



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI( NAIROBI LAW COURTS)**

**CIVIL CASE NO. 917 OF 85**

**LALJI MEGHJI PATEL & CO.LTD.....PLAINTIFF**

**VERSUS**

**SYOKIMAU FARM LIMITED.....DEFENDANT**

**J U D G M E N T**

Three cases namely HCCC No.917 of 195, HCCC No.3958 of 1987 and HCCC 4362 of 1987 were consolidated and heard together. For ease I will call the Plaintiff in HCCC 917/85 Lalji and the Plaintiff in HCCC 3938/87 Kibhare and the Plaintiff in HCCC No.4362/87 Kaydee. Lalji prays for orders that the title to what is now known to be L.R. Number 12715/218 and L.R. Number 12715/219 be transferred to it. I say now became when the suit was filed the titles to those were not registered. It is now clear from page 153 and 157 of the agreed bundle that title documents exist to these properties. I will refer to the pieces of land as “the suit premises” Lalji claims title by virtue of an agreement for sale dated the 27th March 1984 in which Syokimau Farm Limited (Syokimau) and on behalf of John Kilolo Mangeli and Mohammed Mumina agreed to sell to Lalji its plots numbered 327 and 328 each measuring 5 acres or thereabouts being subdivisions of Land Title No. L.R. 7149/11/9 at Embakasi Nairobi. These are what is now the suit premises. This is admitted by the 2nd and 3rd Defendants in their Amended Defence at paragraphs 9(1), as in my ruling of the 19.7.2000 I refused the amendment of this clause by the deletion of the words “now identified as L.R. 12715/218 and L.R. 12715/219 respectively”

As a result of the amendments to the Amended Defence which I allowed the 2nd and 3rd Defendants in paragraph 7 now put the onus of proving the Agreement for Sale on Lalji. Before going any further I feel I must put right a misconception under which the Defendants Syokimau Mr. Mangeli and Mr. Mumina seem to labour. The suit land is registered in the name of Syokimau which has the legal title to the land and therefore the right to deal with it as it wishes. It is not uncommon as in this case that land is allotted to a limited liability company for the benefit of its shareholders who wish to own various portions of the whole land on the basis that in due course the land will be subdivided and the various portions due to individual shareholders are either transferred to them legally or are disposed of by the company in accordance with their wishes.

The relationship between the company and the shareholder is that if Trustee and beneficiary. If by any chance the company disposes of the land or deals with it in any way contrary to the wishes of the shareholder in question then that shareholder’s right is to bring action against the company for breach of trust. In so far as third parties are concerned the company having the legal title is the only body in law which can deal with the land. The third party is not concerned with the rights and liabilities of individual shareholders viz a viz the shareholder and the company. Thus if such a company as in the present case enters into an agreement for sale of any part of the land owned by it legally, the purchaser obtains a good title, irrespective of the rights of the shareholders against the company.

This is borne out by the wording of Section 80 of the Registration of Titles Act which states follows: “(1) Subject to provisions hereinafter contained as to land held upon trust for sale and as to registration of caveats, neither the registrar nor in the absence of actual fraud any other person dealing with land registered subject to this Act shall be affected with notice of a trust express, implied or constructive, and the registrar shall not enter in the register particulars of any such trust or register any instrument setting out the terms of a trust.

(2) Mere knowledge that any such trust is in existence shall not of itself be imputed as fraud.” Turning to the Agreement for Sale, This purports he executed by Syokimau under its common seal and witnessed by the secretary and director. Mr. Mangeli stated that he signed as the secretary and Mr. Mumina admitted that it was right that the 1st Defendant (Syokimau) entered into an agreement with Lalji on behalf of himself and Mr. Mangeli. I am satisfied that the Agreement for Sale was properly executed and indeed no question was raised about its execution until the amendment of the Amended Defence which I have referred to above. Had the agreement not been duly executed the parties would not have done acts in furtherance of the Agreement which in fact they did. The Agreement provided for a purchase price of Shs.720,000/- for the two plots with a deposit of Shs.72,000/- paid to Messrs G.K. Ndunda & co. for the vendors. Completion was to be on the 30 June 1984 the date to be extended by the consent of all the parties depending on the release of the deed plans by the Company’s Surveyor. Completion could not in fact take place until this deed plan was available. The duty to get the deed plans lay with the vendor (see condition 15 of the conditions of Sale). The special conditions provided that Lalji would have vacant possession on the execution of the Agreement. Thus vacant possession was given and as a result Lalji entered the two plots and put some Boards and other improvements on the plots.

With regard to payment of the balance of the purchase price of Shs.640,000/- the agreement provided as follows: “ Kshs.288,000/- upon submission of the share certificate and the allotment letter duly issued in the purchases name with a guarantee from the Vendors that in no circumstances it will deviate from its obligation to transfer the said two plots to the Purchasers. (ii) Kshs.360,000/- on the registration of the transfer documents of these two plots in the name of the purchasers”.

Special condition 7 gave Lalji the right to lodge a caveat claiming a purchasers interest and Condition 8 referred to the sale being frustrated. The share certificate referred to the shares held by Mr. Mangeli and Mr. Mumina. The Agreement provided for the land to be transferred to Lalji or its nominee. With regard to the shares and the letter of allotment these were issued in the names of Lalji and Lamco Limited see page 40, 41, 47 & 48 of the bundles and were duly signed. The significance of these documents is that the second and third Defendants transferred the inequitable right to require the 1st Defendant to transfer the legal title in the property to Lalji and its nominee.

I do not accept any of the evidence given by the third defendant when he says he didn’t sign any agreement and that he didn’t sell his shares to anyone. In my view he is lying as he clearly signed the letter of Allotment page 11 of the bundle. The Guarantee page 44 of the bundle as well as the transfer form for his shares. (See Page 70(c) of the Bundle). His contention that Syokimau had no mandate to sell land is not true. The second defendant’s evidence was to the effect that he would have been happy with the sale of the shares and land had he got his money i.e. the purchase price for it but he was told by Mr. Ndunda Syokimau’s Advocate, that he could no give him the money until the transactions were through. He also mentioned that he had only agreed to sell his shares and not the land.

It is unfortunate that he was not paid his purchase price due to problems which arose later before the sale was completed as we shall see. The Guarantee at Page 44 of the Bundle referred to in the Agreement for Sale was given by J. W. Njoka and the second Defendant for the purpose of undertaking that on the signing of the Agreement for sale a letter of allotment would issue in favour of Lalji or its nominee and that on compliance with the conditions of sale in the Agreement they would on getting final approval of the subdivision of the plots and deed plans in respect thereof transfer the plots to Lalji. In fact all of the conditions were fulfilled and all the documentation in favour of Lalji is in place. What then stopped completion of the sale is shown in the correspondence beginning with the letter of the 14.11.84 (66 in the bundle) from G.K. Ndunda and Company to Bhandari & Bhandari the Advocates for Lalji. The letter requests release of the balance of the purchase price to the beneficiaries i.e. the 2nd and 3rd defendants on

receipt of which G.K. Ndunda & Company would release the deed plans to Bhandari and Bhandari. Bhandari & Bhandari replied on the 22.11.84 maintaining that the Agreement for sale provided that the balance of the purchasers price would be paid on their clients getting the deed plans registered in the name of Lalji. They further proposed that they would hold the balance of the purchase price to be released on the registration of the transfer. They duly received the balance of the purchase price from Lalji and informed G.K. Ndunda & Company of this by the letter of the 4.12.84. They also stated in this letter that they should seek instruction from Syokimau and not Mr. Mangeli to whom they had written.

Instructions were then given by Mr. Mangeli and Mr. Nzoka to G.K. Ndunda & Company on the 5.12.84 to cancel the agreement for sale and stating that as neither Mr. Mangeli or Mr. Mumina had been paid the consideration price for the shares and plots they had cancelled the shareholding of Lalji in Syokimau. On the 6th December 1984 the Chairman and secretary of Syokimau wrote to G.K. Ndunda & Company saying they had dissociated themselves as Syokimau Limited to the agreement for sale. This I take as meaning that they wished to rescind the agreement for sale. On the 11.2.84 G.K. Ndunda & Company sent a cheque to Bhandari & Bhandari for Shs.360,000/- being a refund of the money paid to them as stakeholders and stating the letter cancelled the agreement for sale.

They also enclosed a withdrawal of caveat form to enable the caveat lodged by Lalji to be withdrawn. The letter contained a threat that if the caveat was not removed in seven days a step would be taken against Lalji. On the 3.1.85 Bhandari and Bhandari replied. There is some confusion in the mind of Bhandari & Bhandari as to the condition in the agreement relating to frustration but I will deal with this later. The letter however offered to pay Syokimau 720,000/- on two conditions namely,

“ (a) your clients handing us the Deed plans of the two plots. (b) an undertaking under Seal that they will not attempt to cancel a bilateral Agreement and that when the sub-division is finally approved they will transfer plots No. 327 and 328 to our clients or their nominees and in the meantime they will allow peaceful possession and use of these two plots to our clients.” The letter ends by proposing a meeting at which G.K. Ndunda & Company were to come with the deed plans. G.K. Ndunda & Co. wrote again on the 7.1.85 confirming the deal had cancelled (sic) and there was no question of going back. The letter stated that in their clients opinion the improvements in the land were within a mere Shs.2,500/- and threatened legal proceeding if Lalji did not accept the proposals in that letter. On the 9.1.85 Bhandari & Bhandaris replied stating the sum of Shs.360,000 would be put in an interest bearing account and informing G.K. Ndunda & Co. that Lalji were not accepting the money and were interested in specifically performing the contract of sale.

A further letter was sent by G.K. Ndunda & Company on the 14.1.85 reiterating their clients stand but raised a new issue of land control consent which I will deal with later. Bhandari & Bhandari replied on the 16 January 1985 disagreeing with the suggestion that Land Control Board approval was necessary. Further correspondence entered which took the matter no further and in which threats of proceedings and claims for damages were made. Subsequently G.K. Ndunda & Co. made an application to remove the caveat and thereafter Lalji filed these proceedings on the 30.4.85. The question arises as to whether or not Syokimau had a right to repudiate the Agreement for Sale. The reason given is that Lalji did not pay the balance of the purchase price. The Agreement was subject to the Special Conditions attached and completion is dealt with in Special Condition 4. The agreement itself provided for completion on the 30.6.84 but could be extended by agreement of the parties depending on release of the deed plans by the Company's Surveyors. Read together with the Special conditions, completion was to be in two stages.

On the preliminary completion date the purchase was to pay the balance of the purchase price to the vendors advocates and against receipt of this sum the vendor was to deliver to the purchaser the duly executed conveyance together with all necessary discharges of encumbrances and all necessary consents and clearance certificates. In order for this to be a valid transfer it was necessary for the deed plan to be obtained and annexed to the transfer together with a subdivisional certificate. Without these last two documents, the transfer would not be able to be registered. In fact none of this happened and as such the vendor (Syokimau) had not performed its part of the completion procedure and could not therefore cancel or repudiate the Agreement for Sale as it attempted to do. The purchaser Lalji was not bound to accept the cancellation of the contract and had every right to insist on completion and in default seek an order for

specific performance which it has done. The contract was not frustrated as the vendors suggest as nothing happened which was outside the control of the parties. Indeed everything was in the control of the parties. The titles to the suit properties to be found at pages 153 and 157 of the bundle clearly show that the user of the premises is for residential purposes see special condition 3 in each. As such the user is not agricultural and prima facie no land control consent is required for a transfer. If this was the case the onus was on the vendor to prove it which it has failed to do.

The story does not however end here as an intervening event occurred whilst G.K. Ndunda & Co. and Bhandari & Bhandari were involved in the correspondence I have referred to earlier. On the 6.12.94 an Advocate Mrs. Keshar Shiani wrote to G.K. Ndunda & Co. to inform him that the second defendant had transferred 10 shares numbered 41 to 50 in Syokimau to Kibhare. The letter claimed her client was entitled to the allotment of plot No. 12715/218 and asked for a letter of allotment and further enclosed a cheque for Shs.4,400,000/- being the purchase price for the plot. On the 7.12.84 Mrs Shiani wrote a further letter this time on behalf of Kaydee enclosing a cheque for Shs.335,690/- being the price for L.R. No. 12715/219 on lines similar to the previous letter. Both letters asked for undertakings. On the 11.12.84 G.K. Ndunda & Co. wisely wrote to the second and third Defendants stating that as they had given an earlier undertaking (to Bhandari & Bhandari) it would be unsafe to give another similar undertaking to other lawyers. They then advised the matter await the outcome of the matters being dealt with by Bhandari & Bhandari.

Subsequent correspondence ensued in which Mrs. Shiani asked for Vacant possession of the plots to be given to her clients and acting on behalf of Kibhare threatened proceedings first against the second defendant for trespass which was followed by a letter to G.K. Ndunda & Company on the 11.6.85 stating possession was still with Lalji and threatening action against Lalji to whom the letter was copied. Bhandari & Bhandari on behalf of Lalji wrote to Mrs. Shiani on the 20.6.85 informing her of the valid agreement which they claimed Lalji had with Syokimau. The letter stated Lalji was in lawful possession of the plots and informed Mrs. Shiani of the caveat lodged to protect Lalji's interest on the plots. On the 30.9.85 G.K. Ndunda & Co. wrote to Mrs. Shiani asking for the two deed plans in respect of the suit properties to be sent to them to enable the title to be issued in favour of Mrs. Shiani's clients. She was also sent copies of the plaint and Defence in HCCC.917/85. I have no doubt that documentation given to Mrs. Shiani was properly executed by Syokimau and the 2nd and 3rd Defendants and I do not accept the 2nd Defendants evidence that he only wanted to sell his shares and not the land and that he did not negotiate the sale of his land to Kaydee. I do not also accept the evidence of the 2nd Defendant who said he was only selling shares to Kibhare and not land.

He also said he thought the Transfers signed see pages 70D in favour of Kibhare which had subsequent additions made in page 70J were forgeries. I accept that alterations were made later but there were not made with fraudulent intent but merely to give efficacy to the transfer. It was argued both by Mr. Fraser and by Mr. Gitau that as Kibhare was registered on the 19.12.84 it was unable to obtain a transfer of the shares allotted to it by the 2nd Defendant on the 1st December, 1984 as it did not exist. This also applied to the letter of allotment for plot 327. I accept this argument that these documents are nullities and further accept that they could not be ratified subsequently as it was purported to do. To validate these documents they should have been re executed after the company was formed.

However the transfer of land was executed after the company was formed and this is a valid document subject to what I find later. The documents in favour of Kaydee are in fact in order. Having reviewed the evidence I make the following findings and awards:- 1. the Agreement for Sale between Syokimau and Lalji is valid and still in force. As a result of order Syokimau to transfer the two suit premises to Lalji and his nominees by way of specific performance. 2. The whole purchase price of Shs.720,000/- to be paid to Syokimau on registration of the transfers. 3. Syokimau is entitled to interest on the purchase price as follows:

On the sum of Shs.320,000 returned to Bhandari & Bhandari at the rate obtained in the interest bearing account. On the other part of Shs.320,000/- being the balance of the purchase price at the rate stated in the Agreement for Sale. 4. As Syokimau had sold its interest in the land to Lalji it had nothing to sell to either Kibhare or Kaydee. As a result the monies paid by these companies to Syokimau Advocates is to be

returned to them with interest thereon at Court rates. No damage has been proved and I award nothing in this respect. The General rule is that a purchaser is not entitled to damages in the case of sale of land where the vendor is unable to complete as in this case.

5. Syokimau and the 1st and 2nd Defendant will bear the costs of the Plaintiffs in all three cases to be taxed or agreed. 6. Mr. Nzioka who was joined as a defendant, in my view rightly, as he was an executing party to the agreements, will bear his own costs in these suits but I make no order for costs against him. 7. I give liberty to the parties to apply with regard to the misplementation of my orders and for further orders.

Dated and delivered at Nairobi this 15th day of November, 2000.

**PHILIP J. RANSLEY**

**COMMISSIONER OF ASSIZE.**