



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
HIGH COURT CIVIL APPEAL
CIVIL APPEAL NO. 716 OF 2007

JOSEPH NJAGI KANAKE.....PLAINTIFF/APPELLANT

VERSUS

BEN DUKE OMWENGA.....1ST DEFENDANT/RESPONDENT

ABIGAELE BONARERI OMWENGA.....2ND DEFENDANT/RESPONDENT

*(Being appeal from the Ruling and Orders of the Honorable Chief Magistrate Mrs. Maureen Odero,
dated 23rd July, 2007 in Milimani Civil Case No. 7038 of 2006)*

JUDGMENT

BACKGROUND

1. On the 2nd February, 2006 the Appellant/Plaintiff hereinafter referred to as the Appellant filed suit against the Respondent/Defendants hereinafter referred to as the Respondent. One of the orders prayed in the plaint was for Specific Performance to compel the 1st Respondent to transfer L. R. No. Nairobi. Block 112/63 to the Appellant in terms of the sale agreement, amongst other prayers in the judgment.

2. In the plaint dated 6th February 2006, the Appellant avers that he entered into a sale agreement with the Respondents on the 6/10/04 for the sale of Nairobi Block 112/63. The purchase price was Kshs. 2,600,000/-; that they paid the said sums on the 2/11/04 and 23/5/05 and were issued with receipts No. 907 and 1023 for Kshs.260,000/- and Kshs. 2,340,000/- respectively; that on the 30/5/05 he discovered that the 2nd Respondent had placed a caution against dealing with the said property; that on the 16/12/05 the 1st Respondent through his lawyer sought to unilaterally repudiate/rescind the transaction and to refund the purchase price. The appellant claims in his plaint is that the unilateral attempt to rescind/repudiate the sale agreement is in breach of the sale agreement is null and is no effect in law.

3. A statement of defence was filed by the Respondents on the 27th July, 2006 denying the Appellant's claim. They aver that at time that title was returned to them the appellants had not paid the payment and that the Appellant delayed in making the payment; that by the time their advocate and Simba and Simba advocates were communicating they had withdrawn instructions from the firm of Simba and Simba Advocates. They aver that the 2nd respondent did not place any caution and that it is the appellants who had done so and the caution is the subject of **HCC 295 of 2006** filed by the

2nd Respondent against the Appellant.

4. On the 1st September, 2006 the Appellant's Counsel filed an application under Order VI rule 13(1) (b), (c) and (d) of the old Civil Procedures Rules. In the said application the appellants sought to have the statement of defence dated 27/6/06 struck out and that judgment be entered for the plaintiff as prayed in the suit. After hearing the parties Hon Maureen Odera (as she then was) delivered a ruling on the application. The said ruling is the subject of this appeal.

5. The grounds of appeal in the Memorandum of Appeal as follows;

i. The Learned Trial Magistrate erred in law in dismissing the plaintiff/appellant's application for specific performance dated 1st September 2006.

ii. The Learned Trial Magistrate erred in law and in fact in holding that the defendants were entitled to defend the suit merely because the second respondent had placed a caution on the suit property.

iii. The Learned Trial Magistrate erred in law and fact in taking into account matters which she ought not to have considered in dismissing the appellant's application for specific performance.

iv. The Learned Trial Magistrate erred in law and in fact in failing to take into account matters facts which she was obligated to take into account before reaching the decision to dismiss the appellant's application.

v. The Learned Trial Magistrate erred in law in holding that damages would be an adequate remedy in an application for specific performance of a contract.

vi. The Learned Trial Magistrate erred in law and in fact in reaching a decision that goes against established legal principles and against the weight of the evidence.

The Appellant prays that;

a) That the Appellant's appeal be allowed.

b) That the Ruling/Orders of the Learned Chief Magistrate made on 23rd July 2007 dismissing the Appellant's application dated 1st September 2006 be set aside.

c) That this Honourable Court be pleased to allow the Appellant's application dated 1st September 2006.

d) That costs of this Appeal the application and the suit in the Lower Court be paid by the Respondents.

SUBMISSIONS

6. Parties chose to argue this appeal by way of written submissions. I have read the said submissions, the record of appeal, the ruling and the grounds.

7. In the Appellant's submissions it's argued that they sought orders of specific performance because they had performed their part of contract; that though the Lower Court accepted the said fact then proceeded to disallow the application on the basis that the 2nd respondent had lodged a caution and that entitled her to be heard on merits. It was submitted that the Court erred and misdirected itself in that the 2nd respondent denied placing the caution in her defense, though on page 33 of the record

of appeal shows the caution was placed by the 2nd respondent. The Appellant claimed that the 2nd Respondent was being mischievous as she was the one who signed the sale agreement on behalf of the 1st Respondent.

8. It is further submitted that the Court took into account matters which it should not have. This being the fact that the 2nd Respondent had placed a caution on the land and that the 2nd Respondent's had an interest in the land. The Appellant submitted that the Court failed to take into account that they had fully performed their obligations under the sale agreement and that the 2nd Respondent had been involved in the sale all along; that the Court erred when it held that the Appellant would not be prejudiced as she would be compensated by way of damages, and that this was an irrelevant consideration because the Appellant had elected to pursue the remedy of specific performance and that the issue of compensation was raised by the Trial Court 'Suo Moto' as the respondent did not raise it during trial; that the decision of the Lower Court went against the established legal principles and weight of the evidence and that where it has been established that the defence is sham such a defence ought to be struck out. That if the case is a clear one as it was it should be disposed off in a summary.

9. The Applicants relied on 2 cases namely the case of **Johnson Joshua Kinyanjui & VinubhaiVirpal Shah Vs. Rachel Wahito Thande and Another C.A No.284 of 1997** where Akiwumi, Tunoi & Shah, JJ.A granted an order of specific performance in a case where the balance of the purchase price had not been paid and the Court found that this was a clear cut case that did not require to go to full hearing, also in the case of **Sagoo Vs. Duarado (1983) KLR. Page 365** to support the proposition that as time had not been made of the essence in the contract and had not subsequently been made of essence by a Notice to complete being issued then the defendant's defence that there was a delay in payment of the purchase price was a sham defence.

10. The Respondents submitted that they never received a single cent from the total purchase price of Kshs. 2,6000,000/- allegedly paid to the Respondent's advocates namely, Simba & Simba Advocates. Specific Performance envisages a situation where the sale agreement is subsisting and the Vendor has received full payment of the purchase price but is unwilling to transfer the property to the rightful purchaser; that the sale agreement was terminated on the 26th April, 2005 when the 2nd Respondent wrote to their advocate on record withdrawing instructions and cancelling the sale agreement between the Appellant and the Respondents; that the 1st Respondent signed the transfer documents before receiving payment because of the trust he had for his advocates who happened to be his close family friends.

11. That the agreement for sale between the Appellant and the Respondents was entered into on 6th October, 2004 and by 26th April 2005, some seven months later, the Respondents had not received any payment; that this prompted the 2nd Respondent to write to her advocates withdrawing instructions and thus cancelling the sale; that even though time was not of essence in the sale agreement, seven months delay was a long period and they urged the Court to find that there was inordinate delay in paying the purchase price; that there is no contract between the Appellant and the Respondents to warrant Specific Performance.

12. The Respondents further submitted that they wish to inform the Court that the suit property was no longer vacant and that there had been a change of user from residential to commercial; that the property has since been developed and its value has greatly appreciated and that it is no longer the same property that was being sold in 2004; that granting the orders sought would cause difficulties in enforcing them and that specific performance c be granted in a case where the vendor has not received the purchase price and there has been a change of user.

13. The Respondents further submitted that after the withdrawal of instructions by the 2nd Respondent, the firm of Simba and Simba Advocates went ahead and received the final payment from the Appellant on 23rd May 2005 and it is not clear whether the firm ever informed the Appellant's Advocates that their instructions to act for the Respondents had been withdrawn; that this is the one

reason why the matter should go for full hearing and have the firm of M/s Simba & Simba Advocates joined as a party; that the Appellant seems to be aware of this fact and that is why he filed a suit against the firm.

14. It was submitted that the disallowance of the Appellant's application be the Lower Court was neither an error nor misdirection, that there are weighty matters to be ventilated by the Court before orders of specific performance are issued; that the 2nd Respondent averment that she did not place any caution on the property was an oversight on the part of the Respondents' advocates then on record as the 2nd Respondent did place a caution on the property after realizing that her advocates were mishandling her and were taking advantage of the absence of her husband; that the 1st Respondent and that he Learned Magistrate's reference to a caution filed by the 2nd Respondent at was in order because despite the oversight in the defence, the caution itself clearly indicates that the 2nd Respondent filed it; that at the time of cautioning the property, payment of the full purchase price had not been brought to the attention and/or released to the 2nd Respondent and that at no stage had the parties had an opportunity to testify in Court over this matter an opportunity the Respondents craved for in the Lower Court ; that it was wrong for the Appellant to call the Respondents defence a sham when it was clear that the Respondents had not received any money for their property and that Appellant seems to be aware that the Respondents did not receive any money for the property from the letters written by the advocates Simba and Simba Advocates; that this is not a clear-cut case that can be disposed of in a summary manner ;that Civil Appeal No. 284 of 1997 as cited by the Appellant is not relevant in the appeal before you and should be ignored, the agreement of sale had been cancelled long ago, the relevant transfer documents were long returned to the Respondents, the property has since been developed and is no longer the vacant property mentioned in the agreement; that the case of **SAGOO VS. DUARADO (1983) KLR. PAGE 365** cited by the Appellant is not relevant either; the fact that time was not of essence in the contract did not mean that the parties had the freedom to delay completion for seven months and that in the case of **FLAT KENYA-VS-ROBLE (1973) 1 E. A. 11 (CAN)** an application of specific performance a principle of equity was established and it was held that specific performance could not be granted unless the remedy at common law would not do justice in the matter, which means that specific performance, cannot be granted if an award of damages can sufficiently compensate the aggrieved party; that the Court would not order specific performance where such performance is impossible or where the Court cannot ensure compliance with its order and that the case before Court is one where compliance will be impossible given the current state of the suit property and that damages can sufficiently compensate the aggrieved party.

FINDINGS

15. There is no dispute that parties in this suit had an agreement for sale, monies were paid and the Respondents repudiated the contract. In the submissions filed the Respondent has raised two fundamental issues, the reasons why they chose to repudiate the agreement and the fact that the property is no longer available. In the ruling delivered the Trial Court found that the appellants had paid the purchase price but also the Court could not wish away the caution that was lodged by the 2nd Respondent. In my view the Court did not err in making this finding, as a Court of justice it needed to look at the rights of all parties and in doing so the Court chose to give the respondents a chance to defend the suit and to be heard on the issue. This was done so that the issues between the parties could be ventilated at the full hearing. The Court held that it was mindful of the authorities cited but the Court and felt that the orders were not merited then. I find no misdirection in the said findings. It has even been submitted that the property is no longer available, this is an issue that needs to be established at a full hearing. Each case must be handled on the facts and on its own merit. The Court did not err taking into account what had been deposed by the Respondents' in their affidavit, as a Court of justice it must look at all the issues and decide whether the respondents defense deserved a summary dismissal. In my view this is a matter that needs to go to full hearing. Am cautious not to comment on some of the letters attached on when the amounts were paid or when the contract was repudiated and whether the appellants are entitled to an order of specific performance, in my view this is a matter that can be settled by the parties in light of the new developments if proved. I therefore

dismiss the appeal. Each party shall bear its costs. The lower Court file shall be forthwith returned to the Chief Magistrates Court for the hearing and determination.

Orders accordingly.

Dated signed and delivered this 6th day of **October 2014**

R.E OUGO

JUDGE

In the presence of;

.....**For the Appellant**

.....**For the Respondents**

.....**Court Clerk**