



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL APPEAL NO. 14 OF 1998

LUCY NJERI NJOROGE.....APPELLANT

V E R S U S

NJOROGE KAIYAHE.....RESPONDENT

J U D G M E N T

The Appellant **Lucy Njeri Njoroqe (Lucy)** is the sister of the Respondent **Kaiyahe Njoroqe** (Kaiyahe).

Kaiyahe owns a plot within Ngong Township which he acquired through the Local Council in 1974 and developed thereon a shop, bar and butchery between 1975 – 1979 (hereinafter referred to as “the property”). Kaiyahe’s problems with his sister began in 1990 when he was faced with an attachment of his vehicle by a Bank for recovery of a loan owed. He went looking for assistance from his sister and he offered to transfer to her half his interest in the property so that it is held jointly if she paid Shs. 350,000/= for it. They went before a lawyer who drew up a short agreement on 7th September, 1990 providing for the sale and the terms of payment. Shs. 210,000/= was to be paid upon signing the agreement and the balance of Shs. 140,000/= was to be paid in two equal instalments. There was a default clause if the agreement failed to take effect, that the monies paid would be recovered summarily as a civil debt.

According to Kaiyahe, Lucy did not comply with the agreement with the result that his Bankers wanted to proceed with the attachment thus forcing him to sell another of his properties in order to repay the Bank. That was in July 1991.

In the meantime, Lucy had occupied part of the property in 1990 as the other was let to a tenant. She was not paying rent at the time but when she did not comply with the sale agreement, Kaiyahe rescinded it and henceforth regarded her occupation of the property as a tenancy. For her part Lucy said she paid some Shs. 60,000/= to Kaiyahe’s Bankers and deposited the balance of Shs. 80,000/= with some lawyers who called on Kaiyahe to collect but he declined. When those payments were made however, or the details thereof was not disclosed. It would appear, as a finding of fact was so made, that Kaiyahe moved to the Business Premises Rent Tribunal in 1993 and sought leave to levy distress for rent arrears of Shs. 180,000/=. An order issued by the Tribunal on 3rd January, 1994 in case No. 251 of 1993 was in evidence. It would further appear, as there is a Court order exhibited, that Lucy attempted to challenge the order of Tribunal and sought to have a stay of execution granted by the High Court. Temporary stay was granted on terms which Lucy admittedly never complied with. It is not clear whether the Appeal was pursued.

On 24th March, 1994, Kaiyahe served Lucy with a Notice under Section 4(2) of Cap. 301 seeking to terminate the tenancy with effect from 1st April, 1994. Lucy does not deny receiving the Notice but she did nothing about it. The Notice, therefore, took effect since no reference was filed and Kaiyahe moved to the Senior Resident Magistrate’s Court in August, 1994 to seek vacant possession of the premises. Lucy

filed a defence in January, 1995 asserting that she was not in occupation of the property as a tenant but as a purchaser. She sought a transfer of the property in her Counter-claim or in the alternative the refund of her money paid towards the purchase price.

The Learned trial Magistrate heard each party and their witnesses. After making findings of fact on the sale agreement and non-compliance therewith, the trial Magistrate concluded that the only issue was whether Lucy was a tenant in the property or not. She made a finding that the issue was before the Business Rent Tribunal and was determined when orders were made for levy of distress for rent which orders have not been successfully challenged. She further found that there was a valid notice served on Lucy which has taken effect. She found for Kaiyahe and gave vacant possession of the property to him. She made a further order for offsetting of the rent arrears from the purchase price deposited under the "frustrated or rescinded" sale agreement. The Counter-claim was dismissed. That was on 22nd December, 1997.

Lucy then came before this Court on 23rd January, 1998 and challenged those findings and orders. She set out 8 grounds of Appeal but they were argued as two by Learned Counsel for her, Ms. Ndegwa.

Ms. Ndegwa directed her main attack on the finding that Lucy was a tenant when there was in existence an admitted sale agreement of the property. It had no completion date and there was no evidence of rescission. The doctrine of frustration was erroneously applied as it could not convert a purchaser into a tenant. The *ex parte* orders of the Tribunal relating to tenancy were also of no effect and should not have been relied on. It was necessary for the Respondent to establish the elements of a tenancy as by law defined which he did not.

Secondly there was no consideration of the defence and counter-claim and, therefore, the judgment of the lower Court fell short of the requirements of Order 24 of the Civil Procedure Rules.

For his part Learned Counsel for Kaiyahe Mr. Kabarú submitted that there was no enforceable sale agreement as the one pleaded and exhibited was inadmissible in evidence under Section 19 of the Stamp Duty Act for want of stamping. He also thought the agreement was a controlled transaction under the Land control Act but conceded the point that the premises were within a township and was not agricultural land. Mr. Kabarú further submitted that there was an order of the Tribunal in respect of the tenancy and a conditional order of this Court which was not complied with. Hence the Tribunal Order remains unchallenged and the Appellant, therefore, comes before this Court without clean hands.

I have anxiously considered this Appeal and the submissions of both Counsel. This is a first Appeal and I am, therefore, at liberty to re-evaluate the evidence on record and reach my own conclusions. One ground of Appeal which was withdrawn appeared to suggest that all the evidence was not recorded by the lower Court but that is a serious allegation which ought to have been raised long before the Appeal went for Directions or even before then, if there was evidence in support. I can only deal with what is on record.

On the face of it, it appears unjust to convert a purchaser of immoveable property into a tenant when there was no intention to create a tenancy *ab initio*. That the original intention of the parties under the agreement was to have half the interest of the Respondent transferred to the Appellant is not denied on both sides of the argument. There is an agreement signed to that effect. Its admissibility as evidence is challenged on the basis of being unstamped and Section 19 of the Stamp Duty Act is prayed in aid. That Section however, offers no absolute prohibition of admissibility of unstamped documents. Nor does it declare them a nullity for want of that requirement. My construction of the Section is that such documents may be produced subject to compliance with Subsection 3 thereof. The obligations of the parties *inter se* are not otherwise affected by the section.

So that, both parties signed an agreement for sale of a joint interest in the premises on 7th September, 1990. The circumstances surrounding the desire of Kaiyahe to sell that interest do not appear to be denied by Lucy. Kaiyahe was in debt and his Bankers were after him and so he sought to raise money from his sister for that purpose. The matter was discussed in a family meeting and Lucy agreed to help his brother.

The loan taken from the Bank was Shs. 350,000/= which amount Lucy agreed to pay. It is common ground that Shs. 210,000/= was paid when the agreement was signed leaving a balance of Shs. 140,000/=. But Kaiyahe waited for its payment in vain. He had to sell another property to enable him to repay the Bank loan. He made a demand for the balance from December 1990 until 1992 when in view of its non-payment by Lucy he forgot about the agreement and demanded payment of rent from her. She was in occupation of the premises. In effect he rescinded the agreement and subsequently petitioned the Tribunal for recovery of arrears which the Tribunal obliged. Against that evidence is Lucy's whose onus it is to prove her compliance with the terms of the agreement and breach by Kaiyahe, in her Counter-claim. Apart from the acknowledged payment of Shs. 210,000/= at the signing of the agreement she stated that she paid out another Shs. 60,000/= to Kaiyahe's Bankers and deposited the balance of Shs. 80,000/= with her lawyers for collection by Kaiyahe but he refused to collect it. Surprisingly no supporting documents were exhibited for such payments nor could she remember the time span within which they were made. She made her Counter-claim in January, 1995 and was testifying in November, 1997. Lucy remained deliberately vague and in my assessment she was unable to discharge the onus of proof of payment of the balance of the purchase price.

The learned trial Magistrate was vilified for introducing and applying the doctrine of frustration. But I think there was an element of it in this case. The authority produced by Ms. Ndegwa on the subject, **"Cheshire, Fifoot and Furmstons, Law of Contract"** 11th Edition at page 554 discusses the event of discharge from the obligations of a contract under the doctrine of frustration. The relevant aspect of it is referred to as "the frustration of the Common Venture" and the authors state:-

"Owing to an event that has supervened since the making of the contract, the parties are frustrated in the sense that the substantial object that they had in view is no longer attainable. Literal performance may still be possible, but nevertheless it will not fulfil the original and common design of the parties. What the courts have held in such a case is that, if some catastrophic event occurs for which neither party is responsible and if the result of that event is to destroy the very basis of the contract, so that the venture to which the parties now find themselves committed is radically different from that originally contemplated, then the contract is forthwith discharged. Mere hardship or inconvenience to one of the parties is not sufficient to justify discharge. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for." Underlining is mine.

As stated earlier both parties knew the purpose for which Kaiyahe was selling part of his interest in the property. It was to forestall an impending assault on his property by his Bankers. But that event was not averted, thanks to non-payment of the balance of the purchase price by Lucy. Kaiyahe had to resort to his other property to save the situation. Consequently, the event destroyed the very basis of the contract so that the venture to which the parties now find themselves committed is radically different from that originally contemplated. It was an extraneous event forced in by the Bank and to my mind there was an element of frustration. The ends of justice demand that Kaiyahe should not be bound by the contract when the very basis for entering into it in the first place was destroyed. Did the discharge of the contract convert Lucy into a tenant? May be not. What is the evidence?

There is no denying that the title to the property remained with Kaiyahe until such time as the full purchase price would be made and a transfer of the joint interest registered. The sale agreement so provided. But physical possession of part of the property was given to Lucy. According to Kaiyahe's evidence:-

"I built from 1975 till 1979. I stayed there and then I leased it to Peter Mburu and in 1989 to Defendant Lucy Njeri Njoroge. We agreed that she give me Shs. 350,000/= to pay debt. In January, 1990 the Defendant took occupancy,.....she was to continue paying me rent."

Lucy of course denies that she was supposed to pay rent on the property but she did not challenge the time of her occupation of the property. The occupation would appear to have been prior to the agreement

for sale in September 1990 in which event she may not have initially occupied the premises pursuant to the sale agreement.

A tenancy may be created by express agreement, arise by implication or be created by statute. What bothers me, as it did the learned Magistrate, below is the evidence that Lucy was given an opportunity to challenge the allegation that there was a tenancy between her and Kaiyahe on three occasions. Firstly when an application was made by Kaiyahe to the Tribunal to authorize distress for rent. Secondly, before this Court when Pall, J. gave her conditional stay pending the hearing of her application to challenge the Tribunal orders, which conditions were not complied with. Thirdly, when Kaiyahe served her with the Landlord's Notice to terminate the tenancy on account of non-payment of rent. On all three occasions Lucy did nothing to put the allegation of a tenancy to rest. Consequently, legal consequences ensued in effect confirming the tenancy. I do not in those circumstances fault the learned Magistrate who held that the issue of the Defendant's tenancy was already determined. That determination cannot be ignored since it is not set aside lawfully.

I find no merits in the Appeal and I dismiss it with costs.

DATED at **NAIROBI** this 19th day of April, 2002.

P.N. WAKI

JUDGE