



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH & LAKHA JJ.A & BOSIRE AG. JA)

CIVIL APPEAL NO.40 of 1995

BETWEEN

NDIUCO LTD.....APPELLANT

AND

NAIROBI CITY COMMISSION (NOW NAIROBI CITY COUNCIL)....RESPONDENT

**(Appeal from the Ruling and Orders of the High Court at
Nairobi (Mr Justice Mbiti dated 19th July 1991**

in

H.C.C.C. No. 493 of 1991)

JUDGMENT OF THE COURT

In a forced sale by public auction of a parcel of land known as L.R. 21/1/45, Nairobi, which was held on 12th July, 1988, the appellant, Ndiuco Limited (under the appellant) was the highest bidder at Kshs.500,000/=. The property was then knocked down to it after which it paid the purchase price. The property was sold in execution of a decree in the First Class Magistrate's Court, Nairobi, **Civil Case No.308 of 1984**, in favour of the respondent herein, City Council of Nairobi (under, the respondent) which was the Plaintiff with one John M. Kigwaini, as the defendant. The suit was for the recovery of outstanding rates from the defendant as the ratepayer respecting the above property.

Notwithstanding the sale the respondent secretly allowed the rate payer to settle the arrears of rates and accordingly issued him with a rate clearance certificate, which he later used to effect a transfer of the property to a third party. On being made aware of that fact the appellant brought an action in the superior court against the respondent claiming Kshs.15,310,000/= as special damages, and general damages, in effect for loss of bargain.

In its plaint, the appellant averred, inter alia, that it was the highest bidder in the auction sale of the property; made the necessary payments of the purchase price promptly; was thereafter issued with a certificate of sale; that thereafter it took possession of the property; and took steps to obtain a vesting order in its favour respecting the property. When it had done all that it commissioned a firm of architects to prepare plans for the construction of luxury and executive houses on the land at an agreed fee of 21/2 % of the total construction cost which was estimated at Kshs.60,000,000/= and made part payment of Kshs.1.5m. It also engaged financial experts to secure financing for the project at an agreed fee of

Kshs.3,000,000/=; paid Kshs.9,500,000 to a firm of general contractors as mobilisation and commencement of works fee, and, also, paid a further sum of Kshs.180,000/= to a firm of advocates, K.J. Kinyanjui and Co, for legal services respecting the project. The total amount, which included the purchase price came to Kshs.15,310,000/= which it claimed as special damages. The appellant also averred that the respondent acted fraudulently when it allowed the rate payer to redeem the property.

The respondent was served with the plaint and summons to enter appearance. It filed a written statement of defence in which it made a general denial of the averments in the plaint.

The appellant did not think that the respondent sufficiently traversed the averments in its plaint. It therefore applied by chamber summons under O.VI rule 13 of the Civil Procedure Rules, for orders, inter alia:-

(a) That the defence be struck out for being frivolous and vexatious as it raised no triable issues.

(b) That judgement be entered in its favour in terms of prayer (a) of the plaint which related to the claim for special damages.

(c) That the plaintiff be at liberty to move the court to assess general damages.

The application came before Shields, J. on 6th May, 1991. The proceedings of that day as appear in the record of appeal being very short we propose to reproduce them in full. "Coram: Shields J.

K.J. Kinyanjui for Plaintiff/applicant N.M. Mugalla for the Respondent/defendant

Sale of Property: City Council sold, purchase price paid - property transferred to another

Mugalla does not seriously contest that the defendant broke the contract, he is only interested in contesting the damages claimed.

Respondent claims damages are at large and must be assessed in accordance with Rule 5 of Order IXA.

Court: I strike out the defence and enter interlocutory judgment for the plaintiff. The suit is to be set down for assessment of damages by the court for prayer (c) only. Plaintiff entitled to the costs of this application.

J. Shields.

Judge"

We deprecate the cursory manner in which the learned Judge conducted the proceedings as he was obliged to assign reasons for his decision and to specifically state what was to happen to the other claims in the plaint.

We observe that the learned Judge did not purport to enter judgment for the appellant under O.IXA rule 3 of the Civil Procedure Rules, which had he done would have meant that there would have been a final judgment respecting the claim for special damages of kshs.15,310,000/=. However, having entered the judgment under rule 5, it meant that the appellant was obliged to adduce evidence to prove the basis of its claim for the special damages. Indeed that is the view Mbito, J. who later heard the appellant's case, took.

In obedience to Shields, J.'s order reproduced above, the appellant eventually caused its suit to be listed for assessment of damages. The matter was listed before Mbito, J. One Frederick Mutwiri Mithinji, the Managing Director of the appellant, was the only witness who testified on its behalf. In his evidence

he adopted wholly his affidavit, sworn on 25th February 1991, in support of the application for striking out the written statement of defence. To that affidavit several copies of documents upon which the appellant's claim was premised were annexed. The witness produced the originals as exhibits. That was clearly in breach of the clear provisions of section 35 of the Evidence Act. However considering that no objection was raised to their production, and also the fact that we cannot glean any prejudice to the respondent resulting from the irregularity we say no more on that issue.

In cross examination the witness is recorded as having said, in pertinent part, as follows:

"I applied for loan. This was to the security for the loan although there was no title. I used the certificate of sale. I decided to embark without title as I was sure of obtaining a certificate of title so as not to keep it idle."

What we make out from the foregoing is that the appellant without any prior consultation with or notice to the respondent or any other interested party decided to take steps towards developing the property and to use it as security for a loan even before it obtained title to it. So the respondent was unaware of all that. It is clear from the recorded evidence that the appellant did not adduce any evidence to show that, apart from the price paid, the other heads of special damages were recoverable as a direct consequence of the respondent's alleged breach.

The respondent called one witness who, in effect confirmed that the property was sold before arrears of rates were cleared by the ratepayer and that a rates clearance certificate was improperly issued to the rate payer.

In a reserved judgment the learned trial Judge, after setting out the background facts of the case, made findings of fact, inter alia, that apart from the purchase price, all the other heads of special damages were not within the contemplation of the parties when the property was auctioned, that the purchase price having been deposited in court by the court broker who auctioned the property was not recoverable in this suit apart from Kshs.11,440/= which the court broker deducted as his fees; that the balance could be collected from court by the appellant, and that the appellant was entitled to general damages on loss of bargain which he assessed at kshs.100,000/=. He then gave judgment to the appellant for Kshs.111,440/= with costs and interest on that sum.

The appellant was aggrieved and brought this appeal. The memorandum of appeal has 21 grounds which as set out are clearly in breach of rule 84(1) of the Rules of this Court. However, Mr. Billing who with Mr Kariuki Muigua appeared for the appellant while conceding that the grounds were improperly drawn, stated from the bar that he would argue only two grounds. Firstly, that the learned trial Judge erred in failing to give judgment for the appellant respecting the purchase price paid which in any event was admitted. Secondly, that the award made on loss of bargain was inordinately low as to amount to an erroneous estimate. In his view a reasonable award would have been Kshs.500,000/=.

Mr. Okwach who appeared for the respondent with Miss Kittony, conceded, properly so in our view, that the trial Judge improperly failed to give judgment to the appellant for Kshs.500,000/= it had paid as the purchase price. He was, however, of the view that kshs.100,000/= awarded as general damages for loss of bargain was reasonable regard being had to the fact that the property was sold by public auction in execution of a decree of court.

This being a first appeal we are obliged to analyse the recorded evidence and draw our own conclusions from it, of course without overlooking the findings and conclusions of the trial Judge. We have no hesitation in coming to the conclusion that the purchase price was recoverable in full and that the trial Judge was clearly in error in not specifically giving the appellant judgment on it. The appellant adduced evidence to show that he paid the full purchase price timeously to the court broker. The money was eventually paid into court by the latter. The fact that it was lying in court did not mean the appellant could get it as and when he wanted it. It was not deposited in court in a suit in which it was a party; nor was it paid into court for its benefit. The respondent was the holder of the decree respecting which the money was deposited in court. In those circumstances the money was beyond the appellant's reach.

Regarding the other items on the head of special damages, the trial Judge held that they were not within the contemplation of the seller of the property and were therefore, not recoverable. The position in law is that it is not every loss that a disappointed purchaser of property incurs which is recoverable as damages, but only such loss which the seller must have contemplated would result in the event of breach by him of the sale agreement (see, Openda .v. Ahn [1982 - 88] IKAR 294).

During the auction sale neither the auctioneer nor the respondent would know the purpose for which the appellant was buying the subject property. The expenditure which the appellant said it incurred was decided on long after the auction and it would be preposterous to load it on the respondent on the pretext that it was reasonably in the contemplation of the parties and that it would be wasted in the event of breach of the sale agreement. We, therefore, are of the view that the trial Judge was right when he rejected all the other items of special damages.

As for damages for loss of bargain, the appellant bought the subject property in a forced sale by public auction. It is possible that had the property been sold by any other mode of sale it would have fetched either more or less than was realized. The onus lay squarely on the appellant, which it did not discharge, to demonstrate by acceptable evidence that the loss it suffered as a result of the respondent's breach was either the Kshs.500,000/= which its counsel suggested to us or any greater sum than was eventually awarded to it by the trial Judge. The trial Judge awarded it Kshs.100,000/=, as he said, on the basis of a guess. On the facts and circumstances of this matter it is our view that that figure is not inordinately low as to call for our interference. We accordingly affirm it.

In the result and for the reasons we have given, we allow this appeal, and vary the judgment and decree of the superior court to the extent that the special damages are upped to Kshs.500,000/= with interest on that sum at the rate of 25% per annum from the date of sale until payment in full and on the balance of the decretal sum at 12% per annum from the date of the High Court judgment until payment in full. We award the appellant the costs of this appeal.

Dated and delivered at Nairobi this 9th day of October 1997.

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR