



HASSAMDIN GULAMHUSSEIN POTHIWALLA PLAINTIFF

VERSUS

**KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY
DEFENDANT**

RULING

(1) The successful Defendants in a counter-claim for specific performance of a contract for the sale of land subject of the suit have by Notice of Motion dated 10th March 2011 sought to enforce the decree through the following specific prayers:

“1. That Mombasa /Block 1130/XVII be transferred to the buyer, Kidogo Basic Housing Cooperative Society Ltd, P.O. Box 88505 Mombasa.

2. That the two executors, Hussein H. Pothiwalla and Khuzeina H. Pothiwalla: -

(a) Sign the relevant transfer under the Agreement of sale dated 12th August 1994 and furnish the original certified copy of the Letters of Administration and/or Grants of Probate.

(b) Pay inter alia: -

(i) All arrears of Municipal rates on the date of apportionment;

(ii) The taxed costs of the High Court in the sum of Kshs.490,770/=;

(iii) All costs and disbursements and incidental expenses for the execution and enforcement of the decree for specific performance;

(iv) Costs of this application.”

(2) The Defendants’ application is based on the facts that the decree for specific performance was made by the High Court on the 8th December 1997 and an appeal therefrom to the Court of Appeal was dismissed on 30th January 2009. The individual Defendants therefore seek to obtain their own titles upon the subdivision of the suit property in accordance with the agreement for sale.

(3) The Respondents who are the executors of the deceased Plaintiff oppose the application on three principal grounds, namely, (a) that the Respondents were not administrators of the estate of Gullamhussein Pothiwalla for which the deceased Plaintiff had entered into the contract of sale subject of the suit, and they had not been made parties to the suit; (b) that the Judgment of Court and decree extracted therefrom did not require that plot known as Mombasa/Block XVII/1130 be transferred to Kidogo Basi Housing Cooperative Society Ltd; and (c) the Judgement and decree of the court did not make an order for the payment of Municipal rates in any amount whatsoever by any party, and that the decree is in any event contrary to the Judgment.

(4) The parties were represented by Advocates, Mr. Jiwaji and Mr. Omollo, respectively for the Defendants and the Respondents, and the said counsel made oral submissions in support the parties' contention. The issues for determination by the court were two:

- (a) Whether the court would order the transfer of the suit property in execution of the decree for specific performance made in the suit; and
- (b) Whether the court would order the payment by the Respondents of the apportioned Municipal rates accruing on the suit property.

(5) Should the court order the transfer of the suit property? To be sure the Respondents have not been made parties to the suit and they are not administrators of the estate of Gulamhussein Pothiwalla for which the agreement of sale was contracted by the deceased Plaintiff: they are only the executors of the will of the said deceased Plaintiff. However, the same Respondents had before the Court of Appeal applied to be joined as parties to the appeal following the death of the Plaintiff herein. In the Civil Appeal (Application) No. 330 of 2003 of the 9th February 2006, the Respondents sought leave to be substituted as the Appellants in place of the deceased Plaintiff herein on the grounds inter alia that **“the Appellant Husamiddin Gulamhussein Pothiwalla was the administrator trustee and Executor of the estate of his late father Gulamhussein Ebrahimji Pothiwalla and it is necessary that substitution be done so that the interests of the estate of the late Appellants' father Gulamhussein Ebrahimji Pothiwalla can be represented and/or protected in this litigation.”** The Court of Appeal on the 21st July 2006 (per Waki, JA) granted the application in terms that **“I grant the order with the effect that the deceased Appellant be and is hereby henceforth substituted with Hussein Husamdin Pothiwalla, and Khuzeina Husamdin Pothiwalla, the joint Administrators/Executors of his estate, as the Appellants in this appeal.”**

(6) I think it would be absurd to hold as suggested by the Respondents that they could have been joined in the Court of Appeal to protect the interests of the estate of Gulamhussein Ebrahimji Pothiwalla before that court only and not before this court in this suit because they have not been joined herein. I venture to think that the process of litigation is a continuum beginning with the filing of suit in the trial court through the appellate court on any appeals to the final execution in the trial court upon conclusion on the appeal. So that once a person is substituted for of a party during the hearing of the appeal that person remains a party to the proceedings that may be necessary in execution of the ultimate outcome of the litigation before either the appellate or trial court, as the case may be.

(7) The Judgment of the court dated 8th December 1997 is in its executive part as follows:

“I hereby dismiss the case against the Defendants with costs. I enter judgment on the counter-claim for the Defendants as prayed on specific performance with costs.”

The decree of the court extracted i.e. issued on 22nd April 1998 is expressed as follows:

“1. The Plaintiffs' suit be dismissed.

2. The Judgment is hereby entered on the

counter-claim for the Defendants as prayed for specific performance with costs.

3. The Plaintiff do pay to the Defendants their costs of this suit to be taxed and certified by the taxing master of this court.”

In my view, the decree corresponds with the judgment in all its material particulars and I am unable to uphold the Respondents' objection in this regard. Moreover, the Court of Appeal had occasion to consider the issue of the validity of the decree herein in its ruling of 27th May 2007 on an application by the Respondents (defendants) seeking to strike out the Appeal, where the court stated as follows:

“The matter directing and substantially in issue in that application [and appeal (application) No. 268 of 2002] was the validity of the decree and it having been raised was heard and finally decided by the court. The validity of the same decree cannot again be raised herein for to do so would amount to an abuse of the court process.”

(8) It is clear that the property subject of the sale of agreement of 12th August 1994 whose specific performance was considered by the judgment and decree herein is **“forty Two (42) subdivisions as described in the schedule hereto being sub-divisions of the original plot No. Mombasa/Block XVII/1130 (Orig. 1015).”** The sub-divisions are clearly numbered in the schedule as Nos. 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, (two original sub-divisions) and 45.

It appears that sub-divisions Nos. 1, 9, and 13 are omitted from the transaction, and although the Defendants have sought the transfer of the plot of land No. Mombasa/Block XVII/1130, it is clear that the specific performance of the contract for sale can only apply to the sub-divisions enumerated in the schedule. I would therefore grant the prayer for the transfer of the suit property to the extent only of the named **“sub-divisions of original plot No. Mombasa/Block XVII/1130 (Orig. 1015).”**

(9) The issue of payment of arrears of Municipal rates on the date of apportionment was not determined by the Judgment and it should not be dealt with as if it were part of the proceedings for execution of the decree herein. Although the arrears may accrue on account of the disputed ownership of the plot of land so that each party is unable to make the payments for rates in view of the uncertainty of ownership, the issue ought to be separately determined, in my view, to ascertain the liability of the parties and any necessary apportionment. In such proceedings, the Municipal Council is a necessary party as it is the rates/penalty levying party against whose right to levy the rates/penalties the parties herein may raise the defence of uncertainty with regard to ownership of the suit property, if so advised by their counsel.

As authorized by Article 159 of the Constitution, I propose to hear the dispute as relates to the Municipal rates arrears in proceedings between the parties and in the presence of the Municipal Council of Mombasa as a necessary party, which I hereby direct to be joined pursuant to Order 1 rule 10 (2) of the Civil Procedure Rules. For avoidance of doubt the Respondents herein are deemed to have been joined as parties to this suit by virtue of their substitution by the Court on Appeal in place of the deceased Appellant/Plaintiff.

(10) The costs of Kshs.490,770/= in the High Court were taxed by counsel of the parties and a certificate of costs issued on the 22nd April 1998. This order for costs should have been met by the deceased Plaintiff as the personal representative of the estate of Gulamhussein Ebrahimji Pothiwalla for which the deceased Plaintiff had contracted to sell the suit property herein. The respondents herein point out that they are not the administrators of the estate of Gulamhussein Ebrahimji Pothiwalla but executors of the estate of the Plaintiff herein who sued in his capacity as administrator of the former estate. Pending the appointment of an administrator(s) to the unadministered estate of the said Gulamhussein Ebrahimji Pothiwalla pursuant to section 81 of the Law of Succession Act, I appoint the Respondents herein as administrators pendente lite under Rule 10 of the Fifth Schedule of the Law of Succession Act, which is in the following terms:

“Pending any suit touching on the validity of the will of a deceased, or for obtaining or revoking of probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right to distribute the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction.”

In such capacity of administrators pendente lite the Respondents to this application shall be able to pay the agreed costs of Kshs.490,770/= out of the estate of the Gulamhussein Ebrahimji Pothiwalla in compliance with the certificate of costs of 22nd April 1998.

(11) As regards the **“costs and disbursements and incidental expenses for the execution and**

enforcement of the decree for specific performance” and the costs of this application, the same are allowed as against the Respondents to this application who have already been substituted as parties in place of the deceased Plaintiff/Appellant by the Court of Appeal order of 21st July 2006. The said costs will however be agreed or taxed by the taxing officer of the court upon conclusion of the execution process herein and upon determination of any further proceedings that may be presented before the court.

(12) In reaching its decision herein, the court has been guided by the substantial justice principle under Article 159 of the Constitution and the overriding objective of the Civil Procedure Act under section 1A and 1B thereof to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes under the Act. I have considered that the dispute herein started about 40 years ago and that the decree for specific performance of the contract for the sale of the suit property made on 12th August 1994 was given by the court on the 8th December 1997. I have accordingly disregarded the technical objections taken by the Respondents including the one that a Notice to Show Cause was not given before seeking the enforcement of the decree of the court. I have considered that the filing of the formal Notice of Motion seeking the execution and enforcement of the court decree and the hearing thereof interpartes gave as ample an opportunity for the Respondents to Show Cause as would have been given by a technical Notice to show cause form/summons.

(13) Accordingly, for the reasons given in the foregoing paragraphs, I make the following orders on the Defendants’ application dated 10th March 2011:

(1) That Hussein H. Pothiwalla and Khuzeina H. Pothiwalla are deemed as the Plaintiffs following the Court of Appeal decision of 21st July 2006 substituting them in place of the deceased Appellant/Plaintiff herein.

(2) That the Plaintiffs Hussein H. Pothiwalla and Khuzeina H. Pothiwalla do execute relevant sub-division and transfer documents and furnish the requisite registration documents for the transfer of the sub-divisions Nos. 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, (two original sub-divisions) and 45 of the suit property No. Mombasa/Block XVII/1130 (Orig. 1015), within 14 days from the date of this ruling.

(3) The Deputy Registrar of the Court to execute the sub-division, transfer and any registration documents necessary to effect the transfers of the suit parcels of land if the Plaintiffs default to do so within the prescribed time.

(4) The Municipal Council of Mombasa is joined to the suit as a necessary party for the determination of the issue of rates/penalties and apportionment thereof between the parties, which issue will be determined upon hearing such submissions or further submissions as the parties may present before the court on a date to be fixed in consultation with the parties.

(5) The costs of this application and the costs, disbursements and expenses incidental to the execution and enforcement of the decree for specific performance herein are allowed for the Defendants against the Plaintiffs to be agreed, or taxed by the taxing officer of the court in default, at the conclusion of the execution process.

(6) The matter will be mentioned on 15th October 2012 for compliance.

Dated and delivered this 31st day of August 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Omollo for the Plaintiffs/Appellants

Mr. Jiwaji with Mr. Chakera for the Defendants/Respondents

Mr. Obart Court Clerk