IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Omolo JJ A)

CIVIL APPEAL NO. 190 OF 1991

BETWEEN

1. ISAIAH MATHENGE

2. BENSON OMBUNA.....APPELLANTS

AND

ALFRED RUGENDO KIMOTHO..... .....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Justice Mwera) dated 17th January, 1991

in

HCCC No 892 of 1985)

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JUDGMENT

Kwach JA. Isaiah Mathenge (the first appellant), Benson Ombuna (the second appellant), Josephat Thongo Gichungwa, Francis Judah Muoka, Cornelius Okech, Eliud Njenga, Stephen Koinange, Nahashon Ngugi and Solomon Murugu, were the registered proprietors in common of the piece of land comprised in Title No Mombasa/Block 17/710 (the suit land). All the proprietors, except the first appellant whose undivided share was 2/10, held 1/10 undivided share each.

At a certain point in time, it is not clear when, the proprietors created a charge over the suit land in favour of Pan Africa Insurance Co Ltd (Pan Africa) to secure a loan granted to them by the insurance company. The proprietors defaulted on this loan and Pan Africa threatened to sell the suit land in exercise of its statutory power of sale. To avert this calamity, the proprietors agreed in principle to sell the suit land to raise money and pay off the debt owed to Pan Africa. To this end, K Mwaura & Company Advocates (the advocates), were instructed by the proprietors to find a buyer. Alfred Rugendo Kimotho (the respondent) offered to purchase the suit land and an agreement for sale was prepared by the advocates dated 4th June, 1981. It was signed by the respondent and all the proprietors except the two appellants and Cornelius Okech. In the case of the second appellant, his name did not even appear in the agreement for sale although he was still registered as a proprietor. There was some suggestion that he had sold his share to the first appellant but no formal transfer had taken place.

Following the refusal by the appellants to sign the agreement for sale, the respondent filed a suit in the superior court against the appellants seeking, among other reliefs, specific performance of the sale agreement and general damages for breach of contract *in lieu* of specific performance. The respondent's claim was stated to be based on the agreement itself and a memorandum dated 26th May 1981, to which I will return later.

The appellants filed a joint defence in which they denied having contracted with the respondent to sell their respective shares in the suit land to him. The case was heard by Mwera J who in a reserved judgment found for the respondent and made an order for specific performance against the first appellant only in the belief that the second appellant was no longer interested in the suit land, evidence having been led to the effect that he had sold his share to the first appellant. The appellants were aggrieved by that decision and have appealed against it to this Court. There are 6 grounds of appeal but for the purpose of this appeal, I need only refer to grounds 1 and 5, the gist of which is that the judge erred in law and in fact in holding that the requirements of section 3(3) of the Law of Contract Act (cap 23) (the Act), had been satisfied and also misdirected himself in invoking the law of agency when the same had not been pleaded.

Section 3(3) of the Act before it was amended by Act No 21 of 1990 provided that:

"(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it."

There is a *proviso* relating to an intending purchaser or lessee who has taken possession in part performance of the contract which does not

apply to this case. The agreement for sale dated 4th June 1981, as I have already said was not signed either by the first or the second appellant or anyone authorised by them to sign on their behalf. That being the case, that agreement was not enforceable against them.

The judge considered a number of letters exchanged between the proprietors and came to the conclusion that they constituted a memorandum or note within the meaning of section 3 of the Act and accordingly binding on the appellants. The first is a letter dated 16th July 1981 from the first appellant to SK Koinange in which he said:

"Dear (Mr) Koinange

Sale of Plot No 710/17/Mombasa

Mr Solomon Murugu has shown me the sale agreement documents for Shs 550,000/-. As you are aware I own two shares (1 from Ombuna) plus one of my wife.

If you wish me to sign the sale agreement please let me have the money in cash for 3 shares belonging to me and my wife earliest. On receipt of the cash, 3/10 of the sale proceeds, I shall sign the agreement.

Kindest regards.

Yours sincerely,

I M Mathenge."

A proper reading of this letter shows clearly that all the first appellant told Koinange was that he had been shown a sale agreement by Mr Murugu which he was not going to sign before he was paid his share of the sale proceeds. The letter itself contained no commitment of any sort on the part of the first appellant to sell the suit land to the respondent. So it cannot possibly constitute a memorandum or note signed by the first appellant within the meaning of section 3(3) of the Act.

The second letter, dated 26th May 1981, is from the first appellant to all the other proprietors except the second appellant and it reads:

"Dear Sir/Madam

Sale of plot No 710/17/Mombasa

Hi-Life Building

I have received an enquiry for the purchase of the above property at Kshs 500,000/-.

Would you like us to sell it at that price, remembering that last time at a public auction the highest offer was about the same amount? Please let me know your views urgently before the enquirer changes his mind. If you could get a higher price it would be better but if not, I strongly suggest that we dispose of the property without delay.

Yours faithfully,

I M Mathenge."

The letter was copied to CK Kanji, advocate, and Arun Patel who was then the Managing Director of Pan Africa. Again this letter was only a confirmation of the first appellant's desire to secure a buyer for the suit land but it was certainly not a commitment by him to sell to any particular person not even the respondent. From these two letters and the conduct of the parties, the judge came to the conclusion that a valid sale agreement came into force which could be given effect by an order for specific performance. In coming to that conclusion, I have no doubt in my own mind that the judge was wrong. The judge also appears to have read too much into the suggestion by the first appellant in his letter to Koinange dated 16th July 1981 that he would be willing to sign the agreement if he was paid his share up front. The fact remains that he did not sign the agreement and that letter was not addressed to the respondent in any event. The consequence of this, in my view, is that the appeal by the first appellant must succeed because there was no evidence upon which he could be legally ordered to specifically perform the contract which the respondent claimed had arisen between them.

The case of the second appellant is even stronger and Mr Kaburu properly concedes that his appeal must succeed. The second appellant did not sign the agreement for sale. He did not write any letter to anyone which could constitute a memorandum or note within the meaning of section 3(3) of the Act. As a tenant in common, his interest in the suit land could not be disposed of to a third party without his consent in writing – see section 103(2) of the Registered Land Act (cap 300). The judge tried to get over this hurdle by saying that the second appellant had sold his share to the first appellant. That was indeed the evidence of the first appellant but no steps seem to have been taken by either Mathenge or Ombuna to give

legal effect to this alleged transaction with the result that upto this day Ombuna is still registered as one of the proprietors of the suit land. This may explain why he resisted the respondent's claim in the superior court, and having lost there instituted this appeal. In my judgment in the case of *Kukal Properties Development Ltd v Tafazzal Hatimali Maloo & others* (Civil Appeal No 155/92) (unreported) in relation to section 3(3) of the Act I said:

"The decision is also challenged on the ground that in relation to the claim by the Porbunderwallas, there was no valid and enforceable agreement concluded between them and the appellant. The agreement (Ex 20) is dated 23rd June 1987. It is signed by the Porbunderwallas but it is not signed by the appellant as the vendor. With regard to this omission, the judge took the view that it was due to oversight on the part of the appellant's advocate and that since the Porbunderwallas had been made to believe that the agreement had been executed, the appellant was estopped from relying on non-signature. He held that in the circumstances, the agreement was to be deemed to have been executed. The execution of a legal document is a matter of fact. It is either executed or not executed. This was an agreement for the disposition of an interest in land and had to comply with section 3(3) of the Law of Contract Act (cap

23) ..... The agreement in question was not signed by the appellant or anyone authorised by the appellant to sign it. The Porbunderwallas could not rely on the *proviso* because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance. And as for the judge's holding that the appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of *Patterson v Kanji* (1956) 23 EACA 106, where the Court of Appeal for Eastern Africa held that there can be no estoppel against an Act of Parliament. The result is that the order for specific performance in favour of this couple should never have been made at all because it clearly had no legal basis."

This is exactly the position in the present case. There is no agreement,

memorandum or note signed by the second appellant or anyone on his behalf agreeing to sell his share in the suit land to the respondent. His appeal must accordingly succeed on this ground alone.

The judge also upheld the agreement on the ground that all the proprietors, including, of course, these appellants, had appointed the advocates their agent for the purposes of the sale of the suit land and that having not withdrawn their instructions, they were bound by a sale negotiated by the advocates on their behalf. The judge, I think, was wrong, because the subject matter being real estate, the authority of the advocates was of necessity limited to finding a purchaser. That authority did not extend to executing a transfer on behalf of the clients unless they held a power of attorney, which they did not. The advocates were merely executing the office of an estate agent and there is in fact unchallenged evidence that they also carried on the business of estate agents. Quite clearly they had no authority in law beyond that of an estate agent. I would also allow this appeal on this ground.

In the result, I would allow this appeal, set aside the judgment and decree of Mwera J and substitute therefor an order dismissing the respondent's suit with costs. I would also give the appellants the costs of this appeal. I would also order that if the suit land has been registered in the name of the respondent in execution of the decree, the Land Registrar, Mombasa, do cancel this registration and reinstate as proprietors all the persons named in the land certificate dated 27th January 1971.

Omolo JA. I have had the advantage of reading in draft form the judgment prepared by Kwach, JA and I agree with his final conclusion that this appeal must be allowed with costs, both here and below.

The respondent, Alfred Rugendo Kimotho, sought from the High Court an order for specific performance of an alleged agreement made between himself, on the one hand, and Isaiah Mwai Mathenge (1st appellant), Benson Ombuna (2nd appellant), Eliud Njenga, Josephat Thongo Gichungwa, Francis Judah Muoka, Cornelius Okech, Nahashon Ngugi, Stephen Koinange and Solomon Murugu, on the other hand. The respondent had alleged in his plaint dated the 25th March, 1985, that these nine men were the registered owners of a plot known as Title No Mombasa/Block XVII/710 which was and still is registered under the Registered Land Act, cap 300 Laws of Kenya. They were so registered as co-owners, and upto now all of them still remain the registered owners. As the respondent alleged an agreement for the sale of land, such agreement, by the provisions of section 3(3) of the Law of Contract Act cap 23, had to be in writing

or there had to be a memorandum or note of the said agreement signed by the party to be charged or by some person authorised by him to sign it. The only agreement for sale produced by the respondent was the one dated the 4th June, 1981; while that document was signed by the seven co-owners, it was not signed by the two appellants and the 1st appellant in fact specifically refused to sign it. But the respondent had contended that while the two appellants had not signed the agreement, there were other documents which, when read together, constituted a memorandum or note signed by the 1st appellant which showed that there was an agreement between him and the registered owners of the disputed plot for the sale of the plot to him. In respect of the 1st appellant, the trial judge, (Mwera J) in part agreed with the respondent and on the material on record, I am myself satisfied that he was entitled to make that finding. It was the 1st appellant who initiated the idea that the plot ought to be sold and in his letter dated the 14th October, 1980, (Exh 1) he explained to M/s Kassam Lakha Abdulla & Co why he thought the property should be

sold and he specifically directed that the property be sold by public auction by M/s GA Datoo Auctioneers of Mombasa. Of course as at that time, the respondent or any other buyer had not come onto the scene. Apparently an attempt to sell the property was made and the highest bid obtained was about Kshs 500,000/-. Then on the 26th May, 1981, the 1st appellant wrote to the co-owners (excluding the 2nd appellant) that he had received an inquiry for the purchase of the plot at Kshs 500,000/-. Would the other partners agree to the sale of the plot at that price, remembering that at the public auction the highest bid was about the same sum? If a higher price could be obtained, he would not object to the sale at that price. The respondent relied on this document (Exh 7) as being one of the documents which when read together with others, constituted a memorandum or note signed by the 1st appellant evidencing his agreement to the sale to him.

Then M/s K Mwaura & Co Advocates came onto the scene. From the very beginning they held themselves out as acting for all the nine registered owners. The respondent went to them and offered to buy the plot for Kshs 550,000/-. They accepted his offer and drew up the document dated the 4th June, 1981 which the two appellants refused to sign. Murugu, one of the co-owners took that document to the appellant and he saw it. He saw that the price at which the plot was to be sold was Kshs 550,000/- and he must have seen that the respondent was the buyer and the advocates acting for both the respondent and the sellers were M/s K Mwaura & Co Advocates. In his evidence, the 1st appellant denied that the agreement dated 4th June, 1981 was the same one Murugu showed him, but the learned trial judge, rightly in my view, readily rejected that denial. There was absolutely no evidence that any other agreement apart from the one

dated 4th June, 1981 had been drawn up and the 1st appellant's denial in this respect only goes to show his bad faith in the matter. I readily agree with the trial judge that Murugu showed the 1st appellant the agreement dated 4th June, 1981 (Exh 4). Having seen the agreement drawn up by M/s K Mwaura & Co Advocates, the 1st appellant wrote to SK Koinange Esq, one of the co-owners, as follows:

"Mr Solomon Murugu has shown me the sale agreement documents for Kshs 550,000/-. As you are aware, I own two shares (one from Ombuna plus one of my wife). If you wish me to sign the sale agreement, please let me have the money in cash for 3 shares belonging to me and my wife earliest. On receipt of the cash, 3/10 of the sale proceeds, I shall sign the agreement.

Kindest regards.

Yours,

I M Mathenge."

Two things immediately emerge from this letter dated 16th July, 1981 (Exh 7). The 1st appellant did not question the authority of M/s K Mwaura & Co Advocates to act for him and bind him in the matter. He did not allege that he had not given those advocates authority to enter into any sale agreement on his behalf. Secondly, he did not question the validity of the agreement itself. He would sign the agreement once his share of the agreed purchase price was handed to him in cash. This was one of the documents the respondent relied on, together with the earlier letter to his (1st appellant's) co-owners to which I have referred at constituting a valid memorandum or note of the agreement signed by the 1st appellant. That M/s K Mwaura & Co Advocates were acting for the 1st appellant was again confirmed in Court when Mr K'Owade who acted for the appellants in this Court and in the High Court objected to the evidence of Mr Kirumba Mwaura of that firm on the ground that since Mr Mwaura had acted for the appellants as well as the respondent and since the appellants had not consented to his (Mr Mwaura) disclosing their instructions to him, Mr Mwaura could not, therefore, testify and the appellants called in their aid section 134 of the Evidence Act. The trial judge thereupon disallowed the evidence of Mr Mwaura. If it be agreed that M/s Mwaura & Co Advocates had the authority of the 1st respondent that they should sell the property for them; if it also be agreed that Murugu showed the 1st appellant the agreement drawn up by the advocates whereupon the 1st appellant wrote the letter (Ex 7) to Koinange, then I would myself respectfully agree

with the trial judge that as respects the 1st appellant there was a sufficient memorandum or note in writing signed by the 1st appellant evidencing a valid agreement between them to sell the plot to the respondent. Whether or not that agreement could be enforced by a decree of specific performance would be a totally different matter and in that connection the Court would inevitably consider the fact that the respondent himself had not completed payment of the agreed purchase price by the time the 1st appellant was being asked to sign the agreement.

Nor have I seen anything in the cases cited to us on this aspect of the matter that would make me think that Mwera, J was wrong in his appreciation of the law.

In *Kukal Properties Development Ltd v Tafazzal Hatimali Maloo & three others* (Civil Appeal No 155 of 92) (unreported), the issue as far as I can see from the judgments, was not one a memorandum or note in writing signed by a party to be charged. One of the parties who sought specific performance simply relied on an agreement which was signed by him but not signed by the other party. The judge in that case purported to justify failure to sign by the other party on the grounds that there had been an over-sight on the part of the advocate who was responsible for ensuring that the agreement was properly executed. This Court rightly rejected that argument with Kwach, JA saying:-

"The agreement in question was not signed by the appellant or anyone authorised by the appellant to sign it. The Porbunderwallas could not rely on the *proviso* because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree of specific performance. As to the judge's holding that the appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of *Patterson vs Kanji* (1956) 23 EACA 106 where the "Court of Appeal for Eastern Africa held that there can be no estoppel against an Act of Parliament....."

If my appreciation of this case is correct, the Porbunderwallas did not rely on "a memorandum or note" signed by the appellant evidencing an agreement between them, they simply relied on an unsigned document and the judge gave them specific performance on the grounds that the appellant was estopped from denying the existence of the agreement. It

is no wonder this Court held the judge was wrong.

That is not the position here. The respondent never purported to hold out the document dated 4th June, 1981 as an agreement between him and the 1st appellant who had refused to sign it. If there is a document signed by both sides to the agreement then the question of memorandum or note thereof signed by the party to be charged becomes wholly irrelevant. The question of "a memorandum or note" signed by the party to be charged or by some person authorised by him to sign it only becomes relevant where there is no agreement in writing as the section puts it. The respondent relied particularly on the two letters written by the 1st appellant because the latter refused to sign the agreement.

In *Bidco Clothing Factory Ltd vs Kenya Puleen Ltd* Civil Appeal No 9 of 1984 (unreported), the party seeking specific performance based his case on the doctrine of part performance rather than on a memorandum or note signed by the party to be charged. The other cases cited merely state the principles to be considered when the question is what constitutes a memorandum or note in writing and I cannot see that the trial judge violated those principles in any way. On this aspect of the appeal, I am unable to find that there was no memorandum or note in writing signed by the 1st appellant and I respectfully agree with the trial judge.

This appeal, however, must succeed on the issue of the 2nd appellant. Mr Kaburu for the respondent conceded that in respect of the 2nd appellant who also did not sign the purported agreement of sale, there was absolutely no memorandum or note signed by him to evidence the alleged agreement between him and the respondent. There was no legally acceptable evidence such as a power of attorney, to show that he had authorised the 1st appellant to deal with his share of the property. And by section 103(2) of the Registered Land Act which Mr Kaburu himself quoted to us and to the High Court:

“No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

The respondent to whom the purported sale was being made was a third party and the sale to him required the written consent of all the nine proprietors. There was absolutely no evidence that the 2nd appellant was ever asked for his consent. The whole agreement accordingly fell to the

ground on that basis. It is for this reason that I agree that the appeal must be allowed in the terms proposed by Kwach, JA.

Gicheru JA. I have had the benefit of reading in draft the judgments of Kwach and Omolo, JJ A. I agree that this appeal should be allowed in terms of the orders proposed by Kwach, JA. In the result, the same is allowed on those terms.

Dated and Delivered at Nairobi this 28th day of November 1994.

J.E.GICHERU

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JUDGE OF APPEAL

R.O.KWACH

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR