



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 380 OF 2018

STIMA INVESTMENT CO-OPERATIVE SOCIETY LIMITED.....APPELLANT

VERSUS

DAVID WAIGANJO KIGWE.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Nairobi Milimani Commercial Courts by Hon. A.M Obura (Mrs.) SPM dated and delivered on 12th July, 2018 in Civil Case No. 1822 of 2014)

JUDGEMENT

1. The respondent, DAVID WAIGANJO KIGWE, by a plaint dated 31st March, 2014 and filed in Court on 23rd April, 2014 sought the following orders;

- a) *The sum of Kshs 1,929,200.90 being interest for the period of default being the period between 20th November, 2013 and 2nd December, 2013.*
- b) *Interest on (a) above at Court rates.*
- c) *Cost of this suit.*
- d) *Any other relief the court deems fit to grant.*

2. According to the plaint, the respondent and the appellant entered into an agreement for sale and it was agreed that the respondent would sell to the appellant all that land known as L.R No. 10823/286, Thika for a consideration of Kshs 286,435,000/-. As per the agreement of sale the parties agreed that the completion date was 20th November 2013. The parties at the request of the appellant executed a Variation of the Agreement for Sale on 22nd October 2013. The parties agreed as follows;

1.1 *The Purchaser has agreed to pay the Vendor the sum of Kenya Shillings Sixteen Million Five Hundred Thousand (Kshs 16,500,000/-) being a deposit towards the Purchase Price which receipt the Vendor hereby acknowledges.*

1.2 *The Balance of the Purchase Price of Kenya Shillings Two Hundred and Fifty One Million Nine Hundred and Thirty Five Thousand (Kshs 251,935,000/-) shall be secured by a Bank guarantee.*

1.3 *Upon the execution of this Variation of Agreement by both parties but not later than Twenty One (21) working days from 12th September 2013, the Purchaser shall procure a Bank guarantee from a reputable bank or financial institution on terms acceptable to the Vendors advocates securing the payment of the Balance of the purchase price of Kenya Shillings Two Hundred and Fifty One Million and Thirty Five Thousand (Kshs 251, 935,000/-) in accordance with clause 2 below; and*

1.4 *The whole balance of the purchase price of Kenya Shillings Two Hundred and Fifty One Million and Thirty Five Thousand (Kshs 251, 935,000/-) shall be released by the Purchaser's Guarantors to the vendor within Fourteen (14) days of the successful registration of the Title in favour of the Purchaser but in any event on or before the Completion date.*

3. The respondent upon receipt of the Bank guarantee dated 4th October 2013 forwarded completion documents to the appellant. The respondent claimed that contrary to the Variation of the Agreement for Sale the appellant remitted to the respondent the balance of the purchase price on 3rd December 2013, 13 days from the date of completion contrary to their agreement. The respondent claimed that pursuant to clause 18 of the Agreement for Sale they are entitled to interest on the balance of the purchase price for 13 days delay at the rate

of 21.5% which is 3% above the base lending rate as published by Barclays Bank Limited on 21st November, 2013.

4. The Appellant filed its defence dated 7th May 2014 on even date and denied the respondent's claim. They claim that the Bank Guarantee from Co-operative Bank of Kenya Limited dated 4th October 2013 provided as follows;

4. Any Claim hereunder shall be made by you to us not later than 30 days after the date of default upon which the claim is made and such claim shall be addressed to us in writing through the above noted address.

5. Your Claim shall be settled within 30 days from the date of your first demand letter.

5. The appellant averred that the payment of the balance of the purchase price was to be within 14 days from the date of registration of the transfer. They further averred that there was an obligation to release the payment of the balance of the purchase by the Bank after 30 days from the date of demand by the Vendor to the guarantor Bank. The appellant avers that the Transfer was finally registered on 7th February 2014. It advanced that the remission of the balance of the purchase price on 3rd December 2013 was well within the terms of the Bank Guarantee. It claimed that clause 1.4 of the Variation of Agreement for Sale dated 20th August 2013 were unenforceable as they were outweighed by provisions of Clause 1.2, 1.3 and 2 of the said agreement.

6. After a fully-fledged trial, the Learned Trial Magistrate held that the plaintiff had proved his case on a balance of probability and thus entitled to the sums claimed. She observed that the appellant failed to satisfy the court that interest is not payable at all. The appellant has now lodged the instant appeal and raised the following grounds of appeal:

1. The trial magistrate erred in law and fact by finding in awarding the sum of Kshs 1,929,200 when the same had not been specifically proved.

2. That the trial magistrate erred in law and fact in holding that the plaintiff had proved his case when no evidence was tendered in proof of the rate of interest or how the sum of Kshs 1,929,200.90 was arrived at.

3. That the trial magistrate erred in law and fact in failing to hold that the plaintiff failed to mitigate his loss.

4. The learned magistrate erred in law and in fact in coming, to the conclusions and the judgment she came to contrary to the evidence, the law and submissions urged before her.

7. The appellants in their submissions advanced that special damages pleaded must be strictly proved by a claimant before they can be awarded. The respondent was obligated to adduce evidence of the lending rate. The appellant claims that the respondent further failed to show evidence of how the computation leading to Kshs 1,929,200.90 was arrived at. It also advanced that the terms of the agreement were altered by the variation of the agreement of sale dated 22nd October, 2013. They contend that under the variation agreement, the term completion was defined by reference to the provision on payment of the balance of the purchase price by way of Bank Guarantee from a reputable bank. The amount was to be released to the vendor within 14 days of successful registration of the Transfer in favour of the purchaser. Since the registration was done on 7th February 2014 the completion date was on or before 21st February 2014. They relied on the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2EA 503** where the court held that a Court of law cannot rewrite a contract between the parties; the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

8. The respondent contends that his claim was not for special damages. He argued that the effect of the variation agreement was to provide for payment of the balance of the purchase price and not to alter or extend the completion date as advanced by the appellant. He urged that clause 1.2.1 and 1.2.2 of the agreement for sale and Clause 1.3, 1.4 and 2 of the variation agreement are construed to mean that room was given for the parties to complete payment of the purchase price, delivery of the completion documents and performance of any other pending obligation within 90 days period after execution. He urged that under clause 23 of the agreement for sale parties agreed that a person who is not party to the agreement shall not have any right to rely or enforce any term of the agreement. He submitted that the bank being a third party in the sale agreement did not have any right to rely on any terms of the agreement. He further submitted that where there is an issue as to breach of contract, the party alleging breach ought to some extent attempt to mitigate his loss and relied on the cases of **South Nyanza Sugar Company Ltd v Donald Ochieng Mideny [2018] eKLR**, **Consolata Anyango Auma v South Nyanza Sugar Company Ltd Mgr HCCA 53 OF 2015 [2015] eKLR**, **Kenya Industrial Estates Ltd v Lee Enterprises Ltd Nrd CA Civil Appeal No 54 of 2004 [2009] eKLR** and **Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000[2004] eKLR**. He contends that he sought various reliefs but none included relief for breach of contract. The respondents simply sought interest for the period of default. They advanced that damage for breach of contract was not pleaded and mitigation for loss does not arise.

9. He contended that the applicable base lending rate published by Barclays Bank Kenya Limited as at 21st November 2013 was 18.5% per annum thus an addition of 3% would make it 21.5%.

DETERMINATION

10. Being the first appellate court, I am required to re-evaluate the evidence independently and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify (See **Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348**).

11. It is not disputed that the respondent and the Appellant on 20th August 2013 entered into an agreement for sale where the appellant was the purchaser and the respondent the vendor. As per the agreement of sale clause 1.2 provided that the purchaser has agreed to pay the vendor

the sum of Kenya Shillings Two Hundred and Sixty Eight Million Four Hundred and Thirty Five Thousand (Kshs 268,435,000/-) being the purchase price which was to be paid out as follows;

1.2.1 Upon the execution of this agreement by both parties but not later than Twenty One (21) days from the date of execution, the purchaser **shall procure a Bank Guarantee from a reputable bank or financial institution on terms acceptable to the Vendor's Advocates** securing the payment of the entire Purchase Price in accordance with Clause 6 below;

1.2.2 The whole purchase price of Kenya Shillings Two Hundred and Sixty Eight Million Four Hundred and Thirty Five Thousand (Kshs 268,435,000/-) **shall be released by the Purchaser's Guarantors to the vendor within Fourteen (14) days of the successful registration of the Title in favour of the Purchaser but in any event on or before the completion date.**

3. Completion Date

The date of completion shall be Ninety (90) days from the date of execution of this Agreement (the "Completion Date"). Time shall be of the essence as regards delivery of the completion documents listed in Clause 6 below, completion of payment of the purchase price and all other obligations of the parties under this agreement.

18. Interest

All sums due from one Party to the other under this Agreement shall bear interest at the per annum rate of three per cent (3%) above the base lending rate as published by Barclays Bank of Kenya Limited from time to time (the "Interest Rate") from the date of such sum or sums fall due until the date of actual payment.

12. In due course the parties varied the terms of their agreement vide the Variation of an Agreement for Sale dated 20th August 2013. Essentially the purchaser paid the vendor Kshs 16,500,000/- as deposit towards the purchase price and the balance of Kshs 251,935,000/- was to be secured by a Bank Guarantee which balance was to be released to the vendor within 14 days of the successful registration of the title in favour of the Purchaser **but in any event on or before the completion date.**

13. Under the terms of the letter of guarantee issued by Cooperative Bank ("the Bank") the respondent could raise a claim in case of default on the part of the Bank and such a claim would be settled within 30 days from the date of the respondent's first demand.

14. I have taken the trouble to set out the relevant parts of the agreement for sale and variation of the agreement for sale in my analysis to fully appreciate the terms of the parties and get to the dispute between the respondent and appellant. It is the duty of the court to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed (See **Smith –vs- Cook (1891) AC 297 at 303**).

15. I am called to make a determination as to whether there was breach of contract or simply a claim for interest that had accrued? **Black's Law Dictionary, 9th Edition, Page 213**, defines a breach of Contract as;

"a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

16. I disagree with the assertions of the respondent that their claim was neither one on breach of contract nor one seeking special damages. The agreement for sale under clause 18 contained a remedy in the event of late payment. The contract also provided that time shall be of the essence as regards to completion of payment of the purchase price. The appellant's failure to make payment of the balance of the purchase price on the completion date amounted to breach of contract and the application of interest on late payment was a contractual remedy.

17. I will now proceed to make a determination on whether the late payment by the appellant entitles the respondent to claim interest on the balance of the purchase price after execution of the Variation of Agreement of Sale. This would require an analysis of the parties' contract and interpretation of the terms of their agreement as a whole. In **Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) 1 WLR 601** at 609, held as follows;

"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

18. The appellant urged the court to consider the terms of the letter of guarantee issued by the Bank. However I do not find that the terms of the guarantee should be considered as the letter of guarantee was not in existence at the time the agreement for sale was executed. It is well a settled principle that extrinsic evidence cannot be received in order to prove the object with which a document was executed. In **John OnyanchaZurwe v OretiAtindaCA Civil Appeal No. 217 of 2013 (UR)** where the Court of Appeal cited with approval the following passage in **Halsburys Laws of England (4th Ed. Vol 12) para 1478** on Interpretation of Deeds and Non- Testamentary Instruments: Para 1478 which reads;

Extrinsic evidence generally excluded:

“Where the intention of the parties has been reduced to writing it is in general, not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the documents. The principle applies to records, arbitrators’ awards, bills of exchange and promissory notes, bills of lading and charter parties, bonds, description of boundaries, guarantees, leases or contracts for sale of

.....
Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.

19. The letter of guarantee does not form part of the agreement between the appellant and respondent, thus the parties are only bound by the terms of the agreement for sale and the variation of the agreement for sale. According to the Agreement for sale, it is with no doubt that completion date was 20th November 2013. As per my earlier discussion the appellant had a duty not only to pay the purchase price but also to pay interest at the rate of three per cent (3%) above the base lending rate as published by Barclays Bank of Kenya Limited as at the time of default. There is no doubt that if a party is deprived of the use of his money he must be compensated therefore by an award of interest thereon from the date he was so deprived (see the Court of Appeal decision in **Omega Enterprises Kenya Limited vs Eldoret Sirikwa Hotel Limited & Others Civil Appeal No. 235 of 2001**). The court in **Shah vs Guilders International Bank Limited [2003] KLR 8** held that:

“...we further understand these provisions to be applicable only where the parties to the dispute have not by their agreement, fixed the rate of interest payable. If by their agreement parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent...”

20. Similarly in **Nalinkumar M. Shah vs. Mumias Sugar Company Ltd [2010] eKLR** it was held that;

“...Kenyan courts have power at common law to award interest for late payment of debt or damages irrespective of whether or not there is an agreement between the parties and there is also no impediment to awarding compound interest for the late payment if circumstances justify the same and if such interest will serve the ends of justice. After all a commercial transaction deserves the same treatment whether and wherever it takes place.”

21. I therefore find that the Respondent was entitled to interest. I now turn to whether the respondent established on a balance of probability the interest rate applicable to the balance of the purchase price. As per the Agreement of Sale *all sums due from one Party to the other under this Agreement shall bear interest at the per annum rate of three per cent (3%) above the base lending rate as published by Barclays Bank of Kenya Limited*. This court must therefore abide by the agreed interest rate between parties, but first, what was the base lending rate as published by Barclays Bank of Kenya Limited at the time of default? It is trite law that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist (see **section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya)**). I have looked at the plaintiff’s documents and cannot find the published base lending rate by Barclays Bank of Kenya Limited at the time of default.

22. There was no evidence in regard to the base lending rate. In his own words under cross examination the respondent stated;

“To ensure no loss, I instructed my lawyers to write the demand letter. I am claiming 1.9m it is for 13 days. My advocate did the computation. It is 3% as per the agreement. Clause 18 of Main Agreement (PEXH 1): I relied on calculations by my Advocates hence I did not bother how it was computed. I do not have the breakdown letter dated 28/01/2014 – I have no proof of the base lending rate for Barclays Bank as at 20/11/2013 or 21/11/2013. May be they contacted the bank. The date of issuance of completion documents is before court.”

23. The ascertainment of the amount payable being interest in default as per Clause 3 of the Agreement was not possible without evidence of the base lending rate as published by Barclays Bank of Kenya Limited from the date the sums fell due.

24. It appears to me that the trial magistrate overlooked this important aspect of the suit. Throughout her judgment, there is no indication of what the base lending rate was as published by Barclays Bank of Kenya Limited at the time of default. The finding of the court is generalized and devoid of specifics. The trial magistrate at page 4 of the judgement (last paragraph) stated;

“I find that the defendant failed to satisfy the court that interest is not payable at all or that the plaintiff cannot lawfully demand payment from the defendant in view of the Bank Guarantee. The plaintiff proved his case on a balance of probability. The plaintiff is entitled to the sum claimed

On costs, the general rule is that costs follow the event. I see no reason to deviate from this rule. The plaintiff is entitled to costs incidental to the suit.”

25. I do not find that the respondent clearly established that the interest rate was 21.5% as it failed to produce into evidence the published base lending rate by Barclays Bank of Kenya Limited at the time of default. The upshot is that the appeal is allowed and the judgment by the trial court set aside.

26. The appellant shall have the cost of this suit.

Dated, Signed and Delivered at Nairobi this 20th day of January, 2020.

A. K. NDUNG'U

JUDGE