REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 165 of 1996

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." <u>This is the morality of a game, not of a serious legal contest'</u> (emphasis mine).

As the respondent had rescinded the contract in March, 1993 <u>and</u> 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 <u>Halsbury's</u> laws of England, volume 16, 4th Edition, paragraph 1476, at page 998:

"1476 The <u>Defence of Lanches</u>. 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, <u>vigilantes et non dornientibus lex succurrit</u>. 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. <u>The defence of lanches, however, is only allowed where there is no statutory bar</u> (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:

<u>"Staleness of demand as a defence</u> . 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

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JUDGE OF APPEAL