



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 539 OF 2007

STEPHEN KIAMA KIGANO.....1ST PLAINTIFF

PENELOPE WENDY KIGANO.....2ND PLAINTIFF

- VERSUS -

ZAVERCHAND RAMJI SHAH.....1ST DEFENDANT

BEDANS AUCTIONEERING SERVICES.....2ND DEFENDANT

KISAUNI PROPERTIES LIMITED.....3RD DEFENDANT

REGISTRAR OF TITLES, LAND REGISTRY NRB.....4TH DEFENDANT

OFFICIAL RECEIVER & LIQUIDATOR OF

CONTINENTAL FINANCE LIMITED.....5TH DEFENDANT

JUGMENT ON INTEREST

1. **Stephen Kiama Kigano** and **Penelope Wendy Kigano** (herein after referred to as **Kigano**) filed this action against five defendants. On **4th October, 2017**, a consent order was recorded in the following terms:

“IN COURT ON THE 4TH DAY OF OCTOBER 2017 BEFORE THE HONOURABLE MR. JUSTICE OCHIENG

ORDER

Matter coming up for mention on 4th October 2017 AND UPON hearing counsel for the Plaintiffs and 1st Defendant, AND upon consent entered;

IT IS HEREBY ORDERED By consent:

1. *That the 1st Defendant shall pay to the Plaintiff Kshs 500,000/= in 3 equal instalments beginning from 7 days from the date hereof.*

2. *That the Plaintiff's interest in LR.No. 4242/3 Kitisuru be limited to a portion measuring 0.2277 Hectares, on which there is a house occupied by the Plaintiff.*

3. *That both the suit and counter-claim between Plaintiff and the 1st Defendant is marked as settled with no order as to costs.”*

2. Following that consent the only issues that fall for determination in this matter between **Kigano** and **Kisauni Properties Limited** (3rd defendant) and official receiver and liquidator of **Continental Credit Finance Limited** (5th defendant) are:

a. is interest payable by **Kigano** on the unpaid balance of the purchase price; and

b. if the answer to (a) above is in the positive, at what rate should the interest be?

3. The determination of those two issues shall be on the basis of the documents filed in this matter and the written submissions of **Kigano**, the 3rd defendant and the 5th defendant.

BACKGROUND

4. **Kigano** was a tenant in a house situated on **LR No. 4242/3 Kitisuru Nairobi**. That property was registered in the 3rd defendant's name. The 3rd defendant is wholly owned subsidiary of **Continental Credit Finance Limited** (now in liquidation). On **30th April, 1986**, an agreement for sale was entered into whereby **Kigano** agreed to buy and the 3rd defendant agreed to sell '**the sub division of LR No 4242/3 on which is created a house together with improvements thereon**'.

5. The purchase price agreed was **Ksh 600,000**. **Kigano** paid **Ksh 60,000** to the 3rd defendant at the time of execution of the sale agreement and on **24th July, 1986** paid **Ksh 40,000**. The balance of the purchase price that remained unpaid is **Ksh 500,000**. This is the amount this court is called upon to decide whether it accrues interest and if so how much.

6. As stated before, what **Kigano** was purchasing was a sub division of **LR No 4242/3 (the subject property)** and more specifically, where the house, which he previously occupied as a tenant was.

7. The background of this matter, would not be complete without mentioning that **Kigano** on **4th December, 1986**, registered a caveat on the subject property claiming a purchaser's interest. That caveat was removed on **19th October, 1995**, and the subject property was transferred and registered in the name of **Zaverchand Ramji Shah (the 1st defendant)**.

8. As a consequence of that transfer to the 1st defendant, the 5th defendant, on **28th November, 1995**, filed a suit being **Nairobi HCC No. 3462 of 1995** against the 1st defendant, in this case, and the registrar of titles. By that action, the 5th defendant sought the court's declaration that the conveyance to the 1st defendant of the subject property was null and void for reasons of fraud and for rectification of the title by cancellation of the entry made on **19th October, 1995**.

9. The court in **HCCC No 3462 of 1995**, issued a vesting order of the subdivision of **LR No. 4242/3** except the subject property. By that vesting order, all those titles of the sub division, except the subject property, were vested in different entities and individuals.

10. Although the documents before me do not state clearly whether the transfer to the 1st defendant on **19th October, 1995**, was cancelled in respect to the subject property, it does however seem that it was agreed between the parties before me that, the 3rd and 5th defendants are ready to transfer the subject property to **Kigano** and hence the consent reproduced above in this judgment.

11. Although the clause no. 5 of the agreement of sale dated **30th April, 1986**, between **Kigano** and 3rd defendant was supposed to be completed on **30th July, 1986**, completion did not occur on that date. The delay in completion on the part of the 3rd defendant seems to have been contributed by the winding up of the 5th defendant. Once the 5th defendant was wound up, the transaction was taken over by the official receiver and liquidator of **Continental Credit Finance Ltd**.

12. Perusal of the documents filed in this matter, by the parties, revealed that as far back as **23rd July, 1986**, **Kigano** had obtained a commitment from **Housing Finance Company of Kenya Limited** to finance them to pay the outstanding balance of the purchase price of **ksh 500,000**.

13. What however, seems to have delayed completion of the sale was the official receiver and liquidator's failure to communicate with the then advocate for **Kigano** on the availability of the title deed of the subject property together with the deed plan. I noted numerous letters, some addressed to **J.N. Kingarui, J. K. Muchae, and P. Omondi Mbago** all officers within the official receiver's department. Those letters mostly remained unanswered and therefore the issue of availability of the title and the deed plans remained unresolved.

14. No wonder, it was during that time of lull, that the 1st defendant was irregularly registered as owner of the subject property, which according to **HCCC No. 3462 of 1985**, was alleged to be fraudulent transfer.

SUBMISSIONS

15. I have considered the parties submissions.

16. According to **Kigano's** learned counsel, the delay in completion of the sale agreement was due to the 3rd and 5th defendant's failure to conclude the sub division of the subject property and failure to provide **Kigano** with his entitled portion of that property.

17. **Kigano's** advocate also relied on the many blockages to **Kigano** obtaining the title and deed plan which included the 5th defendant's allegation that **Kigano** had purchased the subject property at an under value and also due to subsistence of **HCCC No. 3462 of 1985**. The later reason is evidenced by various letters from the official receiver and one such letter dated **14th December, 2005** is in the following terms:

"Date: 14/12/2005

Mr & Mrs. Steven K. Kigano,

P. O. Box 46740-00100,

NAIROBI

Dear Sir,

Re: Winding Up Cause No. 29/1986

Continental Credit Finance Ltd

L.R. No. 4242/3 –Kisumu- Nairobi

We are in receipt of your letter dated 7th October, 2005 and do apologise for the delay in responding thereto.

The Kisumu property whose portion was sold to you, has a matter in court. Upon conclusion of the suit, you shall get a title of the plot you bought.

In the meantime, we shall keep you posted of the developments.

Yours faithfully

P. Thoithi Kanyuira

Principal State Counsel

For: Official receiver & Provisional Liquidator

/sao

18. It is because of the above stated incidents that **Kigano** submitted that the delay, and consequently the interest cannot be laid upon him.
19. Following the above submissions, learned counsel for **Kigano** submitted that the applicable clause to determine whether interest is payable is the **Law Society of Kenya (LSK) Condition of Sale of 1982**.
20. Clause 6 (1) of those conditions provides:

“subject to sub – clause 2 hereof where completion is delayed beyond the contractual completion date by an act or default of the vendor or his mortgagee no interest is payable on the purchase money”.

21. The 3rd and 5th defendants in their submissions relied on 2 clauses in the **LSK Condition of Sale of 1989** and prayed that the court do find that **Kigano** are liable to pay interest and that interest be found to be compound interest. To support that submission, those defendants referred to clause 4 of the agreement of sale, which provided that the agreement of sale was subject to **LSK’s Condition of Sale** in as far as they were not inconsistent with that agreement of sale. The defendants further relied on clause 2 (1) (g) of **LSK Condition of Sale** which defines interest as:

““interest” means the annual rate of interest specified in the special conditions or if none is so specified, two (2) percentage points above the maximum rate of interest which may be charged by specified banks for loans or advances pursuant to section 39 of the Central Bank of Kenya Act (Cap 491); provided that, if more than one maximum rate is so specified, the lowest rate shall be applied.”

22. It is on the basis of the above submissions that the defendants sought that **Kigano** be ordered to pay interest on the balance of the purchase price of **Ksh 500,000** which the defendants calculated to be **Ksh 127,100,003**.

ANALYSIS AND DETERMINATION

23. The agreement of sale between **Kigano** and the 3rd defendant did not provide for interest, let alone compound interest. The court will therefore rely on the **LSK Condition of Sale** in that regard. In that regard, the court will rely on the case **John Michuki vs Kenya Shell Limited, Civil Appeal No. 225 of 1999**, where the court held:

“As regards contracts between persons not under disability or at arm’s length, the Courts of law should maintain the performance of contracts according to the intention of the parties and should not overrule any clearly expressed intention on the basis that the judge know the business of the parties better than the parties themselves.”....

that:

“Whatever the document, it must receive a construction according to the plain meaning of the words and sentences contained therein...”

24. The defendants in submissions referred to the **LSK Condition of Sale of 1989**. The agreement of sale between **Kigano** and the **3rd defendant** was dated **30th April, 1986**. It follows that, unless there was specific agreement between the parties, that **agreement of sale of 1986** cannot retrospectively adopt the **LSK Conditions of Sale of 1989**. I could not see such a clause which incorporated the **LSK 1989 Conditions of Sale**.

25. In my humble view, the condition of sale applicable to the agreement between the parties are those of 1982.

26. The completion date of the agreement of sale between Kigano and the 3rd defendant was on **30th July, 1986**. As stated before, **Kigano** had by **23rd July, 1986** secured a loan facility from **Housing Finance Company of Kenya**. **Kigano** were unable to take up the offer of that facility because, as I deduced from the documents, the official receiver and liquidator took over the affairs of **Continental Credit Finance Limited** of which the 3rd defendant was a wholly owned subsidiary. As stated before, the 5th defendant was dilatory in responding to many requests from kigano’s advocate on the availability of the title deed and deed plan. How can that delay on the part of the 5th defendant be blamed on Kigano? There is certainly no evidence before this court that the 3rd defendant was ready to complete the transactions as at **30th July, 1986**.

27. Having considered the documents before me and the submissions made by the parties, I find and I hold that no interest is payable on the outstanding balance of the purchase price.

28. In conclusion the judgment of the court is:

*a. The plaintiff shall not pay to the 3rd and 5th defendants interest on the balance of the purchase price of **LR No 4242/3 Kitsuru measuring 0.2277 Hectares**.*

b. There shall be no orders as to costs between the 3rd and 5th defendants and the plaintiffs.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiffs

.....for the 3rd Defendant

.....for the 5th Defendant