REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 50 OF 2015

(Formerly HCCA NO. 181 OF 2013)

EQUITY BANK LIMITED

(Formerly Equity Building Society).....APPELLANT

VERSUS

JAMES MURAYA MAHUGU.....RESPONDENT

(Being an appeal against the judgement of Honourable R. A Oganyo (Mrs.)

Senior Principal Magistrate delivered at Nairobi on 8th March 2013 by

D.Ole Kiewua(Mr), Principal Magistrate)

JUDGMENT

Background.

This is an appeal against the whole judgement and decree of Hon. R.A Oganyo (Mrs.), SPM delivered on 8th March 2013 in Milimani Commercial Court, Civil Case No. 1783 of 2009, James Muraya Mahugu *v* Equity Bank Limited formerly Equity Building Society (hereinafter referred to only as "the lower court"). The Appellant herein was the defendant in the lower court while the Respondent was the plaintiff. The Respondent commenced the lower court suit by way of a plaint dated 12th March, 2009 in which he sought the following reliefs;

a) An order for specific performance to compel the Defendant (the Appellant) to transfer to the plaintiff's (Respondent's) name, Plot No. RUIRU/KIU BLOCK 9 (EQUITY) L.R 10902/9, subdivision No. 239 or No. 8 (hereinafter referred to as "the suit property").

b) In the alternative, Kshs. 70,000/- together with interest at 32% p.a from 13th January, 1992 until payment in full.

c) General and exemplary damages for breach of contract.

d) Loss of use and mesne profits of Kshs. 3,000 per month from 13th January, 1992 until possession is granted.

e) Costs and interests.

The Respondent's case in the lower court was that, on 4th December, 1991, the Respondent entered into an agreement with the Appellant under which the Appellant agreed to sell to the Respondent and the Respondent agreed to purchase the suit property at a consideration of Kshs. 70,000/- on terms and conditions that were contained in the said agreement. The Respondent paid part of the purchase price in the sum of Kshs. 35,000/- on 4th December, 1991 and was given a loan of Kshs. 35,000/- by the Appellant for the balance of the purchase price. He finished repaying the loan together with interest that the Appellant charged at the rate of 32% per annum on 13th January, 1992. On 31st January, 1994, he was offered a new loan facility of Kshs. 120,000 by the Appellant. He accepted the offer on 7th February 1994. The loan was secured by the suit property. He finished repaying the second loan and sought to have the suit property transferred to his name.

The Respondent averred that he followed up the matter with the Appellant's officers between 1995 and 2008. He averred that he was informed that there were ongoing court cases between the Appellant and a third party over the ownership of the larger parcel of land

(hereinafter referred to as "the mother title") a portion of which was sold to him. He averred that he was asked by the Appellant to wait for the outcome of the said cases the particulars of which were given to him as, Nairobi HCCC 5992 of 1992 and Court of Appeal Civil Appeal No. 316 of 2002(hereinafter referred to as "the then pending cases").

At the trial, before the lower court, the Respondent who testified as PW1 reiterated the contents of his plaint and produced various documents in evidence as exhibits in support of his case which included; Sale agreement dated 4th December, 1991, Receipts issued by the Appellant dated 4th December, 1991 and 3rd November 1995, Passbooks issued by the Appellant detailing how he repaid the loans, a copy of the survey map for the suit property and a loan facility agreement dated 31st January, 1994. During cross-examination, the Respondent stated that the 32% per annum interest rate was not indicated in the sale agreement. He conceded further that the suit property should have been transferred to him when he finished repaying the first loan. He stated further that he knew of the then pending cases in 1994 but sought legal advice and intervention in 2007 when his advocates issued the Appellant with a demand letter. The Respondent stated that he was waiting for the then pending cases to be completed before making his claim against the Appellant. The Respondent admitted that he had not produced any documents in support of his loss of user claims and his contention that the suit property was then worth Kshs. 2,000,000/-. After the close of his case, the Respondent made closing submissions in which the Respondent reiterated the content of his plaint and the evidence that he tendered at the trial.

The Appellant filed a defence in the lower court on 11th May, 2009 denying all the Respondent's claims. It also averred that the Respondent's claim was statute barred. The issue of limitation of action was raised by the Appellant as a preliminary objection to the suit prior to the hearing. The objection was heard by Hon. W. Mokaya, P.M who dismissed the same on 22nd September, 2010 on the ground that it raised issues of fact which could only be determined at the trial. At the trial, the Appellant closed its case without calling any evidence. It however filed closing submissions in which it raised once again the issue of limitation of action.

In a judgment delivered by the lower court on 8th March, 2013, the court found that the Respondent had proved his case against the Appellant. The court held that the Respondent was entitled to specific performance of the agreement of sale between the parties and that in the event that the suit property was no longer available for transfer to the Respondent, the Appellant was to pay the Respondent a sum of Kshs. 70,000/- being a refund of the purchase price together with interest at court rate of 14% per annum. The court also awarded the Respondent Kshs. 3,000/- per month as general damages with effect from 16th November, 1992 until payment in full. In conclusion, the lower court entered judgment for the Respondent against the Appellant as follows;

a) "Specific performance of the land sale agreement in that the Defendant to subdivide a quarter of an acre of land found in their indefeasible plot No. RUIRU/KIU BLOCK 9 (EQUITY) plot renumbered 8 as per part development plan marked as P.Exhibit 6 herein.

b) In the event the Defendant already sold the land in (a) above, I award the Plaintiff Kshs. 70,000/= to be refunded to him together with interest at court rates from 16th November 1992 until payment in full.

c) General damages and exemplary damages for breach of contract - no award.

d) Loss of use and mesne profits at Kshs. 3,000 per month from 16th November 1992 until payment in full.

e) Costs of the suit from date of filing until payment in full.

f) Interest on costs at court rates until payment in full."

On the issue of limitation of action, the lower court found that the cause of action arose in 2008 when the Respondent reached a conclusion that the Appellant was not willing to transfer the suit property to him. The court believed the Respondent's evidence that he had followed up on the transfer of the suit property from 1995 when he finished repaying the second loan that was advanced to him on the security of the suit property by the Appellant and that he visited the Appellant's offices both in Nairobi and Kangema where they kept telling him to wait for the determination of the then pending cases. On the merit of the claim, the lower court found that the Respondent had established that; he entered into an agreement for sale of the suit property with the Appellant on 4th December, 1991, the terms of the said agreement were not disputed, the Respondent fulfilled his part of the agreement and that the Appellant failed to honour its part of the agreement. It was on the basis of those findings that the lower court entered judgment for the Respondent as indicated above.

In awarding the Respondent Kshs. 3000/- per month for loss of use and mesne profits, the court held that although the Respondent had not produced sufficient evidence in support of his general and exemplary damages claim, the Respondent had pleaded that as at the time of filing suit, the parcels of land similar to the suit property were being leased out at Kshs. 3000/- per month.

The Appellant was aggrieved with the said judgment of the lower court and preferred the present appeal to this court.

The Appellant's case on appeal.

In its Memorandum of Appeal dated 4th April, 2013 and filed on the same date, the Appellant challenged the decision of the lower court on the following grounds;

1. The learned magistrate erred in law and fact in awarding the Respondent general and/or exemplary damages for breach of contract.

2. The learned magistrate erred in law and fact in failing to hold that the Respondent's claim and cause of action accrued on 13th November, 1992 and was therefore time barred under Sections 4 (1) (a), 7 and 17 of the Limitation of Actions Act.

3. The learned magistrate erred in law and fact in holding that the Respondent had proved his case on a balance of probabilities on the sole basis that the Appellant had not called any witnesses to controvert the Respondent's case yet the Respondent's witness had been subjected to thorough cross-examination.

4. The learned magistrate erred in law and fact in awarding the Respondent damages for loss of use and mesne profits of Kshs. 3,000/- per month from 13th January 1992 when the same had not been proved by any cognizable evidence.

5. The learned magistrate erred in law and fact in awarding damages for loss of use and mesne profits of Kshs. 3,000/- per month from January 1992 when the same had no basis under the Agreement of Sale.

6. The learned magistrate erred in law and fact in awarding damages for loss of use and mesne profits of Kshs. 3,000/- per month from 13th January, 1992 when it had not been shown that the Appellant was in wrongful possession of the property at all.

7. The learned magistrate erred in law and fact in awarding damages for loss of use and mesne profits of Kshs. 3,000/- per month from 13th January 1992 despite noting in the judgement that the Respondent had not produced evidence in the form of a valuation report to prove the same.

8. The learned magistrate erred in law and fact in awarding damages for breach of contract of Kshs. 70,000/- from 16th November 1992 at the rate of 14% per annum until payment in full yet the court rate is 12% per annum.

9. The learned magistrate erred in law and fact when she granted the Respondent his prayer for specific performance, an equitable remedy, yet the Respondent was guilty of delay of two decades after the Agreement.

10. The learned magistrate erred in law and fact when she granted the Respondent his prayer for specific performance, an equitable remedy yet the Respondent had not proved on a balance of probabilities that the land was available.

11. The learned magistrate erred in law and fact when she entertained the claim by the Respondent when there was no evidence that the transaction between the parties had the necessary Land Control Board consent.

12. The learned magistrate erred in law and fact when she granted the Respondent his prayer for specific performance in the circumstances of the case.

13. The learned magistrate erred in law and fact in completely disregarding the Appellant's submissions.

The Appellant prayed for the following reliefs;

a) That the appeal be allowed.

b) The judgement and resultant decree of Honourable R. A. Oganyo (Mrs.), Senior Principal Magistrate delivered at Nairobi on 8th March 2013 be set aside.

c) The suit by the Respondent in the lower court be dismissed with costs.

d) The costs of this Appeal be awarded to the Appellant.

The appeal was heard by way of written submissions. The appellant filed its submissions on 28th February, 2020 in which it framed the following issues for determination by the court;

a) Whether the suit was time barred.

b) Whether the Respondent was guilty of laches.

c) Whether the learned magistrate erred in law and fact in awarding the Respondent damages for loss of use and mesne profits of Kshs. 3,000/- per month.

d) Whether the learned magistrate erred in law and fact in awarding special damages of Kshs. 70,000/- together with interest from 16th November, 1992 at court rates until payment in full.

e) Costs of the suit.

On the first issue, the Appellant submitted that the Respondent's claim was time barred as it was instituted on 12th March, 2009 while the cause of action arose in 1992 when the breach of the agreement of sale occurred. The Appellant submitted that the Respondent's claim that he did not file the suit earlier because he was pursuing the matter with the bank and waiting for the outcome of the then pending cases was not proved through evidence. The Appellant relied on Sections 4 (1), 7 and 17 of the Limitations of Actions Act, Chapter 22 Laws of Kenya and the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) *v* Rosaline Njeri Macharia & another [2016] eKLR and submitted that the Respondent's claims for breach of contract and recovery of land were both time barred as at 12th March,

2009 when the lower court suit was filed.

On the second issue, the Appellant submitted that a delay of 17 years from the time when the cause of action arose and the time of filing suit was inordinate. The Appellant submitted further that the Respondent did not explain the delay. In support of this submission, the Appellant relied on the cases of Njuguna Githiru *v* Attorney General [2016] eKLR and Rosemary Wanjiru Kungu *v* Elijah Macharia Githinji & another [2014] eKLR.

On the third issue, the Appellant submitted that the Respondent did not tender any evidence in proof of his claim for general damages. Relying on the cases of Equity Bank Ltd *v* Gerald Wang'ombe Thuni [2015] eKLR and Capital Fish Kenya Limited *v* The Kenya Power & Lighting Company Limited [2016] eKLR, the Appellant submitted that special damages must be specifically pleaded and proved. The Appellant contended that the Respondent did none of those and as such the learned magistrate erred in awarding damages for loss of use and mesne profits.

On the fourth issue, the Appellant submitted that the learned magistrate erred in her finding that the cause of action arose in 2008 and in awarding mesne profits from 1992. The Appellant faulted the learned magistrate's finding that the cause of action arose in 2008 which according to the magistrate was the last time the Respondent allegedly visited the Appellant's offices in Kangema. The Appellant contended that the Respondent did not tender any evidence to show that he was following up the matter with the bank. The Appellant contended further that the Respondent was enjoying the suit property having used it as security in 1995 and as such he was not entitled to mesne profits or loss of use. The Appellant submitted in conclusion that the issue of whether the Respondent had been prevented from using the suit property since 1995 was a matter to be proved by evidence and that the Respondent never proved the same.

On the fifth issue the Appellant submitted that based on the foregoing issues, the costs of the appeal should be awarded to the Appellant.

The Respondent's case on appeal.

The Respondent filed his submissions on 29th October, 2020. The Respondent argued that the issue of whether the suit was time barred was the subject of a preliminary objection in the lower court which objection was dismissed and an order made that the issue be determined at the trial. The Respondent argued that during the hearing of the lower court suit, the Appellant decided not to adduce any evidence and the court after considering the issue on merit, came to the conclusion that the cause of action arose in 2008. The Respondent submitted that the Appellant failed to prove at the trial that the cause of action arose in 1992 as it had claimed. The Respondent submitted that the Appellant relied on its pleadings during the hearing in the lower court yet pleadings are not evidence. In support of this submission, the Respondent relied on Esther Nyamweru Waruhiu & another *v* George Kang'ethe Waruhiu [2019] eKLR.

The Respondent cited Stephen Wangai (Minor suing through next friend George Maina Wangai) *v* Paul Temu Nderemo and Camp Garbatulla Catholic Church (unreported) and argued further that the Appellant should have appealed or sought a review of the order for dismissal of its preliminary objection if it was dissatisfied with the same.

The Respondent cited Esther Ingolo *v* Swaleh Said Hamed Bilel & 2 others [2006] eKLR, Pyrethrum Board of Kenya & another *v* Kamau Njehia [2008] eKLR and Mbuthia Macharia *v* Annah Mutua Ndwiga & another [2017] eKLR, and submitted that since the Appellant did not tender any evidence at the trial, the evidence that was adduced by the Respondent stood unchallenged and unshaken.

The Respondent cited Solomon Ndegwa Kuria *v* Peter Nditu Gitau [2019] eKLR, Lydia Akelo Ochuka *v* Cecilia Mwikali Kaloki & Another [2019] eKLR and Marilyn Indombera Ayieko *v* Samarose Investments Ltd [2019] eKLR and submitted that the order for a refund of the purchase price was rightfully made since the Respondent had paid the full purchase price for the suit property.

On whether, he was entitled to an order for specific performance, the Respondent cited Fredrick Korir *v* Soin United Women Group (Sued through Eunice Towett, Jane Mwolomet and Lucio Chebocho) [2018] eKLR and Amina Abdul Kadir Hawa *v* Rabinder Nath Anand & another [2012] eKLR, and submitted that he had satisfied the requirements for an order of specific performance as he had fulfilled his part of the valid and enforceable contract that had been entered into by the parties.

On the award mesne profits, the Respondent argued that the same was justified in that the Appellant had been in possession of the suit property which belonged to the Respondent wrongfully. In support of this submission, the Respondent relied on the definition of mesne profits in section 2 of the Civil Procedure Act and the cases of Attorney General *v* Halal Meat Products Limited [2016] eKLR and Rajan Shah T/A Rajan S. Shah & Partners *v* Bipin P. Shah [2016] eKLR. The Respondent cited the case of Peter Mwangi Mbuthia & another *v* Samow Edin Osman [2014] eKLR, and submitted that the sum of Kshs. 3,000/- per month that was awarded as mesne profits was well substantiated.

In conclusion, the Respondent submitted that the Appellant was seeking to unjustly enrich itself at the expense of the Respondent. In this regard, the Respondent relied on the case of Samuel Kamau Macharia *v* Kenya Commercial Bank Limited [2003] eKLR. The Respondent urged court to dismiss the appeal.

Issues for determination.

The main issues arising for determination in this appeal which summarises the grounds of appeal put forward by the appellant are;

1. Whether the lower court erred in not finding that the Respondent's suit was time barred.

2. Whether the lower court erred in granting the reliefs that it granted to the Respondent.

Whether the lower court erred in not finding that the Respondent's suit was time barred.

While the Appellant argued that the cause of action giving rise to the lower court suit arose on 13th January, 1992 when the breach of contract between the parties occurred by the failure on the part of the Appellant to transfer the suit property to the Respondent, the Respondent on his part argued that the lower court was right in its finding that the cause of action arose in 2008.

In South Nyanza Sugar Company Limited *v* Diskson Aoro Owuor [2017] eKLR, the court stated that:

> **"There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. 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 that date of the alleged breach and not at the end of the contract period."**

It is clear from the foregoing that in the event of a breach of contract, a cause of action arises when the breach occurs. To be able to determine when exactly the agreement between the parties dated 4th December, 1991 was breached, we have to consider the terms thereof dealing particularly with the completion. The clause in the said agreement on completion provided as follows:

"COMPLETION: On registration of the transfer of the plot in the purchaser's name"

From that clause, there was no time frame fixed by the parties within which completion was to take place. The agreement was to be completed when the suit property was transferred to the Respondent. What this meant in my view was that the completion date for the agreement was open ended and could only be said to have been breached when one of the parties formed the view that the other party had failed to complete after reasonable time and notice to complete had been given. In this case, the Respondent led evidence that was not controverted that after completing the payment of the purchase price, he kept following up the transfer of the property with the Appellant and was told that there were ongoing cases concerning the mother title for the suit property which had to be determined before the property was transferred to him. The Respondent produced in evidence in the lower court copies of the judgments that were made in the High Court on 29th September, 1999 and the Court of Appeal on 13th July, 2007 in the said cases. Due to the agreement between the parties on completion, the Respondent could not be faulted for waiting for the determination of the said cases that were pending before demanding the transfer of the suit property to his name.

It was after the said Court of Appeal decision that the Respondent through its advocates Gathiga Mwangi & Company Advocates sent a demand letter to the Appellant dated 27th November, 2007 seeking the transfer of the suit property to the Respondent. There is no evidence that the Appellant responded to the said demand letter. The lower court suit was subsequently filed on 25th March, 2009. I am of the view in the circumstances that the cause of action arose when the Respondent sent a demand to the plaintiff on 27th November, 2007 and the plaintiff failed to comply with the same without giving any reason. It was at this point that the Appellant could be said to have breached the open ended agreement for sale that it entered into with the Respondent.

Due to the foregoing, I am not in agreement with the Appellant that the cause of action arose in 1995 when the Respondent finished repaying the first loan. It is my finding that the cause of action arose after the demand letter of 27th November, 2007 and as such the Respondent's claim was not time barred as at 25th March, 2009 when the Respondent filed the lower court suit for specific performance and in the alternative refund of the purchase price.

Whether the lower court erred in granting the reliefs that it granted to the Respondent.

I am satisfied from the evidence on record that the Respondent established that he was entitled to an order for specific performance. The Respondent proved that he had fulfilled his part of the agreement with the Appellant and that the Appellant was in breach of the said agreement. The Appellant did not give evidence in the lower court. It did not therefore place any evidence before the court on the basis of which the court would have been persuaded not to order specific performance. It must be appreciated nevertheless that due to passage of time there could be a possibility that the Appellant could not be in a position to perform the contract. This explains why the lower court granted also an alternative remedy of a refund of the purchase price in the sum of Kshs. 70,000/- plus interest. I am however in agreement with the Appellant that there was no basis for awarding interest from 16th November, 1992 when the Respondent completed the payment of the first loan. As I have stated above, the Appellant was not under a duty to transfer the suit property to the Respondent on that date if it was not in a position to do. The completion clause in the agreement gave it some leeway. Interest on the said amount should have been awarded with effect from 25th March, 2009 which was the date of filing suit as no basis was laid for backdating it to 1992. I am also in agreement with the Appellant that court interest rate is 12% and not 14th % per annum. Since the Practice Note No. 1 of 1982 that was issued by the then Acting Chief Justice A.H.Simpson on 16th March, 1982 that fixed court interest rate at 12% per annum, I am not aware of any other Practice Note or amendment raising that rate to 14% per annum.

I am also in agreement with the Appellant that the lower court erred in awarding the Respondent Kshs. 3000/- per month for loss of use and mesne profits. First, the claim was not proved. Mesne profits must be sufficiently pleaded and proved. See, Karanja Mbugua & another *v* Marybin Holding Co. Ltd [2014] eKLR. The Respondent only pleaded mesne profits. The same was not proved at the trial. The Respondent simply told the court that if he had let out the suit property, he would have earned Kshs. 3000/- per month as rent. The Respondent placed no evidence before the court on how he arrived at the said sum of Kshs. 3000/-per month. The mere fact that the Respondent had pleaded mesne profits did not entitle him to the award since a pleading is not evidence.

Furthermore, the suit property was not owned by the Respondent. The same had not been transferred to him by the Appellant. Mesne profits

is ordered against a trespasser or someone in wrongful possession of property. The Respondent did not lead any evidence to prove that the Appellant was in wrongful possession or even in possession of the suit property. He just led evidence that he entered into a sale agreement with the Appellant as the vendor. There was in the circumstances no basis for claiming mesne profits from the Appellant. What the Respondent was entitled to was general damages for breach of contract which the lower court held that he had not proved.

Conclusion.

In the final analysis and for the foregoing reasons, the Appellant's appeal succeeds in part. Consequently, I hereby vary the judgment and decree of the lower court delivered on 8th March, 2013 as follows;

1. The order awarding the Respondent interest on Kshs. 70,000/- at the rate of 14% per annum is set aside and in place thereof, the said amount shall attract interest at the rate of 12% per annum.

2. Interest shall accrue on the said sum of Kshs. 70,000/- from 25th March, 2009 until payment in full and not from 16th November, 1992.

3. The ward of Kshs. 3000/- per month for loss of use and mesne profits is set aside.

4. The other parts of the judgment shall remain the same.

5. Each party shall bear its own costs of the appeal.

DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF OCTOBER 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kariuki for the Appellant

Mr. Gathiga for the Respondent

Ms. C. Nyokabi-Court Assistant