National Bank of Kenya Ltd v Wafula (Civil Appeal E044 of 2021)
[2024] KEHC 1187 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1187 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E044 OF 2021

WM MUSYOKA, J

FEBRUARY 14, 2024

BETWEEN

NATIONAL BANK OF KENYA LTD ..... APPELLANT

AND

VICTOR GEORGE WAFULA ..... RESPONDENT

(An appeal arising from the judgement of Hon. PA Olengo, Senior Principal Magistrate, SPM, delivered on 27th October 2021, in Busia CMCCC No. 33 of 2017)

JUDGMENT

1. The suit at the primary court was initiated by the respondent against the appellant, for a refund of Kshs. 80,000.00, with interest at commercial rates of 25% per annum; compensation for the price difference of the purchase price of the 2 titles, the subject of the sale and the suit, between 2003 and the date of judgement at Kshs. 25,000.00 per plot per year; and general damages. The allegation was that the respondent had bought, at a public auction, organized at the instance of the appellant, 2 parcels of land, being Bukhayo/Mundika/2763 and 3154, on 24th May 2004, paid the full purchase price, but the 2 parcels were not transferred to his name, as the said parcels of land had, prior to the sale, been transferred to the name of a third party. The respondent countered the suit by arguing, that although a sale did take place, on the date pleaded, it was not in respect of Bukhayo/Mundika/2763 and 3154, but Bukhayo/Mundika/2263 and 3164; the sale was for Kshs. 70,000.00; that it was always willing to transfer Bukhayo/Mundika/2763 to the respondent, save that the property had been fraudulently transferred to a third party prior to the sale.

2. A trial was conducted. The respondent testified, and called 2 witnesses. 1 witness testified on behalf of the appellant.

3. The respondent testified that he bought the 2 parcels of land, at a public auction, conducted on 24th May 2004, and he paid Kshs. 70,000.00 for them. The property was not transferred to him, and he was

later informed that the same had since been transferred to a third party, whereupon he initiated the suit, the subject of this appeal, sometime in 2012. PW2, Wilfred Nyaloro Nyaberi, was a land registrar, who testified on the ownership of the 2 parcels of land, based on the records held by the lands registry. Bukhayo/Mundika/2763 was said to be registered in the name of Chrispinus Ogutu Omongin, as at the time of the sale, while Bukhayo/Mundika/3154 was in the names of Vivian West Syata Majale and Esther Nanjala Eror, as at that date. He testified that while Bukhayo/Mundika/2763 had been charged at some point, Bukhayo/Mundika/3154 had never been subject to any charge. PW3, Isaac Irunda, was a property valuer. He put the combined value of Bukhayo/Mundika/2763 and 3154 at Kshs. 4,400,000.00.

4. DW1, Ezra Odeke Omari, was an employee of the appellant. He testified that the respondent had bought the 2 parcels of land on 11th May 2004, at a public auction, for Kshs. 70,000.00, but the appellant was not able to transfer the 2 to him, as they had been fraudulently transferred and registered in the name of a third party. He pleaded frustration. He stated that the suit was filed out of time. He stated that the 2 parcels of land had been offered by David Okeda Majale, as security, to support his guarantee, for a loan given to one Esther Nafula Tera. He testified that the appellant had not refunded the money, nor given alternative land, to the respondent, pleading failure of communication between the appellant and the respondent. He conceded that the new owner of the property was registered when there was a subsisting legal charge.

5. In its judgement, dated 17th November 2021, the trial court found that the suit was not statute-barred, for the appellant was estopped from pleading limitation, based on its conduct, of luring the respondent into a sale of property that was not available for that purpose. The trial court found in favour of the respondent, and entered judgement against the appellant, for payment of Kshs. 4,400,000.00, being the current market value of the 2 parcels of land, plus costs and interests.

6. The appellant was aggrieved, hence the instant appeal. In the memorandum of appeal, dated 29th November 2021, it avers that the case was not proved against it on a balance of probability; the trial court failed to find that the suit was statute-barred, and was contrary to the provisions of the *Limitation of Actions Act*, Cap 22, Laws of Kenya; the case against the appellant was in the nature of special damages, which ought to have been specifically pleaded and specifically proved in evidence; there was a failure to find and hold that the contract of sale of the property, and the completion process, had been frustrated by circumstances beyond the control of the appellant; the property had not passed to the respondent, hence the respondent was not entitled to claim its market value as special damages; and the judgement was not reasoned, and was against the weight of the evidence.

7. No directions were ever given, for disposal of the appeal by way of written submissions. Nevertheless, both sides filed written submissions.

8. The appellant has collapsed its grounds into 3: on the claim being in the nature of special damages, on the doctrine of frustration, and the judgement not being reasoned. Siasa Pashua & 2 others vs. Mbaruk Khamis Mohammed & another [2012] eKLR (Ojwang, J), Ndegwa Kabogo vs. Cooperative Merchant Bank Ltd & another [2001] eKLR (Gacheche, CA), Thomas Kimagut Sambu vs. National Land Commission and 2 others [2018] eKLR (JM Onyango, J), BWM Precast Housing Development Limited vs. Kingdom Bank Limited & another [2022] KEHC 147 (KLR)(Muigai, J), Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] eKLR (Githinji, J. Mohammed & Otieno-Odek, JJA), Gathoni vs. Kenya Cooperative Creamaries Ltd [1982] eKLR (Potter, JA) and Zion Mall Ltd vs. Mohammed Jama Abdi [2017] eKLR (Githua, J), are cited in support. The respondent urges that the decision by the trial court be upheld. He did not cite any authorities.

9. This is a fairly straightforward case, where the appellant advertised for sale of landed property by public auction. The respondent attended the sale, and placed successful bids, and paid the purchase price. That is not disputed by the appellant. The appellant did not transfer the 2 parcels of land that the respondent had bought at the public auction. The explanation given was that the 2 parcels of land had been transferred to a third party, before the same was advertised for sale by the appellant. The appellant did not also refund the moneys that it had received from the respondent as purchase price, and the respondent remained without his money, and the land he was buying. The suit is for recovery of what the respondent lost, the money he paid or the value of the land that he lost. The trial court awarded him compensation, in terms of the current or market value of the land that he lost. Although the appellant does admit all these facts, and that it never pursued the person who allegedly acquired the property, the subject of the suit, fraudulently, which was supposed to be security held by the appellant over some loan, and that it never reported the matter to the police, it resists the suit, on grounds that the claim was time-barred.

10. The first ground is about the case not having been proved against the appellant on a balance of probability, in the absence of evidence to support it. I struggle to understand this ground. In the defence, the appellant admitted that the respondent did participate in the public auction, was a successful bidder, and paid the purchase price. That was also admitted by the witness who testified on its behalf at the oral hearing. The appellant and the respondent were on all fours on these facts. The appellant pleaded that there was a contract, which was frustrated by factors beyond its control. The appellant admitted that it was not able to transfer the property, the subject of the public auction, and it also admitted that it had not refunded, to the respondent, the moneys it had been paid as consideration. So, I wonder what case the appellant expected the respondent to present in the face of that.

11. In the written submissions, it would appear that the issue is about the judgement sum of Kshs. 4,400,000.00, awarded by the court, being the alleged value of the property. It is submitted that that figure was not pleaded in the plaint, hence it denied the appellant a chance to challenge that alleged market value of the property. The valuation report placed on record is also challenged, for being incurably defective, for want of evidence of the licence of the valuer. Ndegwa Kabogo vs. Cooperative Merchant Bank Ltd & another [2017] eKLR (Gacheche, CA), Thomas Kimagut Sambu vs. National Land Commission & 2 others [2018] eKLR (JM Onyango, J), BWM Precast Housing Development Limited vs. Kingdom Bank Limited & another [2021] KEHC 147 (KLR)(Muigai, J) and Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] eKLR (Githinji, J. Mohammed & Otieno-Odek, JJA) are cited on that.

12. The impugned valuation was placed on record by PW3. Burden of proof, in civil cases, is at a balance of probability. PW3 asserted that he was a licensed valuer, and produced a valuation report. He was asked questions at cross-examination, but he was not confronted with material which demonstrated that he was not a qualified or licenced valuer, and, therefore, his report was without foundation. It is not enough, in civil cases, for the opposing party to attack the credibility of the witness presented by his rival, by merely confronting him with questions, without presenting material that would paint a contrary picture. The credibility of the valuation he allegedly conducted cannot be impugned by merely questioning him in open court, without presenting a counter-valuation. I see, from the respondent's list of documents, that he filed at the trial court on 4th December 2019, that a valuation report was going to be part of his case. That should have been adequate notice or indication to the appellant, of the nature of evidence that it needed to marshal, to confront what the respondent intended to place before the court. Although section 21 of the *Valuers Act*, Cap 532, Laws of Kenya, has been cited, on registration of valuers, no material was placed before the trial court, by the appellant, to demonstrate that PW3 was not licenced or qualified to practice as a valuer, and none was adduced to

demonstrate that his valuation lacked credibility. Such proof could have been obtained at the relevant registration office, and placed on record. If the appellant doubted who PW3 purported to be, it should have taken steps to impeach him, by concrete evidence. On what should have been contained in the report, PW3 was not cross-examined on that. A counter-witness, preferably another valuer, to provide a second opinion, was not presented by the defence, and no statutory provisions were cited, before the trial court on what ought to be put or contained in such a valuation report.

13. The second ground is on limitation of actions, that the suit was time-barred, as it was filed outside the 6 years limitation period allowed for contracts. Section 4 of the *Limitation of Actions Act*, and Gathoni vs. Kenya Cooperative Creameries Ltd [1982] eKLR (Potter, JA) were cited. It is argued that the respondent slept on his rights. The respondent submits that there was estoppel, which prevented the appellant from raising the defence of limitation, by virtue of section 39 of the *Limitation of Actions Act*. That was the line taken too by the trial court.

14. What should come to mind is the question, when did the cause of action accrue? Did it accrue on the date when the contract was entered into, on 11th May 2004? The appellant is counting the 6 years limitation period from 11th May 2004, when the contract was consummated. But what is the law? A cause of action in contract accrues when breach of the contract occurs, that is the effective date from which the limitation period begins to run. It was said, in South Nyanza Sugar Company Ltd v Dickson Aoro Owuor [2017] eKLR (Mrima, J), that:

> " It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at the date of the alleged breach and not at the end of the contract period."

15. So, was there breach of contract in this case, and, if there was, when was the breach committed? The sale by public auction happened on 11th May 2004. I see from the appellant's list of documents, filed at the trial court, several documents of relevance. There is a certificate of sale to that effect, dated 11th May 2004, issued by Jogi Auctioneers, who carried out the auction, addressed to the instructing Advocates, Manwari & Company, Advocates. There is also a copy of a letter, to the same effect, from the said auctioneers, dated 22nd June 2004, addressed to the same Advocates, and copied to the appellant. Then there is a letter from Manwari & Company, Advocates, who were the Advocates for the appellant, addressed to the appellant, dated 7th November 2006, informing the appellant that although the 2 disputed plots had been sold by public auction, there was a problem, which had prevented the law firm from finalising the transaction, because a certificate of official search, on the said property, issued on 24th July 2006, showed that the land in question had been transferred to a stranger, during the currency of the charge, way back in 2000. Fingers were pointed at officials at the lands registry. The letter sought instructions. It is not clear whether any instructions were given, but I see on the same record, a document that Manwari & Company, Advocates for the appellant, wrote to the Attorney-General, being a notice to sue the Government, Ministry of Lands, with respect to that alleged fraudulent transfer of the property that had been sold to the respondent, on 11th May 2004. That notice is dated 22nd August 2008. There is also a letter from the appellant, dated 14th February 2012, addressed to the Advocates for the respondent, on the said parcels of lands, where the appellant informs that the matter of the 2 plots was receiving attention, and that the appellant would revert once it got information from its Advocates, on the position at the lands office.

16. So, what picture is emerging? The cause of action did not accrue on 11th May 2004, for that was the date when the contract was consummated. The difficulties with completing the sale transaction, by way of having the property transferred to the name of the respondent, emerged in 2006. A certificate of official search, alluding to a fraudulent transfer to a stranger, was issued on 24th July 2006, and that information was conveyed to the appellant by its Advocates, by the letter dated 7th November 2006. By

then the cause of action had not accrued, as it appeared that the appellant was working towards getting a solution to the problem, and so there was no breach of the contract by then. The Advocates for the appellant then gave notice to sue the Attorney-General, on 22nd August 2008, ostensibly on behalf of the respondent. At that time, the cause of action had not accrued, for no breach had happened, for the Advocates for the appellant were working together with the respondent to get a resolution. It would appear that that was when the respondent grew tired of waiting, and treated the appellant as being in breach of that contract, and filed the suit before the trial court, dated 2nd February 2012, on even date. The action was justified by the response from the appellant in its letter of 14th February 2012, when it wrote to the Advocates for the respondent, indicating that its Advocates were to advise them on the issue. There was no time stipulation as to when the transfer was to be done, or when the problem was to be resolved, and it would appear that the appellant believed, as at 2012, that it was still working on the issue, for it had not raised the issue then, of frustration, and it had not started to offer an alternative way out, say by way of reimbursement of the moneys paid. The test of reasonable time should apply, and by the time the respondent went to court in 2012, the cause of action must have had accrued, as no action was being taken by the appellant to resolve the matter, and he was entitled to treat the appellant as being in breach of the contract of sale. Certainly, the breach was not in 2004. It was not in 2006, as that was when the appellant discovered the difficulties about getting a transfer to the respondent. 2008 was when a possible solution was being worked out, but it would appear that the appellant ran out of steam after that and did nothing, until the suit was filed in 2012. It would be safe to presume that the breach happened after 22nd August 2008, when no action was taken by the Advocates for the appellant, after the notice to the Attorney-General. No action was taken thereafter to obtain a resolution through court action, either way, after that date. After that the matter went cold at the desk of the appellant, and that was when the breach occurred, as it signified that the appellant was not going to transfer the property to the respondent, nor to refund to him the moneys that he had paid for the said property. By 2nd February 2012, when the plaint was filed, 3 years and 5 months had lapsed, from 22nd August 2008, and so the suit before the trial court was filed within the 6 year limitation period.

17. The other ground is that the claim by the respondent was in the nature of special damages, and it ought to have been pleaded, and specifically proved. It is an issue about award of damages for breach of contract.

18. Payment of compensation or damages arises where a breach of contract occurs. It was said, in Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 (Lord Diplock), that:

> " The contract ... is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker ... is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ..."

19. The purpose of compensation or damages is to put the innocent party to the position it was in prior to the breach or as at the time it entered into the contract. It is essentially restitution, based on the principle of restitutio in integrum. In the words of the court, in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 (Lord Macmillan):

> " ... On the other hand, the law may endeavour to effect an equitable adjustment between the parties, so as to restore each as far as may be to the position which he occupied before he entered into the contract, and by a process of give and take to mitigate the consequences of the contract having proved abortive. I find this doctrine of restitution stated in its broadest terms in Pufendorf's celebrated treatise on the Law of Nature and Nations, first published in 1672, as follows:

'When the thing at the time of making the promise or pact appeared possible and afterwards becomes impossible we must inquire whether this happened by mere chance or by default and deceit. In the former case the pact is disannulled if nothing has yet been performed on either side. If anything have been already done towards it by one of the parties, the other shall give it back, or pay to the value of it; if neither of these can be done he is to use his best endeavours that the man be not a loser by him. For in contracts the first regard is had to the thing expressly mentioned in the agreement; when this cannot be obtained it is sufficient to give an equivalent; but whatever happens all imaginable care is to be used that the other party suffer no prejudice.'

... It is obvious that neither of these attempted solutions of the difficulty can be productive of complete justice. To leave matters as they stood when the contract became impossible of fulfillment may result in great gain to one of the parties and great loss to the other and to a grave infringement of the maxim nemo debet locupletari aliena jactura. It is no consolation to the individual sufferer to be told that on the whole such a rule works less injustice than any other. It is in truth a confession of impotence in the face of a problem deemed to be inextricable. On the other hand, to attempt to restore matters in their entirety is to attempt the impossible. The hands of the clock cannot be turned back; things cannot be as if they had not been. At best some sort of equitable accommodation can be achieved which must inevitably fall short of complete justice. The process is sought to be rationalized on a theory of quasi-contract. The parties have made no provision in their contract for the event which has frustrated it, so the law implies for them what it assumes they would have agreed upon if they had had the unforeseen contingency in contemplation when they entered into their contract. On another view, restitution is regarded as a separate principle of the law independent of contract."

20. Locally, in Dormakaba Limited v Architectural Supplies Kenya Limited [2021] KEHC 210 (KLR) (Mativo, J), with respect to the object of compensation, it was said:

> " Damages in contract are ... intended to place the claimant in the same position as he would have been in if the contract had been performed. As early as in 1848 in Robinson v Harman it was held "the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed ... ""

21. With regard to what the claimant ought to place before the court to prove entitlement to damages or compensation, the court, in Dormakaba Limited v Architectural Supplies Kenya Limited [2021] KEHC 210 (KLR) (Mativo, J), stated:

> " In a recent decision of this court, I stated that to successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant's breach. The Plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.' A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the

onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff."

22. From the material, that was placed before the trial court, the contract was not disputed. Indeed, in the pleadings, the appellant admitted that it entered into the sale agreement, which it then alleges got frustrated by the discovery, that the property, purportedly sold, had long ceased to belong to its customer, for it had been allegedly fraudulently transferred to another, and was not available for transfer to the respondent. The contract is not denied, the issue is that the contract had become impossible to perform. It is not disputed that the appellant received money from the respondent as consideration. It is equally not disputed that that money has never been returned to the respondent, and the appellant has held on to it since 2004 to date, no doubt, trading with it and benefitting from it, to the detriment of the respondent, who has no access to those funds, and who did not get the benefit of the contract, the property that was supposedly being sold to him.

23. Did the respondent prove loss, and establish entitlement to damages or compensation? Yes, he did. He does not have the property that was purportedly sold to him, and he does not have the money that he paid for that property. He satisfied his end of the bargain, by paying the purchase price, but the appellant did not satisfy its part, by transferring the property to him. That is what breach of contract is about. Well, the appellant argues that it did not breach the contract, for the performance had been rendered impossible. Fine. However, where a contract cannot be performed, after money had changed hands, then a refund ought to be made. When the appellant realised, or discovered, that it could not perform the contract, for the reasons advanced, then it should have taken steps to refund the purchase price, instead of holding on to it for 20 years. The retention of the money for that long period of time, no doubt, gave him hope that the appellant was doing something, to have the transaction completed. The respondent became entitled to restitution, to the position he would have occupied had the contract been performed. As the appellant could not transfer to him alternative property of equivalent value, the best it could do should be to give to him the equivalent in monetary terms, which would be the value of the property as at the date the court assessed damages or worked out the compensation. A valuation report was placed on record by the responded, the appellant did not do its own valuation. The trial court was entitled to work with the material that was before it, for the respondent had proved, on a balance of probability that that was the loss that it had sustained.

24. The doctrine of frustration has been raised by the appellant, as applicable to the circumstances of this case, on the basis that the contract has become unenforceable, for it has been frustrated by certain circumstances, to wit, the discovery that the contract property had been, prior to the contract being entered into, transferred to a third party.

25. The starting point should be with what frustration is all about. So, what is the purport of the doctrine of frustration? There is a definition, in Halsbury's Laws of England, Vol. 9(1) 4th edition, paragraph 897, which goes as follows:

> "As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place;

and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

26. It is a common law principle, and how the courts have handled it would provide useful insights. In Davis Contractors Ltd v Farehum UDC [1956] AC 696 (Lord Radcliffe), it was said:

> "...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do."

27. In J. Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1,8 (Lord Bingham MR) said:

> "The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises ... The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances ... (2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended ... (3) Frustration brings the contract to an end forthwith, without more and automatically. (4) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it ... A frustrating event must be some outside event or extraneous change of situation ... (5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it ..."

28. Kenyan courts have largely relied on and have been guided by the above decisions and authorities. In Dormakaba Limited v Architectural Supplies Kenya Limited [2021] KEHC 210 (KLR)(Mativo, J), the doctrine of frustration was said to mean:

> "... I am not aware of any wholly satisfactory definition of frustration of contract. It is sufficient to quote two judicial statements. The first is that "frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated

by the parties when they entered into the agreement." The second is that "frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.""

29. The court, in Dormakaba Limited v Architectural Supplies Kenya Limited [2021] KEHC 210 (KLR) (Mativo, J), went on to state:

> " It will be seen that the question whether frustration has occurred turns in large measure upon the degree to which the supervening event has defeated the parties' reasonable expectations of performance, founded on the contract ... It's important to note that not all disappointments lead to frustration ... Frustration occurs only where the supervening event is such that the substance of the obligation, considered as a whole, cannot be performed or the event has effected such a change in the significance of the obligation that what has been undertaken would, if performed, be a different thing from that contracted for ... Frustration does not depend upon an election by a party to determine the contract by reason of the frustrating event. Indeed, it occurs even if all the parties are unaware of the frustrating event. Thus, if a contract is frustrated by a subsequent law which prohibits the performance of the contract, the contract is frustrated immediately the law takes effect. Frustration is not deferred until the parties, or any of them, becomes aware that performance of the contract has become illegal ... A party cannot rely upon an event he himself has brought about as a frustrating event nor can inability to pay a debt attributed to the defendant's liquidity problems be a frustrating event."

30. For the doctrine of frustration to be successfully pleaded, certain conditions ought to be met or satisfied. One of them was alluded to in Davis Contractors Ltd v Farehum UDC [1956] AC 696 (Lord Radcliffe), default on the part of the party relying on it. The court said "The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self induced." It had earlier been said, in Bank Line Ltd v Arthur Capel & Company (26) [1919] AC 425 (Lord Sumner) that "It is now well established that the doctrine of frustration cannot apply where the event alleged to have frustrated the contract arises from the "act or self-election of the party" who seeks to invoke it. Reliance cannot be based on a self-induced frustration." That was reiterated in Lucy Njeri Njoroge v Kaiyahe Njoroge [2015] eKLR (Nambuye, Musinga & Murgor, JJA), where it was said "For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. "

31. In Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited [2023] KECA 700 (KLR)(Sichale, Achode & W. Korir, JJA), it was stated that it was important for the court to evaluate the evidence to ascertain whether the party seeking to rely on the doctrine contributed to the frustration, emphasising that the important question would be whether the frustration was foreseeable in the circumstances of the case. Ewan Mckendrick's Contract Law, eighth edition, paragraphs 14 and 15, page 251, was cited, on what constitutes a foreseeable event, where it is written:

> " An event is foreseeable and will prevent frustration of the contract only where it is one which 'any person of ordinary intelligence would regard as likely to occur' (see Treitel, 2007, para. 19-078, and contrast Hall 1984). In other words, the question would appear to be one of fact and degree and much will depend on the extent to which the event in question was

foreseeable by the parties. As Rix LJ stated in The Sea Angel [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [127], "the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case may lead on to frustration.""

32. The other factor that comes into play is that the party who wishes to rely on the doctrine must plead the same, and set out the particulars of the circumstances. See Toshike Construction Company Limited v Harambee Co-operative Savings and Credit Society Limited [2021] eKLR (Mboya, J). It was said, in Kenya Commercial Finance Co. Ltd v Kipng'eno Arap Ngeny & Another [2002] eKLR (Gicheru, Lakha & Owuor, JJA), that:

> " A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the Amended Plaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same."

33. Perhaps the last point on frustration, is that the incidence of frustration does not invalidate an otherwise valid contract. In Billey Oluoch Okun Orinda v Ayub Muthee M'igweta & 2 others [2017] eKLR (Waki, Nambuye & Kiage, JJA), it was said that:

> " ... it is our finding that the trial court was in error in treating the contract as having been nullified on account of frustration and making an order for refund of the purchase price only. As we understand it, frustration, even where one is pleaded and proved, does not render a contract null and void. The supervening event simply makes the further performance of a valid contract impossible and releases the parties from further obligations under the contract."

34. Having set out the law on the doctrine of frustration, the next consideration should be whether the same applies to the circumstances of this case. Going by Kenya Commercial Finance Co. Ltd vs. Kipng'eno Arap Ngeny & Another [2002] eKLR (Gicheru, Lakha & Owuor, JJA) and Toshike Construction Company Limited vs. Harambee Co-operative Savings and Credit Society Limited [2021] eKLR (Mboya, J), the first consideration should be whether the same was pleaded by the party whose seeks to rely on it, the appellant herein. It does appear that the appellant had pleaded the doctrine in paragraph 4 of its plaint, dated 29th March 2012, and as amended on 17th September 2013, and to that extent, the appellant would be entitled to assert the doctrine.

35. It is pleaded, at paragraph 4 of the plaint, as follows:

> " The defendant shall at the hearing hereof further state that been more than willing to transfer land parcel number Bukhayo/Mundika/2763 to the plaintiff save that soon after the said sale by Public auction it was discovered that the suit land had been transferred fraudulent and without knowledge of the defendant to a 3rd party one Christopher Ogutu on or about 7th November 2006 with the defendants charge over the property still subsisting and this was beyond the control of the defendant."

36. It would be one thing to plead the doctrine of frustration, but whether it applies to the case is another matter. That should be the next consideration, does it apply to the facts herein? The case by the appellant was that it was unable to transfer the demised property to the respondent, for it was discovered, after the sale, that the property had been transferred to a third party, sometime in 2006. The defence statement is inaccurate. The transfer to the third party happened in 2000, according to

the certificates of official search placed in the trial record, it was the discovery by the appellant that the property had been transfer to the third party that happened in 2006. The question then is, was the alleged transfer an intervening event that frustrated performance of the contract? I do not think it was. The event happened in 2000, long before the sale in 2004. When it happened in 2000, there was no contract of sale, between the parties herein, with respect to the subject property, and, therefore, that event could not possibly intervene to frustrate a contract that was yet to be entered. When that event happened in 2000, it did not frustrate the 2004 contract, as that contract was not in existence then. Secondly, the court, in Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited [2023] KECA 700 (KLR)(Sichale, Achode & W. Korir, JJA), brought in the concept of foreseeability of the supervening event into the matrix. Foreseeability can only relate to the future, not the past. One can only foresee events likely to happen in the future. It would be a misnomer to talk of foreseeability with respect to past events. Without saying more, it is my conclusion that the doctrine of frustration does not apply to the circumstances herein.

37. What transpired was that the appellant sold property to the respondent, which did not exist, for it was not available for foreclosure; or, to put it differently, the appellant did not have the capacity to transfer the said property to the respondent. That fact was already in existence in 2004, when the appellant transacted with the respondent, for the property had been transferred to the third party 4 years prior. The appellant had nothing to sell to the respondent, in 2004. There is a sense in which the appellant acted on a false misrepresentation, made to the respondent and the general public, that it had property to sell to them, and in respect of which it could pass a good title, which was not the case. Whether that false misrepresentation was innocent or fraudulent is neither here nor there. The contract entered into in 2004 was incapable of enforcement from inception, for it was based on a falsity. It had no foundation, for what was allegedly being sold was no longer under the power and control of the appellant. The appellant owed a duty of care to the respondent, and the general public, arising from the licence to operate a bank, issued to it by the State, to permit it to receive deposits, and other moneys, from the public, to ensure that whatever exercise it undertook, in its dealings with the public, in its normal course of banking business, was completely in accordance with the law. It called for due diligence on its part, before setting in motion the exercise of selling any foreclosed property by public auction, to ensure that that property was still intact, available and capable of being transferred to any successful bidder at the public auction. That the appellant could do very easily, by carrying out a search on the title of the property it sought to sell. Going into a public auction blindly, before ascertaining whether the property sought to be sold was still available, exposed the appellant to the risk of seeming to or in fact hoodwinking the public into believing that it had property to sell, when that was not the case. It was a breach of a duty of care and of trust, for the general public would expect that a licensed bank would act fully in accordance with the law. Purporting to sell property, in respect of which the appellant had no power or control over, because the property belonged to another person, who had no dealings with the appellant, did not amount to acting in accordance with the law, and it did not display any effort to exercise due diligence.

38. The next ground relates to the trial court failing to hold that the suit property had not passed to the respondent, to entitle him to claim compensation, with respect to it, at market value. I believe I have said enough about this ground above, when I discussed the matter of compensation or damages. Going by the principle of restitutio in integrum, the respondent was entitled to be restored to the position he would have occupied had the breach not occurred, or had it not become impossible to perform the contract. He paid the full purchase price, it has not been refunded to him, 20 years after it was paid, and he does not have the property he paid the money for. He was entitled to be placed to the position he would have been in after he paid the money, the value of the property he was buying, being the equivalent of what he lost. Put differently, the money he parted with entitled him to acquire property

of the value he was paying for in 2004, and he should be restored to a position, so far as money can do it, where enough money is placed in his hands sufficient for him to buy equivalent property today, for that was his loss.

39. There are some disturbing aspects of this matter. One, that the appellant, a licensed bank, can advertise for sale of assets by way of public auction, to dispose of assets in respect of which it has not ascertained their current status before the sale. Two, that after discovering that the property it purported to sell by public auction was not available for such sale and transfer to the successful bidder, it fails to refund the sale price moneys that it had collected from the successful bidder, and holds on to the same for 20 years. Three, that the appellant, while holding on to that sale price money received, and without transferring the land that was allegedly sold and bought, uses the legal shield of limitation of actions, to justify enriching itself. Four, although it alleges that there was a fraudulent transfer of the subject property to a third party, it takes no action to recover the allegedly fraudulently transferred property from the alleged transferee. Five, the alleged fraudulent transfer would be criminal activity, yet the appellant did not make a report to the police, to have those involved in the fraudulent activity prosecuted.

40. In view of everything that I have stated above, it is my finding and holding that the appeal herein has no merit. I accordingly uphold the judgement of the trial court, and confirm the final orders made in that judgement. The appeal is accordingly dismissed, with costs to the respondent. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 14TH DAY OF FEBRUARY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Sibika, instructed by Bogonko Otanga & Company, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.