his cross-examination. The learned judge, however, as he himself stated in the judgment, decided the case on the evidence before him. I find no suggestion in the judgment that the learned judge shifted the burden of proof to the appellant. There was, in my judgment, no question of onus in the determination as it came to be made. The judgment was a considered result of the evidence and onus as a determining factor never arose for the learned judge could, and did, come to a positive conclusion on the evidence laid. I cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of

onus in such cases. The Privy Council in ROBINS V. NATIONAL TRUST CO 1927 A.C. 515 at 520 stated:-

"But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."

(6) Mr. Kariuki, on behalf of the appellant, submitted that this last ground of appeal was in reality the crux and fundamental issue in the whose case. It is whether the documents of title to the suit property owned by the respondent were delivered to the appellant as an escrow or by way of a transfer on sale. The learned judge held that the documents of title were delivered by the respondent as an escrow upon the terms that if the respondent defaulted in the repayment of the amount of K.Shs. 5,000,000/= loan advanced to him then the suit property would be transferred into the name of the appellant. He also held that the loan advanced on 30 December 1995 was duly repaid in May 1996 plus interest as required by the appellant. But counsel for the appellant advanced the contention that for delivery of documents to amount to an escrow, two conditions must be fulfilled: there must be an instrument in writing and the documents must be deposited with a neutral third party. With respect, I am wholly unable to agree that either of these conditions need to be complied with. Whether an instrument is executed as an escrow on some and if so what conditions is a question of fact depending on intentions. It would not be useful to go through the authorities on this matter of escrow. Quite apart from Chitty on Contracts referred to by the learned judge, suffice it to say that the legal position is set out in the following two paragraphs found in Volume 12 of Halsbury's Laws of England (4th Edition):-

"1332. Escrow. ***An intended deed may, aftersealing and any signature required forexecution as a deed, be delivered as an escrow(or scroll), that is as a simple writing whichis not to become the deed of the partyexpressed to be bound by it until somecondition has been performed. Thus, a conveyance on sale or a mortgage or a surrender discharging a mortgage may be delivered in escrow so as to be binding on the grantor only if the grantee pays the consideration money or only if the grantee executes a counterpart or some other deed or document as agreed with the grantor.***

Like delivery as a deed, delivery as an escrow may be made in words or by conduct although it need not be made in any special form or accompanied with any particular words, the essential thing in the case of delivery as an escrow being that the party should expressly or impliedly declare his intention to be bound by the provisions inscribed, not immediately, but only in the case of and upon performance of some condition then stated or ascertained. In the absence of direct evidence whether or not a deed of conveyance was delivered as an escrow, the fact that only part of the purchase price has been paid at the time of delivery justifies the inference that the deed was delivered as an escrow pending payment of the balance."

"1333. To whom escrow may be delivered. ***For a deed to be executed as an escrow, it need not be actually delivered into the custody of a stranger to the deed to keep until performance of the condition, and then to deliver it over to the party intended to benefit. A deed may well be delivered as an escrow though the party to be bound retains it in his own possession. It may be delivered as an escrow to an attorney acting for all parties thereto, and even to the solicitor acting for the party to benefit under the deed, provided it is handed to him as the agent of all parties for the purpose of such delivery.***

Where several persons are parties to a deed as grantees and one of them is also the solicitor of the other grantees and of the grantor, and the deed is delivered to him, evidence is admissible to prove that it was delivered to him, not as a grantee, but in his capacity of solicitor to the grantor and as an escrow to take effect only upon the performance of some condition.

At law, however, a deed cannot be delivered as an escrow to the party intended to benefit under it, as such, because delivery of the document to him is necessarily its delivery as a deed, and any stipulation then made by word of mouth and purporting to suspend the operation of the deed until the

performance of some condition would be repugnant to such delivery, and the party delivering the deed would be estopped from averring such a stipulation in contradiction of the deed. In equity, if a sealed writing was delivered as a deed (or a fortiori as an escrow) to a party to benefit under it, upon an agreement that is should not take effect until the performance of some condition, he would be restrained from enforcing it at law until the condition was fulfilled, and if the condition was not observed, the other party would be relieved from liability under the deed."

It is thus clear that the submission of Mr. Kariuki is ill-founded in law. The learned judge's findings (set out above) are findings of fact which this Court will not normally interfere with unless there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong: PETERS V. SUNDAY POST LTD. 1958 EA 424.

I am not persuaded that any such grounds exist (nor was any relied upon) to warrant an interference with the findings made by the learned judge with which I respectfully agree.

I agree with substantially the whole of the judgment of the learned judge and would dismiss the appeal with costs - a result which I am happy to reach as it seems to me to be in accordance with the justice and the reality of the case.

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

A.A. LAKHA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR