



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & OWUOR, J.J.A.

CIVIL APPEAL NO. 57 OF 1998

BETWEEN

FRANCIS MWANZA MULWA APPELLANT

AND

LUCIA MWELU DEON MUSAU RESPONDENTS

**(Appeal from the judgment and decree of the High Court of Kenya at Machakos Mwera J) dated
12th November, 1997**

in

H.C.C.C. NO. 124 OF 1987)

JUDGMENT OF THE COURT

By an agreement in writing made on 3rd August, 1982 at Machakos, between **LUCIA MWELU** (*Lucia*) of the one part and **FRANCIS MWANZA MULWA** (*Mulwa*) of the other part, Lucia agreed to sell to *Mulwa* all her leasehold interest in a plot of land known as **MACHAKOS TOWN/BLOCK/1/71** (the suit property) for a sum of KShs.110,000/=. The completion date for the contract of the sale of land was designated to be within one month after the Municipal Council of Machakos, on behalf of the Commissioner of Lands, would have accorded its consent to such transfer.

The agreement for sale confirms that Lucia had received a sum of KShs.30,000/= on or before the signing of the said agreement. It was also stipulated, as one of the special conditions printed in the agreement, that *Mulwa* would have paid a sum of KShs.90,000/= to Lucia on or before 10th October, 1982.

There was a dispute between Lucia and *Mulwa* as regards the exact sum(s) paid by *Mulwa* to Lucia. What is not in dispute is that *Mulwa* did not pay the sum of KShs.90,000/= by 10th October, 1982. However, Lucia continued thereafter, accepting irregular payments made to her by *Mulwa*. *Mulwa* stated before the superior court, in examination-in-chief, that he paid sums totalling KShs.106,520/= but in cross-examination he said he had paid a sum of KShs.101,520/= by 29th March, 1983. *Mulwa* attempted to prove two payments by producing counterfoils in his cheque book but the learned judge, on objection by Lucia's counsel, did not allow that evidence. Later *Mulwa* produced bank statements to show that the two cheques (counterfoils whereof were shown) had been paid. The bank statements of course do not show the name of the payee and no paid cheques were produced.

Mr. Masika whilst arguing this appeal, attempted to show payments allegedly made by Mulwa as follows:

1. As acknowledged upon the signing of the agreement KShs.30,000/=
2. On 30/08/82 - by cheque KShs. 9,500/=
3. By acknowledgement dated 11/09/82 KShs.10,000/=
4. Per acknowledgement by Kitavi dated 04/09/82 KShs. 5,000/=
5. Per acknowledgement by Kitavi dated 11/09/82 KShs. 5,000/=
6. Per authority by Lucia to pay Kitavi. This was not a payment. KShs.21,000/=
7. Per acknowledgment by Kitavi dated 15/10/82 KShs. 1,000/=
8. Per acknowledgment by Kitavi dated 05/11/82 KShs.10,000/=
9. Per acknowledgment by Kitavi dated 03/02/83 KShs. 6,000/=
10. Per acknowledgment by Kitavi dated 18/12/82 KShs. 1,000/=
11. Per counterfoil of cheque dated 21/01/83 KShs.10,000/=
12. Per counterfoil of cheque dated 09/04/83 KShs. 5,000/=
13. Per acknowledgment by Lucia dated 07/11/83 KShs.12,000/=

It is obvious that the above-mentioned alleged payment No. 3, of Kshs.10,000/=-, is in respect of acknowledgements signed by Mr. Kitavi, numbered 4 and 5 above.

It is also obvious that the above-mentioned alleged authority (No.6) is in respect of acknowledgements signed by Mr. Kitavi, numbered 7, 8 and 9 above (which total up to KShs.18,000/=-).

There is no proper proof as regards payments referred to in numbers 11 and 12 above. Therefore according to our own calculations payments made by Mulwa to Lucia until 7th November, 1983, come to KShs.79,500/=-. The letter of 01/08/85 written by Lucia's then advocates to Mulwa, refers to payments made to Lucia, totalling KShs.74,000/=-.

In this state of affairs, relating to the accounts between the parties, the learned judge said he was "*greatly in doubt as to the exact sum Mulwa paid by the time the deal went sour*". Mr. Masika has attacked this finding by his third ground of appeal. Mr. Masika argued that the learned judge was duty bound to calculate the exact amount paid by Mulwa to Lucia. It was for Mulwa to prove, on a balance of probability, the exact sums he paid to Lucia. His evidence that he paid a sum of KShs.106,500/=-, or KShs.101,500/=- does not stand scrutiny by us. Our scrutiny puts the proved payments sums at a total of KShs.79,500/=- which sum is certainly less than the sum of KShs.90,000/=-. Mulwa was to pay by 10th October, 1982 or by such time as extended by conduct of Lucia accepting late payments. The learned judge, in the uncertain state of accounts, as put forward by Mulwa, was bound to say what he did say. We have dealt with the third ground of appeal first as that ground is a crucial one.

The first ground of appeal propounded by Mr. Masika reads:

"In making his decision the learned trial judge misdirected himself and erred in treating the Agreement between the Appellant and the 1st Respondent, as lawfully rescinded notwithstanding overwhelming evidence to the contrary."

By a letter dated 26th November, 1984, M/s Kilonzo & Company Advocates notified Mulwa that Lucia was rescinding the sale agreement as he had failed to comply with his obligations under the contract. Pursuant to the condition in the Law Society Conditions of Sale which governed the sale agreement, Mulwa was given 21 days within which to make good the defaults failing which the sale agreement was to stand rescinded. Mulwa did not respond. He did not take issue upon the alleged defaults. Lucia, then, on 10th January, 1985, entered into an agreement with the second respondent (Benjamin Dean Musau) by which agreement she sold her leasehold interest in the suit property to Musau. Lucia had made it clear to Musau that her previous sale to Mulwa had aborted and stood rescinded.

The rescission of the contract between Lucia and Mulwa was done purportedly in accordance with condition 25 of the said Law Society Conditions of Sale. Mr. Masika took exception to such rescission arguing that condition 25 is not relevant to rescission. It is true that condition 25 per se does not cater for rescission but the letter itself is clear. It required Mulwa to make good the default within 21 days and threatened rescission if the default was not made good. Mulwa would have had no difficulty in understanding the purport of the letter. Another letter (not before us - but not denied by Mulwa) from M/s Kilonzo & Company Advocates, dated 14th December, 1984, appears to have put a seal on the fact of rescission, as expressly reiterated in the letter of 1st August, 1985 addressed to Mr. Mulwa by M/s Kilonzo & Company Advocates. That later letter shows that the rescission was complete. Mr. Mulwa did not respond to that letter until November, 1985 when his present advocates by their letter of 12th November, 1985 repudiated the rescission. On 4th July, 1985 the suit property was already registered in the name of Musau.

The rescission notice, receipt whereof is not denied by Mulwa, followed the format set out in clause 4 of the Law Society Conditions of Sale. This clause is at the second page of the said printed conditions but that page is not before us in the record. Whether this is by design or inadvertance, we are unable to say but clause 4 clearly stipulates giving of a 21 day notice for rescission, in the absence of another date being of essence of the contract.

The omitted page (second page of the Law Society Conditions of Sale - 1982 Edition) is crucial to the issue of rescission; Clause 4 (6) reads:

"This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the contractual completion date.

(a) In this condition "completion notice" means a notice served in accordance with this sub-condition.

(b) ...

(c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one days of service and in respect of such period time shall be of the essence of the contract."

There are letters warning Mulwa of his default. We do not see what else Lucia was supposed to do. She extended time, by conduct, to enable Mr. Mulwa to pay Kshs.90,000/=. Still he did not pay. In all the circumstances of this case, we have no hesitation in saying that the sale agreement was properly rescinded and we see no substance in the first ground of appeal.

The second ground of appeal was abandoned by Mr. Masika and correctly so. It has already been pointed out by us that at least there was no proof of payment of KShs.90,000/= prior to the rescission of the contract.

The fourth ground of appeal takes issue with the learned judge when he held that the second respondent was unnecessarily sued. Mr. Masika urged that as Musau was aware of the agreement for sale between Lucia and Mulwa he bought the suit property at his risk. That cannot be. Musau was told that the earlier agreement stood rescinded. It is not for him to inquire into the validity or otherwise of any alleged dispute

between Lucia and Mulwa. The learned judge was right in so ruling. Musau is registered as proprietor of lease in respect of the suit property and effect of such registration is shown in section 27 (b) of the **Registered Land Act, Cap 300**, Laws of Kenya. It reads:

"27. Subject to this Act -

(a) ...

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging to and appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease."

Clearly, the rights of a registered proprietor of a lease are not affected by overriding interests as mentioned in section 30 of the Registered Land Act and again it is clear that if Mulwa had any cause of complaint, it would be against Lucia only.

By his fifth ground of appeal, the appellant complains that the learned judge erred in concluding that fraud or illegality had not been proved as against the respondents. Lucia had, through lawyers, properly rescinded the agreement for sale. She had informed Musau that the sale to Mulwa had gone sour. Musau being aware of this fact, and on advice of lawyers, bought the leasehold interest in the suit property having paid the agreed price of KShs.120,000/=. There is no fraud or illegality shown. This ground of appeal also fails.

The learned judge whilst answering issues 10 and 11, quite wrongly concluded that failure to plead to defence allegations amounts to admission of the fact so pleaded. These allegations were in paragraph 7 of the defence wherein it is pleaded as follows:

"7. Further and without prejudice to the foregoing the Defendants aver that following the purchase of the said property by the second Defendant a reasonable offer of refund and account to the plaintiff of all funds that he had extended (should be expended) towards the purchase price by virtue of the agreement of 3rd August, 1982 were made which were rejected improperly and unreasonably and for no cause and the cheque forwarded to the Plaintiff was returned. The Defendants will crave leave of the court to produce and refer to the correspondence exchanged and the cheques given to the Plaintiff."

Although it was clearly a misdirection on the part of the learned judge to say that no joinder of issue on defence allegations amounts to admission, nothing turns on this misdirection. The learned judge did not base any part of his judgment on this pleading and it was clear that Lucia had, through M/s Kilonzo & Company Advocates, offered to refund whatever she thought was the sum due to Mulwa. The sixth ground of appeal also fails.

The seventh ground of appeal refers to charging of the suit property to Standard Chartered Bank Kenya Limited, Machakos Branch. It is common ground that it was Mulwa who, as a holder of the power of attorney from Lucia, executed the charge. The dispute is as to who (of Lucia and Mulwa) received the loan of KShs.50,000/= from the said bank. The bank manager stated that the amount was released to Mulwa by way of deposit in Mulwa's account with the said bank. The bank manager had no record that Lucia had a loan with the bank. Mulwa had a blank signed transfer form. He had a power of attorney from Lucia. He was obviously in financial difficulties. He could not pay the sum of KShs.90,000/= by November, 1982. One of his cheques towards payment of the purchase price, was dishonoured prior to rebanking when it was cleared. He had given a "*CLIENTS ACCOUNT*" cheque to Lucia. He was the educated person. He was holding a power of attorney which actually enabled him to charge the suit property for obtaining (securing) a loan and for doing anything that Lucia could have done with the suit property. The conclusion is irresistible. He must have obtained and used the loan. Lucia put it succinctly when she said that there was no need for her to charge the property to raise a loan when she was selling it. The learned judge came to the only proper conclusion, that is, that it was Mulwa who obtained the loan in

the name of Lucia. He probably took advantage of a trusting lady. She was fortunate that she got a buyer whose payment enabled her to discharge the charge, or else she would have lost all.

Finally we would add that Mulwa's suit in the High Court and this appeal were both tryons and were doomed to failure.

This appeal is dismissed with costs.

Dated and delivered at Nairobi this 4th day of December, 1998.

R. O. KWACH

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.