REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 141 of 2005

MESKY M. ABDALLA …….……....….APPELLANT

VERSUS

SYMPROSE A. SEMBA ……..RESPONDENT

CORAM

J. W. MWERA J.

MISS OMOLLO FOR APPLICANT

ONJORO FOR NJOGA FOR RESPONDENT

COURT CLERK DIANGA INTERPRETER/SWAHILI/ENGLISH/LUO

J U D G E M E N T

This appeal arose from the lower court judgement at Kisumu where the appellant/plaintiff sued the respondent/defendant on account of land sale agreement of 7th June 2000. It was pleaded in the plaint that the respondent agreed to sell land parcel No. KISUMU/MUNICIPALITY/BLOCK/4/579 to the appellant at shs.1,400,000/=. As per the agreement the appellant paid a deposit of shs.400,000/= on the date of the agreement. The balance shs.1,000,000/= would be paid on the day the lease would be transferred to the appellant. It was averred that the respondent then failed to effect the transfer thereby causing the appellant loss and damage. So she prayed that the lower court do order that the respondent transfer the subject property to the appellant or refund the deposit shs.400,000/= with interest with effect from 7th June 2004.

The plaint was filed by Miss Anne Omollo, Advocate, who represented the appellant both in the lower court and here.

Mr. O. Njoga, Advocate, filed a defence in the suit and also represented the respondent.

The defence began by charging that the plaint filed as well as the verifying affidavit was incompetent. The sale agreement terms thereto and that a deposit was paid, were denied. But it was added that time of the transfer of the lease was not of essence in the contract and that the Commissioner of Lands had yet to prepare and hand over the certificate of lease to the respondent who would in turn hand it over to the appellant. That such factors had delayed the conveyance of the lease. So the suit was considered premature and should be struck out.

The learned trial magistrate heard evidence from each of the litigants. He concluded that time was not made on essential part in the agreement of 7th June 2000 and the suit was dismissed.

A four-point appeal was filed, and argued on two fronts.

Miss Omollo argued that much as time of the transfer was not so stated in the contract initially, in the letters exchanged between the parties, that came to be. That on 28th September 2000 after 3 months from the date of the sale agreement, the appellant addressed the respondent a letter to the effect that she should proceed with speed to effect the intended transfer. And if that was not done in writing

"……**..In the next 14 days I'll have no option but to seek legal redress.**

(see Exh.P2)

On 11th October 2000 a reply came from M/S S.M. Madzayo & Co., Advocates, acting for the respondent, explaining that the sale agreement was pegged on the respondent's processing the title first before transferring the purchased interest. That time was not of essence in the contract. However:

"**In the meantime, our client wishes to indicate that she has been assured that the title to the property will have been processed latest by 30th November 2000, whereafter she will execute the Transfer."**

(see Exh.P3)

Be it noted that both Exh.P2 and 3 were not part of the record of appeal but were gleaned from the lower court record. From those two letters, it can be noted that the respondent acted in the 14 days the appellant threatened to take legal action in the event the transfer was not effected. None was effected and on 21st May 2001 – this suit was filed - about 6 months since it was assured that at the latest the certificate would be ready by 30th November 2000, and thereafter the transfer would be executed.

Miss Omollo maintained that time had thus become of essence and also that even if that was not a term in the contract, the appellant felt delayed in the transaction and so she had factored time as of essence when she penned the notice of 28th September 2000. The suit was filed because the respondent had not transferred the property. So because specific performance was not forthcoming, a refund ought to have been ordered.

Mr. Njoga's position was that the learned trial magistrate properly analysed the evidence, the law and properly declined to grant the orders sought. Time was not of essence in the contract and the letter of 28th September 2000 was not a valid notice. And that the 3 months from the time of the agreement to the writing of this letter, would not be deemed to be inordinate so as to entitle the appellant to seek to rescind the contract. Or she could not unilaterally make time of essence. Two cases were cited to support the respondent's stand.

Aida Nunes versus J. M. Njonjo & Another {1962} E.A. 88 and Smith versus Hamilton {1952} 2 All E.R.928

It was added that there was no impropriety on the part of the respondent to warrant rescinding of the contract.

Asked by the court whether his client was still ready and willing to effect the transfer as at the time of hearing this appeal, Mr. Njoga answered that he could not state that from the Bar.

Just as has been remarked about the plaint plus the arguments the appellant put forth, evidence was in more or less the same order – from the sale agreement, letter of 28th September 2000 (Exh.P2) and the reply Exh.P.3. The appellant added that in her Exh.P4 she intimated to the respondent that she was ready

to pay the balance of the sale price, and even move into the house as the transfer was being processed. And that all this was necessitated by the fact that she took a loan for that deal (Exh.P5).

In cross-examination the appellant conceded that she did not carry out a search to confirm in whose name the house was before she entered into the sale agreement. But she knew that it was in the respondent's late husband's name. She had not cancelled the agreement which did not provide for a remedy in the event of a breach and/or refund with interest. Then this litigant was shown the documents which the respondent had in respect of survey, payments etc. They had never been shown to her before.

On her part, the respondent similarly admitted the undisputed facts. In the agreement she received the deposit. She would process the lease certificate for the appellant then the balance would be paid. She then produced a rate clearance certificate, a letter of allotment, survey documents etc and lease certificate. This had her name wrongly spelt. A fresh one was to issue only that the appellant did not give the respondent time to effect the transfer. The agreement had not been abandoned. The respondent blamed the Commissioner of Lands about the delayed lease.

In the view of this court, it is not in dispute that the sale agreement did not make time of essence. There was no provision for a remedy in the event of breach or that a refund would come with interest. But the deposit was paid. The agreement did not contain/acknowledge that the seller/respondent was not the registered owner of plot number 4/579. Neither was it agreed that the property belonged to her late husband and that transferring it was subject to first processing change of ownership into the name of the respondent. The agreement made by the litigants themselves and witnessed by a magistrate at Winam court set out the parties, the property being sold, the price and how it was to be paid.

The issue that seemed to rank foremost in the minds of counsel and the learned trial magistrate was what to make of time being or not being of essence since it was not stated in the agreement, regarding when the sale would be completed.

The sale agreement was entered into on 7th June 2000. The respondent had done nothing in 3 months. On 28th September 2000 the appellant gave her 14 days to confirm whether or when the transfer would be executed (Exh.P2). On 11th October 2000, the respondent through her lawyers promised that at the latest by 30th November 2000 the title would be ready and she would execute the transfer. So this became the time set by parties. It was promised by the respondent and the appellant sat back awaiting the title. That agreed time came and passed. This suit then followed on 21st May 2001 – some six mothers or down the line. In the circumstances the appellant was entitled to terminate the contract because its terms had been breached by the respondent. Even as at the time of hearing this suit some four years later, she was not ready to perform her part. Accordingly, the lower court ought to have ordered that the deposit paid be refunded. There is no justification for the respondent to keep both the money deposit and the property. She should not be heard to call into play the process she took to get the title into her name and thus blame the Commissioner of Lands for the delay involved. All that was extraneous to the sale agreement.

But that she is no longer interested in conveying the title of plot number 4/519 to the appellant, this court directs that the respondent refund the deposit in the next 30 days. The refund has no interest attached to it. That was not provided for in the agreement.

This appeal succeeds with costs here as well as in the court below.

Judgment accordingly.

Delivered on 3rd July 2009.

J. W. MWERA

J U D G E

JWM/mk.