IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Kwach & Lakha JJ A)

CIVIL APPEAL NO 148 OF 1988

Between

ASSOCIATED MOTORS LTD .....APPELLANT

AND

J. M. GITHONGO .....RESPONDENT

J. S. ARMITAGE.....RESPONDENT

NATIONAL BANK OF KENYA LTD.....RESPONDENT

(Appeal from a judgment/decree of the High Court of Kenya at Nairobi (Schofield J) dated 29th April, 1987

in HCCC No 3325 of 1978)

JUDGMENT OF THE COURT

This appeal by the plaintiff from the judgment of the superior court (Schofield J) delivered on 29th April, 1987 whereby he dismissed the plaintiff's suit with costs raises a short but interesting question whether in the circumstances of this case there was a note or memorandum of the contract to satisfy the provisions of section 3(3) of the Law of Contract Act (Cap 23) (the statute).

On or about 15th May, 1978 the plaintiff's Managing Director (Jamal) called upon the offices of the first respondents with a view to purchasing property known as LR No 209/7994 which is an industrial plot in Nairobi (the property). He offered Shs 775,000/- for the property and he was asked to return the next day which he did. According to his version of events, Mr Githongo required the price Shs 800,000 and required immediate payment. Jamal wrote a cheque for Shs 160,000/- and obtained a receipt for it. In the afternoon of the same day he instructed his advocates to write the following letter to the respondents:

> 16th May, 1978
>
> The Receivers and Managers,
>
> Messrs Githongo & Associates,
>
> Accountants and Auditors,

Nairobi.

Dear Sirs,

Sale of Property known as LR Number 209/7994 to Associated Motors Limited

I have been consulted by my client company Associated Motors Limited who instructs me that this morning it was agreed between my client company and yourselves that the above mentioned property would be sold to my client at a price of Kshs 800,000/- (Kenya Shillings eight hundred thousand). I am further instructed that pursuant to the said agreement a sum of Kshs 160,000/- (Kenya Shillings one hundred and sixty thousand) was paid to you this morning being 20% deposit of the purchase price and that the balance of Kshs 640,000/- (six hundred and forty thousand) is to be paid tomorrow to your firm. Accordingly in terms of my client company's instructions I am enclosing herewith my client company's cheque for Shs 640,000/- being the balance of the purchase price, receipt of which please acknowledge.

Kindly arrange to let me have the title deeds of the property to enable me to prepare the necessary transfer in my client's favour. You will no doubt ensure that the terms agreed between my client company and yourselves relating to consent of the Commissioner for Lands and other matters are attended to as soon as possible to effectuate the agreement between the parties and facilitate early registration of transfer in my client company's favour.

Yours faithfully,

Sayed Ahamed.

Copy to:

Associated Motors Limited.

Nairobi.

On or about 20th May, 1978 he received a reply from the first respondents although the letter was dated 16th May. It was in the following terms:

Ishmail E Jamal, Esq,

Managing Director

Associated Motors Limited

PO Box 30789

NAIROBI

Dear Mr Jamal

Sapra Limited

1. We confirm receipt without prejudice, of Kshs 160, 000/- being 20% deposit in respect of the purchase of Plot No LR 209/7994. This is received on account of the purchase of the above property and we expect to receive the balance of Kshs 640,000/- tomorrow and we will hold the total sum pending the outcome of negotiations which we are presently carrying on with the receiver and manager of Sapra Limited and appointed by Grindlays Bank International Limited.

2. As the receiver is aware that we have still not entered into a binding agreement to sell this plot

we are presently negotiating with him and we must stress that the amounts received from you are held on account pending the outcome of these negotiations, and that such acceptance is in no way to be construed as constituting an agreement on our part to sell the property to you.

Yours faithfully

Joseph Muiruri Githongo

John Stuat Armitage

Receivers & Managers".

The appellant's case was for damages of Kshs 1,000,000/ for alleged breach of contract by the respondents, being the difference between the market price of Kshs 1.8m and the contract price for the property. The appellant's claim for specific performance included in the plaint was waived because by the time the proceedings were instituted the property had already been sold and transferred to another party for a sum of Shs1.8m. The respondent's main defence was that there was no note or memorandum in writing of the contract to satisfy the requirements of the statute.

Mr Gautama for the appellant relied on the above two letters and the two receipts issued for payment made by the appellant of the alleged purchase price together with two further letters dated 18th May and 16th May which we need not reproduce although in the superior court he contented himself by relying only on the two letters set out above and the two receipts. Be that as it may, it was the appellant's case that these documents constituted a note or memorandum to satisfy the requirements of the statute. Although the memorandum of appeal set out seven (7) grounds of appeal this was the only point relied upon and argued on behalf of the appellant.

The first respondent's case was that none of the documents relied upon by the appellant satisfied the requirements of the statute. Mr Gautama relied, in the main, on two authorities: first, *Bailey & another v Sweeting* [1861] 9 CBNS 843, a decision of a strong Court of Common Pleas. In that case, he argued that the Court found a note or memorandum although there was a repudiation of the contract by the defendant and, secondly, referred to the well known case of *Tiverton Estates Ltd vs Wearwell Ltd* [1974]2 WLR 176 from which he cited the passage at page 181 from the judgment of Willes J in *Buxton vs Rust* [1872] LR 7 Exch 279 where at page 281 speaking of the contract, he said:

".....I am of opinion that the letters of the defendant of

February 8 and 9 satisfy the Statute of Frauds. They amount to this. The defendant says: 'I did enter into a contract with you on January 11, but I will not perform it for a particular reason, and in order to show that my construction of the contract is the correct one, I forward you a copy of its terms.' This is a sufficient admission, and the fact that it was accompanied by a repudiation of the obligation to perform the contract, does not prevent its being used as an admission."

Mr Gautama thus was at pains to persuade us that even if the letter of 16th May was a repudiation, it nevertheless satisfied the requirements of the statute because the three essential terms of the contract, namely, the identity of the parties, the price and the property were clearly set out therein.

Mr N M Mungai for the respondent in an able and attractive submission was of the opposite view. If we may say so, he put his submissions not only succinctly but also precisely and with admirable brevity. Relying on the very decisions cited by Mr Gautama he submitted that for any writing to be a note or memorandum to satisfy the statute it required to recognise the existence of the contract. Put in another way, the contract had to be admitted before it could satisfy the requirements of the statute. After all, what is it that the leading case of *Bailey v Sweeting* relied upon by the appellant decide? This is clearly set out in the judgment of Lord Denning M R in the *Tiverton* case at page 181 where he said that:

It was held that, if the letter distinctly admitted the contract and all the terms of it, but only denied

liability for some reason connected with the performance of it, then the letter was a sufficient writing to satisfy the statute"

Again, at page 184 after considering the three illustrations he concluded that:

> "I cannot myself see any difference between a writing which (i) denies there was any contract; (ii) does not admit there was any contract; (iii) says that the parties are in negotiations; or (iv) says that there was an agreement "subject to contract," for that comes to the same thing. The reason why none of those writings satisfies the statute is because none of them contains any recognition or admission of the existence of a contract."

Lord Denning M R was not alone in observing this point. At page 192, Stamp LJ expressed himself thus:

> "I consider that prior to the year 1970 it had been recognised by authorities binding upon this Court (*viz*: *Buxton v Rust*, L R 7 Exch 279 and *Thirkell v Cambi* [1919] 2 K B 590) that to satisfy the requirements of the statute there must be in the note or memorandum of the contract upon which the action is brought something to indicate that the party signing it thereby acknowledges or recognizes the existence of the contract".

And Scarman LJ at page 195 stated as follows:

> "For the reasons given in the preceding judgments I am convinced that *Law v Jones* was wrongly decided and that the reasoning in *Griffiths v Young* (though the actual decision may have been correct on its facts: see the finding of the trial judge at p 677 of the report) was also erroneous in so far as it proceeded upon the principle that the note or memorandum required by the section need not recognise the fact of agreement provided it contains the terms. I agree, therefore, that the appeal should be dismissed."

Mr Mungai distinguished *Bailey vs Sweeting* and submitted that in point of fact in that case the letter was sufficient to satisfy the statute because it in fact admitted the contract. Erle C J at page 338 stated as follows:

> "After the making of the oral contract, however, there was a letter written by the vendee to the vendors, which contains this statement, "The goods selected for ready money was the chimney glasses, amounting to 38l. 10 s 6 d" (the goods in dispute), "which goods I have never received, and have long since declined to have, for reasons made known to you at the time," - the reason being, that, in consequence of the negligence of the carrier through whom they were sent, the goods were damaged. Now, the first part of that letter is unquestionably a note or memorandum of the bargain: it contains a description of the articles sold, the price for which they were sold, and all the substantial parts of the contract. If it had stopped there, there could be no dispute as to its being a sufficient note or memorandum to satisfy the statute."

The fact that in the latter part of the letter the defendant declined to take the goods because the carrier had damaged them in their transit thus repudiating his liability did not detract from the fact that there was an admission of the existence of the contract. The matter was put beyond doubt by the judgment of Keating J who at page 340 had this to say:

> "No doubt the contract in this case was good if evidenced by writing. The object of the Statute of Frauds was, to provide the certainty of written evidence for the uncertainty of oral evidence of contracts. The defendant's letter of the 3rd of December does contain all the terms of the bargain between these parties. It is said that that letter ceases to be a note or memorandum of the contract, because the defendant has thought fit to add to it an intimation that he does not wish or intend to be bound by it. It seems to me, however, that that statement cannot be allowed to vary the operation of the previous words of the letter which amount to a clear acknowledgment of the terms of the bargain."

We ourselves have given most anxious and careful consideration to the rival contentions of both counsel and have come to the conclusion that none of the documents relied upon by the appellant contains an admission or recognition of the existence of the contract. A letter repudiating liability is sufficient if it admits the terms of the contract but disputes the construction put upon them by the other party; but not if it denies, as is the position in the instant case, that no contract was ever made. We, therefore, find ourselves in full agreement with the learned trial judge when he stated in his judgment:

> "But subsection (3) of section 3 of Cap 23 talks of "the agreement upon which the suit is founded, or same memorandum or note thereof. The second paragraph of the letter exhibit 1 is a denial of the existence of a binding agreement. There is no acknowledgment of the existence of such concluded agreement in that letter or in any other of the letters written by the defendants referred to in the plaint or tendered in evidence. The purpose of the statutory provision is to require written evidence of a contract relating to land for the evidence of fraud. How can a written denial of a binding agreement be an acknowledgement of an agreement so
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> as to satisfy the words and very purpose behind the statutory provision? The plaintiff's advocate invited me to consider the speeches in *Tiverton Estates Ltd v*
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> *Wearwell Ltd* [1974] 1 All ER 209. I have done so. I can find nothing in them to persuade me that a denial of a binding agreement can constitute a sufficient memorandum or note to satisfy the requirements of section 3(3) of the Laws of Contract Act (Cap 23)."

So it is essential that the writing should contain an admission of the existence of the contract and all the terms of it. If it fails to do so, it is not sufficient to satisfy the statute. We are fortified in our conclusion by two cases: first, the decision in *Thirkell v Cambi* [1919] 2 K B 590, where Bankes, L J said at p 595:

> ".....If Mr Bevan could have established that the letter of January 2nd recognized that a contract had been made and that its terms were correctly stated in the appellant's letters, I agree it would be immaterial that it also contained a refusal to perform the contract so recognized."

And Scrutton L J said at p 597:

> ".....In order to make that position good (ie a sufficient writing) it is necessary to prove two things, which may be one thing containing two elements, a signed admission that there was a contract and a signed admission of what that contract was."

Secondly, in *Societe Capa Societe a Responsabilite Limitee v Acatos & Co Ltd* [1953] 2 Lloyd's Rep 185 Parker, J at p 191 said:

> ".....In order that such a letter can amount to a note or memorandum it is in my view essential that there should be a recognition and admission of the contract. It is not enough, as it seems to me, that the letter of repudiation should admit the letters and say that those letters do not amount to a concluded contract."

Accordingly and, for the reasons above stated, the learned trial judge was plainly right in the decision to which he came. For that reason, this appeal fails and it is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 12th day of October, 1995

J.M GACHUHI

.....

JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

A.A LAKHA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR