REPUBLIC OF KENYA

COURT OF APPEAL AT MALINDI

CIVIL APPEAL 165 OF 1996

GURDEV SINGH BIRDI and NARINDER SINGH GHATORA as Trustees

of RAMGHARIA INSTITUTE OF MOMBASA..... APPELLANTS

AND

ABUBAKAR MADHBUTI..... RESPONDENT

(Appeal from Judgment of Hon. Justice A. Mbogholi-Msagha dated 30th January, 1996

In

H.CC.S. NO. 58 of 1995

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JUDGMENT 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 relief 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 appellants' 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. Karimbhai as follows;-

"I refer you to my letter dated 28th April, 19 9 3 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 appellants' 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. Karimbhai wanted to 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, 199 3." 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 Laws 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 Nunes v John Mbiyu Njonio & 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 void 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 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

JUDGE OF APPEAL