IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Omolo & Lakha JJ A)

CIVIL APPEAL NO 139 OF 1989

BETWEEN

DANIEL M. NJAI .....APPELLANT

AND

HIGH VIEW FARM LTD.....RESPONDENT

GEORGE N. MWICIGI.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr Justice Bhandari) dated 11th February, 1988

in

Civil Case No 4060 of 1985)

JUDGMENT

This is an appeal by the defendant (appellant) from the decision of the superior court (late Bhandari, J) whereby he decreed specific performance to the second plaintiff (second respondent) to transfer to him the land known as Land Reference No 11453/1 situated north east of Thika (the property) free of all encumbrances on his tendering the balance of the agreed sale price.

In or about September or October 1984 the appellant met the second respondent who approached him for purchasing the said property. After negotiation he agreed to sell to him the said property at the price of Shs 1.75 million. On 17th January 1985 he signed the agreement in the presence of Mr Gibson Kuria, advocate, who acted for both the parties. The second respondent was not present at the time and he had not signed the said agreement. Later on the appellant received the copy of the agreement with the second respondent's signature on it. He noticed that the agreement was signed by him and the second respondent. He did not object to the farm being registered in the name of the first respondent. It is in these circumstances that the agreement of sale although made in the name of the appellant as vendor and the first respondent as purchaser was signed by the second respondent. It was not on behalf of the first respondent nor was it signed as an agent of the first respondent. The 10% deposit specified in the agreement in the sum of Kshs 175,000/ was deposited by the second respondent. On 11th February, 1985 the Muranga Land Control Board gave necessary consent and on 19th February, 1985 the second respondent in accordance with an agreement with the appellant took possession of the property with the right of maintaining, cultivating and making further development to the property. Inspite of demand the appellant refused to complete sale giving rise to the suit by the first respondent against the appellant for

specific performance.

At the conclusion of the evidence of the second respondent and the appellant and the Court having visited the land, it was during the course of submission on behalf of the appellant that the learned judge granted leave to the first respondent to amend its plaint by adding the second respondent. There was no application for an adjournment on behalf of the appellant nor was there any application to call any further evidence. The learned judge found that there was a subsisting contract of sale between the second respondent and the appellant who had unlawfully attempted to rescind or to declare it unenforceable. He also found that time was not of the essence of the contract as the appellant never gave any notice to make it so and in fact handed over the property to the second respondent in about February 1985 and the second respondent has been in occupation since.

The judgment of the learned judge was attacked at the hearing of the appeal on four principal grounds. It was submitted that the learned trial judge erred.

> (i) in allowing the first respondent to amend the plaint by adding the second respondent to the suit;
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> (ii) in holding that there was subsisting a contract of sale of the property between the second respondent and the appellant;
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> (iii) in failing to hold that there was no Land Control Board consent to the sale; and
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> (iv) in decreeing specific performance in the circumstances of the case.

To deal first with the first ground. There is no question that the Court has power, under VIA rule 3(1) of the Civil Procedure Rules to allow an amendment, at any stage of the proceedings, on such terms as to costs or otherwise as may be just and under rule 5(1) of the said order for the purpose of determining the real question in controversy between the parties. There is no doubt that an amendment can always be allowed if the interest of justice so requires. The position in the present case is somewhat a curious one. The first respondent alleged the contract of sale between it and the appellant but at the time of the contract the first respondent had not yet been incorporated. When this was realized at the hearing of the case and was made a ground of a submission by the appellant's advocate, the first respondent, in consequence, and to meet the said objection, applied for leave to add the second respondent to the suit. Upon this application being allowed the submissions continued, there having been no application for an adjournment or to call further evidence. The appellant now complains that the amendment should not have been allowed at such a late stage of the proceedings. But the power of the court specifically provides that an amendment may be made at any stage of the proceedings.

It is also contended that the proposed amendment defeats what the appellant considered was a complete answer to the first respondent's case. We fail to see what injustice could result to the appellant by allowing the amendment. The hearing had not concluded. Amended pleadings in defence would be no more onerous than pleading to a new suit. Abortive pleadings to date can be compensated in costs. The mere fact that the first respondent may succeed on the amended pleadings where it would have failed on the original pleadings is not an injustice to the appellant. As to convenience, it seems to us that there would be no greater inconvenience to the appellant in filing amended defence than in filing defence to a new suit. The amendment enables the Court to determine the real question in controversy between the parties.

We are, therefore, inclined to think that the interest of justice was best served by allowing the applicant to amend. In any event, the grant of such an amendment is a matter of a judicial discretion not lightly to be interfered with. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by Court of Appeal for East Africa in the case of *Mbogo vs Shah* [1968] EA 93. In his judgment Sir Clement de Lestang V P said at page 94:-

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected

> itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion".

Applying these principles to the present case, the discretion was, in our view, properly exercised and this Court will not reverse the learned judge's decision to grant an amendment notwithstanding the late stage at which the amendment was allowed.

We observe, before leaving this part of the case, that the order granting amendment was general. As was stated by Briggs, JA in *Hashan Merali and another v Javer Kassam and Sons Ltd* [1957] EA 503 at 504:-

> "There is no doubt that in contested cases it is ordinarily undesirable to give unrestricted leave to amend....."

Order VIA rule 3 does not mean that an order may be made in general terms but gives a general power to make proper orders in all cases for determining the real question.

As was said by Farwell L J in *Hyams v Stuart King* [1908] 2 KB 696 at 724:-

> ".....But in my opinion it is the duty of the plaintiff's counsel, the duty which ought to be enforced by the judge, when he asks for an amendment which raises a fresh issue or a fresh cause of action, to formulate and state in writing the exact amendment that he asks, in justice to the defendant, in order that he may know exactly the new case that he has to meet, and to the learned judge in order that he may know exactly what he is asked to try, and to the Court of Appeal in order that they may know what has been tried and decided....."

Secondly, it was contended that the agreement of sale dated 17th January, 1985 was between the appellant and the first respondent. It is common ground that on that date the first respondent had not been incorporated. The agreement, however, is signed by the second respondent without any qualification whatsoever. It is, therefore, submitted on behalf of respondents that the agreement was in fact made by the second respondent in his personal capacity. Now in all cases where a person purports to contract on behalf of a company not yet formed, then however he expresses his signature he himself is personally liable on the contract unless there is a clear exclusion of personal liability. Here, the second respondent who has signed the agreement did not do so for or on behalf of the company or as a director of the company or as an agent of the company. If he had done so it may then have been argued that it was the company which was contracting. The general principle is, of course, that a person who makes a contract ostensibly as an agent cannot afterwards sue or be sued on it, subject to some qualifications where there is a foreign principal or a *del credere* agent. The real problem in any given situation is to determine the status of the person who enters into the agreement. Is he entering into it, whatever form of description he may use, as an agent or as a principal? In the instant case, in our judgment, having regard to the surrounding facts leading to the formation of the agreement we are satisfied that the reality of the matter was that the second respondent so subscribing himself was acting as a principal, and this was so as no reference was made to the company which was in contemplation though not incorporated when the contract was signed. The contract was not on the company's note-paper and it was clearly not intended to be a company's contract as the company had not yet been incorporated and the second respondent's signature was not in the company's name or on its behalf and by signing in his own name as a principal he cannot purportedly have intended to make the company a party to the contract. The case, in our judgment, does not rest on any narrow point as to the way in which the contract was actually signed. The case stands on what the contract purported to do. Here, the contract was clearly intended to be, and intended only to be, a contract directly with the second respondent. The contract, for example, in the special condition, states that "the transfer will be made to either the purchaser herein or to his nominees (emphasis supplied). And in his own evidences the appellant conceded that the negotiation took place with the second respondent and he agreed to sell the property to him (emphasis supplied). The appellant was indifferent if the property was registered in the name of the first respondent. The contract on its face and having regard to the evidence adduced was a contract between the appellant and the second respondent and the company which had not been incorporated had nothing to do with it as a purchaser.

On a careful consideration of the material before us and our own evaluation of the evidence we are satisfied that the learned judge was right in decreeing the specific performance of the said contract in favour of the second respondent.

Thirdly, it was argued that there was no Land Control Board consent to the transaction in breach of the provisions of the Land Control Act Cap 302. This is a point which was not raised before the superior court and we do not have advantage of the finding by the learned judge on this issue. As was observed by Lord Birkenhead, LC in *North Staffortshire Railway Company v Edge* [1920] AC 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. The acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the judges in the courts below."

It is, however, settled law that this Court will not allow a new point to be taken on appeal unless it is satisfied that all the facts bearing upon the new point had been elicited in the court below; see: *Tanganyika Farmers Association Ltd vs Unyamwezi Development Corporation Ltd* [1960] EA 602. In our judgment, it does not appear that there was a full investigation in the court below of all the facts relating to this issue and it is not available to the appellant. This notwithstanding, we are, however, satisfied that this is not a case of a complete lack of consent from the Land Control Board. The Muranga Land Control Board had granted a consent to the sale of this property. We may add that the onus of establishing want of consent was upon the appellant and we are far from persuaded that the appellant discharged the onus on him. We are satisfied upon a careful consideration of all the material before us that there was consent in respect of this transaction.

Finally, it was urged that the respondents did not come to Court with clean hands and this was not a case in which an equitable relief of specific performance should have been granted. We are unable to agree. The learned judge made the following finding:-

> "On the facts found by the Court it is satisfied that there is a subsisting contract of sale between the second plaintiff and the defendant and that the defendant has unlawfully attempted to rescind it or declare it unenforceable. The Court grants second plaintiff's prayer for specific performance of the said contract and orders that the defendants do transfer the said property to the second plaintiff free of all encumberance on this plaintiff tending the balance of the agreed sale price."

The remedy of specific performance is an equitable remedy and it is also a discretionary one. We have reviewed all the circumstances of the case and find that the learned judge exercised his discretion on correct principles and did not err in any manner. This is not a case in which we would interfere

with such an exercise of discretion. Taking all the circumstances of the case into account we find that the relief granted was justified and we see no reason to interfere.

Accordingly and, for the reason above stated, this appeal fails and it must be, as it hereby is, dismissed with costs.

Dated and delivered at Nairobi this 14th day of August, 1995

J.M GACHUHI

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR