REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 165 of 1996

GURDEV SINGH BIRDI and MARINDER SINGH GHATORA as Trustees of

RAMGHARIA INSTITUTE OF MOMBASA …….....APPELLANTS

AND

ABUBAKAR MADHBUTI …….....…….. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Mbogholi

Msagha, J.) dated 30th January, 1996

IN

H. C. C. C. NO. 58 OF 1995)

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JUDGMENT OF GICHERU, J. A.

When the appellants sought the relief of specific performance of the agreement of sale of the respondent's property registration Number L. R. MN/1/7673 measuring in area 2. O40 Hectares and situated in Mombasa Mainland North in their plaint dated and filed in the superior court on 25th January, 1995 they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement referred to above which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement. I shall hereinafter refer to the agreement set out above as the agreement and the respondent's property in respect thereof as the suit property. That agreement which was between the respondent as the vendor and Ramgharia Institute of Mombasa through its trustees, the appellants, as the purchaser stipulated the purchase price of the suit property as Kshs. 4, 000, 000/= of which K. shs. 400, 000/= was paid by the appellants and received by the respondent on its execution on 14th September, 1992. The balance of Kshs. 3, 600, 000/= was to be paid by the appellants to the respondent on/or before 31st January, 1993. Other terms and conditions of the agreement were that the respondent was to obtain the consent of the Commissioner of Lands, land rent and Municipal rates receipts; hand over the original title deeds of the suit property to K. M. Karimbhai, Advocate , who was the joint advocate for the parties to the agreement; and pay Kshs 75, 000/= commission to the estate agent, Mr. Firoz Virji.

Subsequent thereto and in pursuance of the agreement , the appellants paid to the respondent a further sum of Kshs. 150, 000/- on 27th November, 1992. They also paid to the estate agent, Mr. Firoz Virji, Kshs 75,000/- on behalf and at the request of the respondent. The balance of the outstanding purchase

price was to be paid to the respondent by the appellants on/or before 31st January, 1993. This date came and passed and the balance of the purchase price of the suit property remained unpaid to the respondent. Hence, nearly two months thereafter, by a letter dated 29th March, 1993 addressed to Ramgharia Institute of Mombasa by K. M. Karimbhai, Advocate, the respondent purported to cancel the agreement and to forfeit the money paid to him by the appellants in pursuance of the agreement as damages. The appellant's response through, it would appear, their new advocate , Mr. D. S. Obhrai, in a letter dated 28th April, 1993 was to protest the respondent's entitlement to the money paid to him by them in pursuance of the agreement and refusal to accept the purported rescission of the agreement. In the same breath, however, they required the respondent to refund the money paid to him by them. Thereafter, slightly over six months elapsed with neither party to the agreement taking any action in relation thereto. Then in a letter dated 8th November, 1993 and addressed to K. M. Karimbhai, Advocate, Mr. Obhrai required the respondent to deliver the title deeds to the suit property to him within 21 days of the date of that letter with his undertaking to hold the same on trust and to the order of K. M. Karimbhai, Advocate and with a promise to effect payment of the balance of the purchase price of the suit property on registration of the same in favour of the purchaser. In that letter, the appellants threatened to institute an action for specific performance of the agreement if delivery of the title deeds to the suit property was not made as required within the stipulated time. There was no reaction to this letter from the respondent. On 11th April, 1994,the appellants caused a caveat to be registered against the title to the suit property.

According to the appellants, before the respondent's letter of 29th March, 1993 they had approached K. M. Karimbhai, Advocate, for a copy of the agreement and title deeds to the suit property as without those documents they were unable to proceed with the deal. While therefore the respondent was pressing for the payment of the balance of the purchase price of the suit property, they were asking for the said documents which, according to them, K. M. Karimbhai, Advocate, said he did not have. This was notwithstanding that one of the terms of the agreement was that the respondent was to hand over the original title deeds to the suit property to K. M. Karimbhai, Advocate. It was in these circumstances that they sought advice from Mr. Obhrai who then wrote the letter dated 28th April, 1993 in response to the respondent's purported cancellation of the agreement. According to them, a big businessman was ready and willing to give them money on behalf of Ramgharia Institute of Mombasa to enable them complete their part of the agreement. That businessman, however, wanted to have the title deeds to the suit property before donating the balance of its purchase price. It was on account of this that Mr. Obhrai wrote the letter dated 8th November, 1993 and addressed to K. M. Karimbhai, Advocate as is referred to earlier in this judgment. With no response to that letter and sensing that the respondent may sell the suit property to somebody else, they put a caveat against the title to the said property as is mentioned above.

The respondent's position in the superior court was that the agreement was made between him and the appellants before K. M. Karimbhai, Advocate, who had been chosen by them for that purpose and the terms of that agreement were what was agreed before him. Mr. Karimbhai wanted the title tot he suit property to be sure that the same was unencumbered. At the drawing of the agreement therefore, the respondent was with the said title which he left with Mr. Karimbhai and only carried with him a copy of the same. After the appellant's failure to pay the balance of the purchase price of the suit property as per the agreement, he instructed Mr. Karimbhai to cancel the agreement which was done vide the letter dated 29th March, 1993 as is referred to above.

K. M. Karimbhai, Advocate, told the superior court on oath that he was the one who prepared the agreement and before doing so, he was to be satisfied that the suit property existed. The title document to the said property was therefore availed to him by the respondent when the parties to the agreement appeared before him. It was from that document that he extracted the details in relation to the suit property and cited them in the agreement. That title document was left with him by the respondent after the execution of the agreement by the parties thereto in his presence on 14th September, 1992 and had remained with him all the time. His evidence in connection with the title document to the suit property was accepted as true by the learned trial judge.

In paragraph eight of his amended defence and counterclaim in the superior court, the respondent herein had pleaded that time was of the essence of the agreement. This issue did not feature prominently in his

evidence nor in the evidence of Mr. Karimbhai in the superior court. Indeed the written submission of his counsel in that court appears to have glossed over it. Nevertheless, the said court zeroed on whether or not time was of the essence of the agreement and it was this issue that appears to have principally engaged the mind of the learned trial judge in his judgement given on 30th January, 1996. In that judgment, the leaned judge observed that going by the evidence and the exhibits before him, he found that the appellants were in breach of the agreement in not paying the balance of the purchase price of the suit property by 31st January, 1993 and the subsequent correspondence read together with the agreement confirmed that the time set in the agreement was of the essence. According to the learned trial judge, the respondent did not therefore have to give notice tot he appellants making time to be of the essence of the agreement. Consequently, he held that the respondent herein was entitled to rescind the agreement after the expiry of the completion date, namely; 31st January, 1993. Further, holding that the agreement did not make any express provision for forfeiture , the learned trial judge concluded his judgment by saying that as the respondent in the present appeal was not in breach of the agreement, the appellants were to bear the loss of the sum of K. Shs. 75,000/- paid to the estate agent on behalf of the respondent but the other sum of money amounting to K. Shs. 550, 000/- referred to earlier in this judgment was to be refunded to the appellants without interest on account of their breach of the agreement. He otherwise dismissed the appellants' suit with costs.

Against the dismissal of their claim for specific performance of the agreement, the appellants have appealed to this Court putting forward eight grounds of appeal whose chief complaint is that the leaned trial judge was in error when he dismissed their claim for specific performance on the basis of time being of the essence of the agreement which they were in breach.

The respondent has cross-appealed against the refund of K. Shs. 550, 000/- and in accordance with rule 91(1), (2) and (3) of the Rules of this Court has sought to have the decision of the superior court affirmed, save for and except the refund of K. Sha. 550,000/- aforementioned, on grounds other than those relied upon by that court amongst which was that:

"The Appellants wee never ready, able and willing to carry out their part of the contract and there was no evidence that they were in a position to do so."

At the hearing of this appeal on 6th and 7th May, 1997, Mr. Inamdar who on the first day appeared for the appellants with Messrs. Obhrai and Pandya but on the second day without the latter submitted that notwithstanding the stipulation in paragraph eight of the respondent's amended defence and counterclaim in the superior court there was nothing in the agreement that indicated that time was of the essence of the agreement. Hence, the respondent's purported cancellation of the agreement by the letter dated 29th March, 1993 on account of the appellants' failure to pay the balance of the purchase price of the suit property by 31st January, 1993 was inconsequential to the life of the agreement. If the respondent wanted time to be of the essence of the agreement after the appellants' non-payment of the balance of the purchase price by the date above mentioned, he could have made it so by giving notice to the appellants fixing a reasonable time within which to perform their part of the bargain failing which he could treat the agreement as broken. As neither this was done nor had time been expressly stated in the agreement to of the essence, it was not open to the learned trial judge to hold that subsequent correspondence read together with the agreement confirmed that time was of the essence of the said agreement. It was here therefore that the learned judge was in error and according to Mr. Inamdar, the respondent had no justification whatsoever to treat the agreement as broken. On account of this, Mr., Inamdar sought to have the appellants' appeal allowed with costs and with specific performance of the agreement being decreed in their favour.

Concerning the respondent's notice of affirming the decision of the superior court on grounds other than those relied upon by that court, Mr. Inamdar's submission was that the said grounds were based on issues that were neither raised nor raised nor canvassed in the proceedings and judgment of the superior court. This Court, according to him therefore, should not exercise its discretion on such issues as to do so may lead to a miscarriage of justice.

The response to the appellants' appeal by Mr. Gautama and Mr. Nowrojee who appeared for the respondent was that the appellants did not at any time after 31st January, 1993 up to the date of filing suit on 25th January, 1995 show that they had the money to enable them comply with the terms of the agreement . Indeed, the appellants did not evince their ability to complete their part of the agreement. They did not keep the agreement alive and could not therefore have hoped to obtain the equitable relief of specific performance of the same. It is no the basis of this that the respondent now seek to have the decision of the superior court affirmed on the ground set out above.

Regarding the respondent's cross-appeal, counsel submitted that having breached the agreement, the appellants were not entitled to a refund of K. Shs. 550, 000/- as decreed by the learned trial judge . To counsel therefore, the dismissal of the appellants' suit in the superior court ought to be affirmed with the resultant dismissal with costs of their appeal to their appeal to this Court and the respondent's cross-appeal be allowed with costs.

It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property by 31st January, 1993 as stipulated in the agreement. There was, however, no express stipulation nor any indication in the agreement that time was of the essence of the agreement. The appellant's failure to deliver up the balance of he purchase price of the suit property by the appointed date, that is to say, 31st January, 1993, did not bring the agreement to an end . This is where the learned trial judge went wrong when he held that the time set in the agreement was of the essence of the said agreement even though there was no express stipulation nor any indication and indeed no subsequent notice was given to the appellants in that regard. The resultant holding by the learned trial judge that the respondent was entitled to rescind the agreement after the expiry of that date is therefore insupportable.

It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

"must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."

The latter was the position taken by Lord Esher, M. R. in COATSWORTH V. JOHNSON, (1886) 54 L. T. 520 at page 523 when he said that:

"The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract, …….. the court of equity would refuse to grant specific performance and would leave the parties tot heir other rights. Then if the court of equity would not grant specific performance, we are not to consider specific performance as granted. Then the case is at an end."

When the appellants came to court seeking the relief of specific of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice. Hence, although the learned trial judge dismissed the appeallants' clainm for specific performance under the erroneous premise that was of the essence of the agreement, had he properly directed himself on the law in the matter before him, he would

nonetheless have dismissed the said claim. It is therefore not without cause that the respondent has sought to have the decision of the superior court affirmed in the circumstances set out earlier in this judgment.

Concerning the respondent's cross-appeal, it is not in doubt that the aggregate sum of K.Shs. 550,000/- paid by the appellants to him as outlined towards the beginning of this judgment was intended merely as a part payment of the agreed purchase price of the suit property and not as a deposit or earnest for performance. The same was not therefore subject to forfeiture. The learned trial cannot therefore be faulted in decreeing the refund of the said sum of money to the appellants without interest for the reason that the appellants were in breach of the agreement.

From what I have attempted to outline above, and granting the respondent's notice to have the decision of the superior court affirmed on grounds other than those relied upon by that court, and in particular that which is set out in this judgment, I would dismiss the appellants' appeal with costs to the respondent and also dismiss the respondent's cross-appeal with costs to the appellants. As Tunoi, J.A. agrees, there will be a majority judgment of the Court in these terms.

Dated and delivered at Nairobi this 28th day of May, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

BETWEEN

GURDEV SINGH BIRDI and NARINDER SINGH GHATORA as Trustees of RAMGHARIA

INSTITUTE OF MOMBASA.....APPELLANT

AND

ABUBAKAR MADHBUTI.....RESPONDENT

JUDGEMENT OF TUNOI, J. A.

The appellants, Ramgharia Institute of Mombasa, filed a suit on January 25, 1995, in the superior court against Abubakar Madhbuti, the respondent, claiming, as prayed in the plaint, specific performance of an Agreement of Sale and damages in lieu thereof.

The background of this appeal is as follows. By an Agreement of Sale (the agreement) dated September 14, 1992, made in writing between the respondent as the vendor and the appellants as the purchasers for the sale by the respondent to the appellants of a parcel of land known as subdivision No. 7673, section 1, Mainland North, Mombasa, for shs. 4,000, 000/=. The agreement provided, inter alia, that a sum of Shs. 400,000/= would be paid by the appellants to the respondent on execution of the agreement and the balance of the purchase price on or before January 31, 1993. It is common knowledge that the appellants duly paid the deposit and later a further sum of shs. 150, 000/=. Thus, the appellant paid in all a total of Shs. 550, 000/= towards the purchase price.

One other very important term of the agreement as far as this appeal is concerned is that the respondent was to hand over the original title deed to Mr. Karimbhai, the advocate who acted for both parties in

drawing the agreement.

On March 29, 1993, Mr. Karimbhai wrote to the appellants:-

" I refer you to the Agreement dated the 14th September 1992 and regret that in spite of extending the completion date several times you have failed to pay the balance of the purchase price.

Therefore, please note that my client has cancelled the agreement and that he has forfeited the deposit as damages."

The appellant's retort was by a letter dated April 28th, 1993 from their new lawyer, Mr. Obhrai saying that the appellants did not accept the notion of forfeiture and required the respondent to refund the deposit. Nothing of significance occurred until about six months afterwards when Mr. Obhrai again wrote to Mr. Karibhai as follows:-

' I refer you to my letter dated 28th April, 1993 and very much regret to note that you have failed to respond to my aforesaid letter up to now.

I reiterate that the agreement made between the parties for the sale of the above mentioned property does not provide for recession of the sale nor forfeiture of the money paid by my clients as part payment towards purchase price of the said property.

My clients now hereby require you to forward the title deeds of the said property within 21 days from the date hereof for completion of the sale of the said property. I undertake to hold the title deeds of the said property on trust and to your order and to effect payment of the sum of Shs. 3, 300, 00/= being the balance of the purchase price on registration of transfer of the said property in favour of my clients.

I have also been directed by my clients to state that should your client fail to provide title deeds of the said property within the time referred to above an action for specific performance would be instituted against your client without any further reference to him, holding your client responsible for all costs and consequence thereof."

On April 11, 1994, the appellants lodged a caveat against the title and on being requested to remove it litigation ensued.

It is the appellant's averment that time was never the essence of the contract and the respondent was not entitled to rescind it as the appellants were at all material times ready, willing and able to pay the balance of the purchase price but that the respondent had refused to honour the agreement.

The respondent countered these allegations and maintained that he had reason to rescind the contract as the appellants were not ready and willing to pay the balance of the purchase price until November, 1993, more than a year after the agreement was entered into. Moreover, he argued , that even if the time was not of the essence it was made so by various subsequent discussions as evidenced in the notice of cancellation of the agreement dated march 29, 1993.

At the trial the two trustees of the appellants testified that despite numerous requests to Mr. Karimbhai he did not avail them the title deeds. Though their community had the money and were ready to pay the balance of the purchase price the donor on whom they expected financial support could not assist unless he had sight of the titles.

The respondent averred in his testimony before the learned trial judge that he had left the title deeds with Mr. Karimbhai.

The respondent testified:-

"The terms in Ext. 2 (Agreement of Sale) are what we agreed upon. Mr. Karimai wanted see the title

deed if it was mortgaged. I had carried it. I showed it and left the title deed with Mr. Karimbhai to-date."

Mr. Karimbhai also testified as follows:-

"Before preparing the agreement I was satisfied the property existed. I extracted the details from the Title (title shown to court). The Title document was given to me by Mr. Madhubuti when all the parties came to see me. …… The title document has always been with me all this time ……'

Later in cross-examination he said:-

' ….. When I made the agreement the title document was produced."

The learned judge in a considered judgment held that the appellants had not mentioned anything about the payment of the balance of the purchase price and that they had not shown that they had the money; and therefore, had failed to comply with its part of the agreement . As to the evidence of Mr. Karimbhai, the learned judge preferred it to that of the appellants:-

"because he was an independent party who originally was acting for both parties."

The learned judge found that the appellants were in breach of the agreement by not paying the balance of the purchase price on its due date. He held that time was the essence of the contract and the respondent did not have to give notice and therefore the contract was lawfully rescinded. However, he decreed the refund of the deposit of shs. 550,000/= as no express provision was included in the agreement. Finally, he dismissed the respondent's counter claim for general damages for breach of contract.

It is against that decision of the superior court that the present appeal has been lodged. The judgment of the learned judge was attacked at the hearing of this appeal on two main grounds. Mr. Inamdar, for the appellants submitted, first, that as a matter of law the learned judge erred in holding that time was of the essence of the contract; that the respondent did not have to give any notice to the appellants making time the essence of the contract; that the appellants having failed to comply with the condition of the payment of the balance of the purchase price the respondent was entitled to rescind the contract after the expiry of the date of payment and that the respondent validly rescinded the agreement. Secondly, that the learned judge ought to have granted specific performance of the agreement as prayed in the circumstances of the case and on the evidence before him.

The agreement was unambiguous document. It was drafted in a very simple language. It spelled the contractual relationship between the appellants and the respondent. The most important condition as far as this appeal is concerned is:-

"Balance to be paid on or before 31st January, 1993"

This condition only specified the time within which the balance of the purchase price was to be paid. This fixation of period per se does not make time of the essence of the contract. Nowhere in the agreement did the parties make time of the essence since they did not specify a date for completion. If they intended to make time of the essence of the contract they should have expressed their intention in clear and unmistakable language. The following is what Halsbury's Law of England 4th Edition Volume 9 paragraph 481 says on the point :-

"Time not generally of the essence

The modern law, in the case of contracts of all types may be summarised as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.'

In the present case there being no evidence of an express stipulation making time of the essence and the nature of the subject matter or the surrounding circumstances not showing that time should be considered of the essence, the respondent ought, if he felt subjected by the appellants to unreasonable delay, to have given it notice making time of the essence.

It is trite that the element of notice I have referred to in a situation where time has not been made the essence of contract is especially important in that no court of law will allow one party suddenly to turn to the other and say: "time has elapsed, the agreement has been cancelled and the deposit has been forfeited." In the case of Aida Nuns v John Mbiyo Njonjo & Charles Kigwe [1962] E. A 88 the appellant agreed to sell the goodwill and certain fixtures in the Chania Bar and Restaurant for Shs. 30, 000. It was a condition of the agreement that the appellant obtain a sublease from the head landlord to cover the Bar and Restaurant. If such sublease was not obtained, the agreement would become null and avoid and all purchase monies paid would become repayable. The money was paid but due to delay and apathy on the appellant's part the sublease was not forthcoming and the respondent successfully filed a suit to recover the shs, 30,000. The appellant successfully appealed to the Court of Appeal. Newbold, J. A. explained that the agreement did not provide that it should become automatically void on the happening of a particular event. No time had been agreed upon and the fact that the sublease had not yet been obtained merely caused the contract to be voidable at the election of the respondent. He continued:

"When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that, at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence."

In my judgment I find that time had not been made the essence of the contract and the respondent could not avoid it on the ground of unreasonable delay by the appellants until a notice has been served after the unreasonable delay making time the essence.

However, the appellants' conduct has been such as to render it inequitable for specific performance to be granted. Firstly, the respondent's purported rescission or repudiation of the contract was accepted by the appellants by their letter of April 28, 1993, by which they demanded refund of Shs. 700,000/=. That acceptance disentitled them thereafter to claim specific performance. I agree with both Mr. Gautama and Mr. Nowrojee for the respondent that in the circumstances the contract became irrevocably and unequivocally rescinded at the instance of the appellants.

Secondly, there was no evidence that prior to the filing of the suit the appellants tendered the balance of the purchase price to the respondent. This, in my view, only confirms that they were never ready, able or willing to carry out their part of the contract. The appellants simply could not raise the balance of the purchase price on or before the specified time, i.e. January 31, 1993, and were in fact in breach of the agreement.

Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed in January, 1993, the period fixed for completion, it would be oppressive , unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property more than four years after the event when its current value has materially appreciated.

In the result, I would affirm the decision of the learned judge and dismiss this appeal with costs to the respondent. I would also dismiss the respondents cross-appeal with costs to the appellants. I concur with the orders proposed by Gicheru, J. A

Dated and delivered at Nairobi this 28th day of May, 1997.

P. K. TUNOI

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JUDGE OF APPEAL

BETWEEN

GURDEV SINGH BIRDI and NARINDER SINGH GHATORA as Trustees of RAMGHARIA

INSTITUTE OF MOMBASA.....APPELLANT

AND

ABUBAKAR MADHBUTI.....RESPONDENT

(Appeal from judgment of Hon. Justice a. Mbogholi-Msagha dated 30th January, 1996 in the High Court of Kenya at Mombasa

in

Civil Suit No.58 of 1995)

GURDEV SINGH BIRDI and NARINDER SINGH GHATORA as Trustees of RAMGHARIA

INSTITUTE OF MOMBASA..…….....…….APPELLANT

AND

ABUBAKAR MADHBUTI …….....…… RESPONDENT

(Appeal from judgement of Hon. Justice a. Mbogholi-Msagha dated 30th January,1996 in the High Court of Kenya at Mombasa IN CIVIL SUIT NO. 58 OF 1995)

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JUDGMENT OF SHAH, J.A

On 14th September, 1992 an agreement for sale of land, known as L. R. MN/1/7673, situate on mainland North, within the municipality and District of Mombasa (the suit property), was entered into between Mr. Abubakar Madhbuti (the respondent) and Ramgharia Institute of Mombasa and /or their nominee. The area of suit property is given as being 2.040 Hectares. The agreed price of the suit land was shs. 4,000, 000/=. A sum of shs .400,000/= was paid to the respondent on the signing of the agreement and the balance of the purchase price was to be paid on or before 31st January, 1993. The purchaser (Ramgharia Institute) also paid a further sum of shs. 150, 000/= to the respondent, on 27th day of November, 1992.

I will refer to the purchaser (the appellants) hereinafter as “the trustees”. It is not in dispute that the two appellants sued in their capacity as the trustees of Ramgharia Institute, a society registered under the provisions of section 10 of the Societies Act of Kenya.

The agreement for sale, which was exhibited to the plaint, in parts ,material says:

Payments 1…..

2. Balance to be paid on or before 31st January, 1993.

Other Terms and Conditions

1. The vendor to obtain consent of the Commissioner of Lands.

2. Vendor to obtain land rent and municipal rates receipts.

3. Vendor to hand over original title deeds to K. M. Karimbhai Esq. , Advocated, Mombasa.

4. Vendor to pay shs. 75,000/= commission to the estate agent Mr. Firoz Virji.

It is not in dispute that the trustees failed to pay the balance of the purchase price on or before 31st day of January, 1993. Such balance then was shs. 3, 450,000/=. It is common ground that the estate agent was paid the sum of shs. 75,, 000/= aforesaid, by the trustees.

Upon carefully perusing the agreement of sale of the suit Land I have no doubt in my mind that there was no date fixed for completion of the sale; nor was time made of essence of the contract. What I have to consider first, following upon able arguments advanced by Mr. Inamdar for the appellants and Messrs Gautama and Nowrojee (in turns) for the respondent, is what inter alia, is the effect of time not being made of essence of contract when the contract in eventually sought to be specifically performed.

The sequence of events after 31st January, 1993 is of some importance of the purposes of this appeal.

On 29th March, 1993 Mr. Karimbhai (who was still acting for both the respondent and the trustees) wrote to the appellant, on the instructions of the respondent as follows:

"I refer you to the agreement dated the 14th September, 1992 and regret that inspite of extending the completion date several times you have failed to pay the balance of the purchase price.

Therefore , please note that my client has cancelled the agreement and that he has forfeited the deposit as damages."

The response to Mr. Karimbhai's sid letter (of 29th March, 1993) came from the trustees' new advocate Mr. Obhrai. Where relevant Mr. Obhrai's letter of 28th April, 1993 in response to Mr. Karimbhai's said letter of 29th March, 1993 states:

"My clients do not accept the decision of the agreement made between the parties and in any event your client is not entitled to forfeit the sum of shs. 700, 000/= paid by my clients.

I hereby require your client through you to refund the sum of shs. 700,00/= paid by my clients to him".

The matter then went into a limbo and it was not until the 8th day of November, 1993 that the trustee's advocate Mr. Obhrai wrote to Mr. Karimbhai pointing out that the agreement for sale does not provide for rescission of the sale nor forfeiture of the sums paid by the trustees to the respondent. Mr. Obhrai required the respondent's advocate Mr. Karimbhai to forward the title deeds of the suit property to him to enable him to complete the transaction and gave a professional undertaking to pay a sum of shs. 3, 300,000/= being the balance still payable still payable, upon registration of the transfer of the suit property in favour of the trustees. The letter also informed the respondent that he would otherwise face an action for specific performance.

On 11th April, 1994 the trustees registered a caveat against the title of the suit property, forbidding

dealing with the same. The caveat claimed a purchaser's interest. The respondent took steps to have the caveat removed but he was unsuccessful, and the superior court extended its validity.

Once again the matter went into a limbo until 25th of January, 1995 when the trustees filed the suit for specific performance of the agreement of sale.

What transpired during the course of the hearing is important. The first trustee who gave evidence (he is P. W. I Mr. Narinder Singh) said in regard to the availability of the balance of the purchase price.

"We asked Mr. Karimbhai to produce the title deed so that money can be paid. We had the money to pay the balance of the purchase price …. We still have the money. A big businessman was ready to give us the money-donation. Even when we wrote the letter we consulted him-ready to give the donation then and even to-day.

PWI continued later as follows:

"we are prepared to deposit the amount even to-day in court . I have sworn an affidavit to that effect….. I see Exb. 4 (should be exhibit 3). I was surprised as we already got donation"

During cross –examination PWI said:

"When the agreement was made the donor was not mentioned."

PW2 . , Mr. Gurdev Singh Birdi, in regard to the issue of payment of the balance of the purchase price said in examination in chief:

"The money was there then. It is there to day. We ask that we deposit the money with court".

In cross-examination PW2 said:

"There is no mention that some money shall come from a donor… As late as 8. 11. 93 we were ready to pay."

So what come out during the course of the trial was that there was a donor waiting in the sidelines wishing to pay the balance of the purchase price.

It cannot be denied that where a contract for sale of land does not make time the essence of the contract, equity requires that time be made of such essence before the contract can be rescinded. This requirement is also subject tot he ability of the purchaser to complete the contract in good time. Equity requires that the vendor calls upon the purchaser to complete the contract within a reasonable time when time is not the essence of the contract. It is for this reason that I agree with the holding in the case of Graham v. Pitkin [1992] 2 All E. R. 235 which I quote :

"Unreasonable delay by a purchaser in completing a contract for the sale of land does not entitle the vendor to rescind the contract without first serving a notice to complete, although delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract".

In the Graham v. Pitkin case (supra) Lord Templeman delivering the judgment of the Board (Privy Council) said at page 238:

"The dictrum of Surgent J (91 LJ Ch 758 at 759 [1992] All E. rep 748) is not authority for statement in Emmet on Title (19th Edn,1986) para 7. 043 that if delay has been unreasonable no notice to complete need be given, albeit that the statement was approved by Goff J. in Accuba ltd. v. Allied Shoe Repairs Limited [1975] 3 All E.R. 782 at 787-788, [1975] 1 WLR 1559 at 1564. Delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract. But in the

present case the delay appears to have been the fault of the solicitor. The vendor never complained about the purchaser or reserved a notice to complete. On 2 December, 1980 the purchaser paid and the vendor accepted $10,000 in reduction of the purchase price and as late as 28th April, 1981, the purchaser affirmed that she wished to purchase the property. There was no evidence of repudiation by the purchaser in the absence of a notice to complete.

Mr. Inamdar for the trustees placed heavy reliance on what is stated in Halsbury's Laws of England, 4th Edition, Volume 9, page 337, paragraphs 481, which paragraph points out, in my humble view, the correct position in appropriate circumstances. The paragraph reads:

"481. Time not generally of the essence. At common Law stipulations as to time in a contract law stipulations as to time in a contract were as a general rule, and particularly in the case of contracts for sale of land, considered to be of essence of the contract, even if they were not expressed to be so, and we construed as condition precedent; therefore one party could not insist on performance by the other unless he could show that he had performed, or was ready and willing to perform, his part of the contract within the stipulated time. However, in the exercise of its jurisdiction to decree specific performance the court of chancery adopted the rule, especially in the case of contracts for sale of land, that stipulation as to time were not to be regarded as of essence of the contract unless they were made so by express terms, or it appeared from the nature of the contract, or the surrounding circumstances, that such was the intention of the parties; and, unless there was an express stipulation or clear indication that time should be of the essence of the contract, specific performance would be decreed even though the plaintiff failed to complete the contract or to take the various steps towards completion by the date specified."

"The modern law, in the case of contracts of all types may be summarizes as follows. Time will not be considered as of essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."

And it is equally important to refer to paragraph 485 of the same volume of Halsbury's Laws of England , page 340 where it is stated:

"In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance within the time so fixed , he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at time when the notice is given.

It is at this stage that the judgment of the superior court becomes most relevant. The learned Judge held as follows:

"The plaintiff having failed to comply with the condition of the payment of the balance, the defendant was entitled to rescind the contract, after the expiry of that date. The letter of 29th March, 1993 by Mr. K. M. Karimbhai to the plaintiff was therefore perfectly in order."

The learned judge, in my view, was clearly wrong in coming to the conclusion that the respondent was so entitled to rescind the contract. Rescission can, in the circumstances of this case, only come after a reasonable notice in writing has been given to the defaulting party not in default. No such notice was admittedly given.

The defence (title amended defence and counterclaim) says in paragraph 6, 7 and 8

6. As regards paragraph 6 of the plaint ,the defendant states that according to the Agreement of sale the balance of the purchase price was to be paid on or before 31st January, 1993. The plaintiff failed to comply with this term of the agreement and that the defendant therefore cancelled the sale Agreement by

notice dated 29th March, 1993. The defendant therefore refused to comply with the plaintiff's notice of the November, 1993".

7. The defendant states that he had lawful reason to rescind the contract as the plaintiff was not ready and willing to pay the balance of the purchase price till November , 1993, more than a year after the agreement of sale was entered into."

8. As regards paragraph 8 of the plaint the defendant states that in the Sale Agreement time was of essence of the contract and if the same was not, which is denied, then time was made the essence of the contract by various subsequent discussions as evidenced in the notice of cancellation of Sale Agreement dated 29th March, 1993."

The afore-mentioned paragraphs which I have reproduced represent the crux of the defence. The defences in these in these three paragraphs and the so-called written submissions made to the learned judge was called upon to adjudicate on the first ground in the notice of grounds for affirming the decision. This ground is a very elaborate one as drafted, I presume, by Mr. Gautama who directed most weighty of his arguments towards attempting to convince the court of the correctness of his arguments. If this point had been pleaded and fully argued in the superior court I may have come to a different conclusion but sitting in this court, which is the first and the last appellate court in this country, I can and will only consider points which were pleaded, argued and ruled on by the judge. I do not have the benefit of the learned judge's observations on fundamental issues raised, in my view, for the first time in this court. So put it in a summary form this ground urges this court to conclude that the respondent was entitled to rescind as he did and that such rescission was accepted by the trustees by requiring respondent to refund the part purchase price paid thereby disentitling them to seek specific performance. As I have pointed out, nowhere in the pleadings or evidence or the judgement this complex point springs up.

The second ground advanced by Mr. Gautama for affirming the decision of the learned judge is the alleged conduct of the trustees in the circumstances and delay on their part after notification by the respondent to the trustees of the rescission of the contract and hence accepting the rescission. This second ground (not numbered) is synonymous with the first ground. In my humble view (and I have anxious moments considering this point) the trustees first reserving their position in law in not accepting the rescission and then claiming refund do not comprise their position. Had the respondent refunded the sum of shs. 550,000/= and had the trustees accepted such refund the contract would certainly have come to an end. Again I must point out that this point as now urged by Mr. Gautama was not so pleaded, nor so urged and I do not have the benefit of the findings or observations of the learned judge thereon.

The third ground relied upon by Mr. Gautama for affirming the decision of the superior court was that there was no evidence of availability or tender of the balance of purchase price and that as such the appellants (the trustees) were never ready, able and willing to carry out their part of obligations under the contract . This is the only ground, in my humble view. Which is pleaded in paragraph 7 of the defence and indeed some attempt was made towards establishing this point by way of cross-examination of the trustees. But is there an obligation on the part of the purchaser to tender the balance of the purchase of the purchase price when the vendor has rescinded the contract? This issue is answered simply by saying that there is no obligation on the part of the purchaser to tender the balance of the purchase price when the contract stands rescinded. In the well known case of Openda v. Ahn [1982-88] 1 KAR 294 it was held that "since the appellant had wrongly repudiated the contract and persisted in such repudiation, he could not object that the respondent had failed to carry out the 'perfectly useless exercise ' of actually tendering the balance of the purchase price." I accepted as did this court in Openda v. Ahn case the situation as epitomised by the citation referred to by Kneller and Hancox JJ.A (as they then were) from Rightside properties v. Gray [1974] 2 All E. R 1169 at 1183 which citation is as follows:

" Of course, in the present case the repudiation was not accepted at once: Rightside kept the contract open. Equally, however, there was all times until, and there was persisted in during the trial, a wrongful repudiation. It appears to me that in consequence Rightside was never at anytime under any obligation to show that it was "able"

""to perform its parts of he contract. "Ability" in this connection, means arranging the finance, which, under modern conditions, could be done either by arranging a mortgage or a sub-sale, and doubtless there are other methods as well. But they all involve sum form of preparation on the part of the person raising the finance, and it appears to me pessimi exempli if the vendor in a position to say: "Because you were not on a particular day ready with your finance, you cannot claim damages against me . True it is that it would have been perfectly useless for you to make the preparations because I told you I was not going to complete, but I can now huff you for having failed to carry out this perfectly useless exercise." This is the morality of a game, not of a serious legal contest'

(emphasis mine).

As the respondent had rescinded the contract in March, 1993 and as in November 1993 the trustees made an unequivocal offer had through their advocate for payment of the balance of the purchase price (which offer was not responded to) I do not see how it can be stated that the trustees were not able, ready and willing to complete the contract as at the date of suit. It has not been suggested that Mr. Obhrai was not good for his unequivocal undertaking to pay the sum of shs 3.3. million in November, 1993. It is on this basis that I would disagree with Mr. Gautama's arguments on this issue which arguments I must confess sounded very attractive to begin with.

Mr. Gautama's fourth ground for affirmation of the judgment is that the appellants (the trustees) were guilty of laches and inordinate delay disentitling themselves to specific performance after non-payment of the balance of the purchase price . The issue of lanches and inordinate delay was not pleaded, nor was it argued before the learned judge , nor do I have the benefit of the learned judge's findings or observations on this point. The question of lanches and inordinate delay becomes irrelevant, in my view, when statute gives a litigant a certain period to file his claim in court. A contract for sale of land under our Limitation of Actions Act (cap. 22, Laws of Kenya) remains open for enforcement for six years. The doctrine of lanches as well as the issue of inordinate delay, being equitable defences, are not available to the defendant unless the land has changed hands. I can do more than simply quote from Halsbury's laws of England, volume 16, 4th Edition, paragraph 1476, at page 998:

"1476 The Defence of Lanches. A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of principle which has underlain the Status of Limitation, vigilantes et non dornientibus lex succurrit. A court of Equity refuses its aid to stale demands where the plaintiff has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his lanches. The defence of lanches, however, is only allowed where there is no statutory bar (emphasis mine). If there is a statutory bar, operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable; and an injunction in aid of a legal right is not barred untill the legal right is barred, although laches may be a bar to an interlocutory injuction.

It can be seen straight away that the defence of lanches has to be pleaded and canvassed properly. It is of necessity so because in determining whether there has been such delay as to amount to lanches the main points to be considered are:

(i) The acquiescence on the plaintiff's part.

(ii) Any change of position that has occurred on the defendant's part.

The issues as I have pointed out, were not seriously canvassed.

In the same volume of Halsbury's Law of England it is stated at page 1001 paragraph 1481:

"Staleness of demand as a defence . Staleness of demand, as demand distinguished from a statute of Limitation and analogy to it, may furnish a defence. A defence based on this ground renders it necessary to consider the time which has elapsed and balance of justice or injustice in affording or refusing relief …….. Mere delay would not appear to be sufficient to bar a claim, but generally in the efficient to bar a claim, but generally in the absence of minority or some circumstances preventing an action, a claim will

be treated as barred after a lapse of twenty years."

Section 4(1) of our Limitations of Action Act (Cap 22) allows a period of six years from the date of the accrual of the cause of action, for action founded on contract, before limitation can be pleaded as defence. Section 4(1) (e) of the same Act allows a six year period to file actions including actions claiming equitable relief, for which no other period of limitation is provided by that Act or by any other written law.

It is my humble view, in all the circumstances of this case, that offer of payment (undertaking to pay) in November, 1993, when the respondent had not served notice making time of the essence of the contract, places the trustees in a position to seek their lawful redress.

Save for the ground numbered as 3 in the notice of grounds for affirming the decision of the superior court I would not have allowed Mr. Gautama to argue the other grounds as the same were not before the superior court.

In the case of J. L. Lavuna & others v. Civil Servants Housing Company Limited and Another, (Civil Appeal No, 4 of 1995, unreported) (Gachuhi, Akiwumi & Lakha, JJ.A) said:

"In the absence of a proper pleading there is no finding of the trial judge on these issues. As was said by Lord Birkenhead L. C., in North Staffordshire Railways Company v. Edge [1992] A. C. 254 at pg. 263:

"the appellate system in this country is conducted in relation to certain well-known principles and by familiar methods…. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as a the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the court below."

It is open to a first appellate court to re-evaluate the evidence to see if the learned judge has made wrong findings or drawn wrong inferences of facts but in my view it is not open for this court to inquire, for the first time, issues which were not pleaded or canvassed on which this court has no benefit of the opinion of the learned judge.

What I have said so far is enough to dispose off this appeal. To summarize I say that as time was not the essence of the contract, and as time was not made of the essence of the contract in writing, and as it cannot be inferred that the respondent wanted to make the time of such essence the learned judge erred in stating simply that the letter of 29th March, 1993 by Mr. Karimbhai was in order. Also that although there was a delay of some seven months in the actual undertaking given by Mr. Obhrai for payment of the balance of the contractual sum, from the date of the rescission of the contract by the respondent, the contract still remained open until the respondent made time of the essence of the contract. Also that the only ground which I consider which Mr. Gautama can properly argue for affirmation of the decision, is not available to him as I have earlier endeavoured to point out. I would therefore allow this appeal with costs and I would order specific performance as prayed in the plaint in the superior court. I would dismiss with costs the notice of grounds for affirming the decision.

I come now to the notice of cross-appealed. The learned judge declined to order forfeiture of the sum of shs. 400,000/= paid upon signing of the agreement and the sum of shs. 150,000/= paid in November, 1992.

The Learned judge was in my view, right in not treating the first payment as a forfeitable deposit. There is nothing in the agreement of sale even remotely suggesting that the first payment was to stand forfeited upon non-completion. As I am for allowing the appeal I need to go into the cross-appeal but as there is a conflict of judicial opinion I ought to make my views know on the merits of the cross-appeal in the short manner I have already done. I would dismiss the cross-appeal with costs.

Dated and delivered at Nairobi this 28th day of May, 1997.

A.B. SHAH

……..……

JUDGE OF APPEAL