Mangi v Munyiri & another

Court of Appeal, at Nairobi

August 1, 1991

Masime, Cockar & Muli JJ A

Civil Appeal No 143 of 1990

(Appeal from the Judgment and Decree of the High Court at Nairobi, Mr

Justice Shields J, dated 9th November 1989 in HCCC No 1413 of 1989)

Equity *- equitable remedies - specific performance - matters the courts will consider in granting such remedy.*

Land Law *- sale of land - rescission of an agreement for sale on account of the purchaser failing to complete the transaction on time - purchaser seeking specific performance - whether time was of the essence - whether both parties to blame for not completing the transaction - whether order of specific performance properly given.*

The appellant who intended to sell his residential property, the subject mater of this suit to the respondent purported to rescind the contract of sale on the ground that the respondent was unable to complete the transaction on time. The respondent contested the rescission in court and sought specific performance of the contract which was granted by the High Court.

The appellant, feeling aggrieved by the decision of the High Court, appealed to the Court of Appeal contending on the main that time was of essence to the sale contract and that by the completion date the balance of the purchase price was not available to the respondents. He stated further that by that time, there was no undertaking of payments as required under the Sale Agreement.

Counsel for the appellant further criticised the learned trial judge for granting specific performance stating that he erred in failing to apply his mind to the principle governing the grant of the remedy.

Held:

1. A claim for specific performance is not granted as a matter of courses. Being an equitable remedy, the court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief.

2. Both parties performed their respective parts of and trusted their common lawyer to handle legal requirements. It was unfortunate that the lawyers involved in the transaction could not do their part before the completion date but for these delays, the appellant and the respondents were at all material time ready, willing and also able to complete the contract before the completion date.

3. The order for specific performance had been properly made and there was no ground for this Court to

interfere with it.

Appeal dismissed.

Cases

1. *Wagiciengo v Gerrard* [1982] KLR 336

2. *Openda v Ahn* [1983] KLR 165

Statutes

No statutes referred.

Advocates

*Mr Waweru Gatony*e for the Appellant.

Mr Ndegwa for the Respondents.

August 1, 1991 the following Judgment of the Court was delivered..

This is an appeal from the judgment and decree of the High Court of Kenya (Shields, J) dated the 9th November, 1989, in Nairobi Civil Case No 1414 of 1989.

The subject matter of the suit was the residential property known as LR Nairobi/Block 93/466 situated in Nairobi (hereinafter referred to as "the property") owned by the appellant and which had a charge in favour of Kenya Re-Insurance corporation in the sum of Kshs 330,114/50 ct.

By an agreement entered into between the respondents who were the plaintiffs in that suit and the appellant and dated 12th October, 1988, the appellant agreed to sell and the respondent agreed to buy the appellant's said property at the price of Kshs 700,000/-. The completion date stipulated in the said agreement was 90 days from the date of the agreement such completion date agreed to be on or before 12th January, 1989. M/s Kembi and Muhia acted for both the purchasers/respondents and the vendor/ appellant. The purchasers/respondents deposited with the common advocate the sum of Kshs 70,000/- being the ten per cent of the purchase price. The respondents also negotiated with the Housing Finance Company of Kenya for a mortgage of Kshs 540,000/-. There was a further payment of Kshs 10,000/- to the appellant by the common advocate at the request of the purchasers and which sum the purchasers considered to be a part performance of the agreement. These facts are not in dispute.

The Sale Agreement was not completed on or before the completion date ie 12th January, 1989. The parties blamed each other. The respondents accused the appellant for breach of the agreement stating that he, the appellant, was unable to complete the sale since he did not have clear title and had not discharged the charge in favour of the Kenya Re-Insurance Corporation. The respondents also blamed the appellant stating that he the appellant was not in a position to give vacant possession of the premises or the property because the property was under a lease to the Government. The appellant on the other hand stated that the respondents were not ready, willing and able to complete the agreement on or before the stipulated date namely the 12th January, 1989. By his letter dated the 13th January, 1989, the appellant advised the respondents that unless they completed the agreement within five days from 13th January, 1989 the appellant would rescind the agreement. No payment was made and the appellant treated the Sale Agreement as rescinded. The respondents then filed the suit which was heard by the High Court (Shields, J) seeking, *inter alia,* specific performance of the Sale Agreement.

In a short crisp judgment dated 9th November, 1989, the judge found for the respondents and granted them specific performance of the contract dated 12th October, 1989. Hence this appeal.

Mr Waweru Gatonye who appeared for the appellant filed some 12 grounds of appeal and attacked the judgment of the High Court on the grounds of non-direction and misdirections. He argued grounds 1,2 and 3 of Memorandum of Appeal together stating that under the Sale Agreement time was of the essence. That by completion date the balance of the purchase price was not available to the respondents and that there was no undertaking of payment as required under the Sale Agreement.

The Law Society Conditions of Sale, conditions 3 thereof provides:-

> "3. The purchaser shall on or before entering into the contract pay to the vendor's advocates stakeholder such a sum as will, together with any preliminary deposit paid to the vendor or his agent amount to ten per cent out of the purchase money (including any separate price to be paid for chattel, fixtures or fittings). Save in the case of a sale by auction, such deposit shall be paid either by banker's draft or by a cheque drawn upon an advocates client account. In the event that the said draft or cheque is dishonoured upon first presentation the vendor shall have the right by notice to purchaser within seven working days thereafter to elect to treat such dishonour as a fundamental breach of the purchaser's obligations under the contract."

Condition 4 thereof provides for completion date as follows:- Stage 1

> (1) "On the preliminary completion date the purchaser shall pay the balance of the purchase money (other than the portion thereof being financed by a loan to be secured by a mortgage over the property) to the vendor's advocate who shall hold the same as a stakeholder until the final completion date."
>
> (2) ...
>
> (3) Where the purchase of money or any part thereof is being financed by a mortgagee there shall in addition to the documents and other maters provided for by (2) above be handed to the vendor a professional undertaking from the advocate for the mortgagee forthwith on completion of the registration and in any event not take more than seven days after the receipt of the mortgagee forthwith on completion of the registration and in any event not take more than seven days after the receipt of the mortgage by the advocate for the mortgagee from the appropriate Land Registry duly registered" (The underline is mine.)

Special condition 1 of the Sale Agreement dated 12th October, 1988, stipulated that time was to be of the essence of the contract. Mr Gatonye relied heavily on the above provisions stating that the respondents were in breach of those conditions. In particular, he relied on the lack of professional undertaking by the Advocates for Housing Finance company who were M/s Archer and Wilcock or from themselves as mortgagee. To this extent, we think Mr Gatonye is right as no evidence of professional undertaking was given by or on behalf of the mortgagee, the Housing Finance Company Ltd. As to the payment of the preliminary deposit, the respondents paid to the common advocate Kshs 70,000/- being 10% of the purchase price and the common advocate paid to the appellant a sum of Kshs 10,000/- at the request of the respondent. The preliminary deposit was paid late in fact after the completion date – 3rd April, 1989. It is clear therefrom that the respondents did comply with the Sale Agreement to that extent except of course payment of preliminary deposit which was paid after two weeks. What is in dispute is what happened thereafter as Mr Gatonye submitted that there was no payment of the balance of the purchase price on the completion date, 12.1.1989. There was no mortgage signed by the mortgagee, in this case the Housing Finance Company, and no professional undertaking for payment of the balance of the purchase money given by or on behalf of the mortgagee's advocate. There was no evidence from the common advocate to show that the Sale Agreement was complied with up to the completion date. Mr Gatonye submitted that the respondents were not serious and therefore not ready and willing to complete the contract.

By the letter dated 13th January, 1989, one day after the completion date, the appellant wrote to the respondents as follows:-

> "I note that the completion date was yesterday the 12th January, 1989, and regret to note that our common lawyer has not forwarded the sale proceeds to me. Please note that I had committed the total funds payable to me somewhere and the same should be released to a third party on 15th January, 1989 at 9.00 am.
>
> In view of the circumstances take my notice that unless the balance of the purchase price is paid to our lawyer within five working days from the date hereof in accordance with the conditions of sale, I am instructing our lawyer by a copy of this letter to release your deposit to you and consider the sale rescinded to enable me to settle from any further financial embarrassment."

The appellant no doubt treated time to be of essence of this contract. He appears to have performed his part except the discharge of the charge over the property in favour of Kenya Re-Insurance Company and delivery of vacant possession of the property which was under a lease to the Government. Mr Gatonye summed up that the appellant was ready and willing to give extension of time although purchasers did not ask for it. We think the common advocate was expected to act appropriately on behalf of the respondents. Be that as it may, the position as on the completion date and a further 5 days extension of time was that the respondents had not obtained the balance of the purchase price and there was no mortgage or professional undertaking that the balance would be made in terms of the agreement. Although the appellant may have not known what was happening, but the common lawyer did, and the charge of silence by the respondents may not be fully justified. We would like to examine what was happening behind the scene.

It is common knowledge that both the appellant and the respondents entrusted their common lawyer M/s Kembi & Muhia to put together the transactions concerning this sale of the property. Within twenty four hours of the signing of the Sale Agreement, the common lawyer of the parties wrote on 13th October, 1998, to the chargee of the property, Kenya Re- Insurance Corporation, requesting them to release all documents of title to enable the said common lawyer for the parties to complete the transfer. The common lawyer gave the usual professional undertaking. There was a further letter from the common lawyer to the Advocates for Kenya Re- Insurance Corporation, requesting for the release of some documents under similar professional undertaking. There was a reminder from common lawyer to Hamilton Harrison & Mathews for Kenya Re-Insurance Corporation dated 7th November, 1988. On the same day HHM sent to the common lawyer copies of the documents of title. The documents were acknowledged on 21.12.88. On 28th December, 1998, common lawyer received a letter from advocates for Housing Finance Company, M/s Archer & Wilcock in connection with the same transaction. On 5th January, 1989, the common lawyer wrote to M/s HHM and copied to M/s Archer & Wilcock for HFCK in furtherance of consultations in connection with the documents.

It is common knowledge that on the completion date, the documents were not ready for registration. The machinery of conveyance was still being pursued by the common lawyer who was in constant touch with the lawyers for the chargees. M/s Kena Re-Insurance Corporation and those of the intended mortgagee, M/s Archer and Wilcock. All what remained was negotiations between the common lawyer and advocates for the intended mortgagee and those of the chargee of the property for the release and discharge of the charge. By completion date these negotiations were still going on between the lawyers and it was clear to the appellant and the respondents that documentation could not be completed in time. Mr Gatonye lays the entire blame on the respondents. We do not think that the delay was occasioned by the respondents. They did all that they could including obtaining an offer for the intended mortgage by HFCK. They relied on their common lawyer for fulfillment of the legal requirements. Similarly the appellant relied on the common lawyer to have the charge over the property discharged. We think both the parties performed their respective parts and trusted their common lawyer to handle legal requirements. It was unfortunate that the lawyers involved in the transaction could not do their part before the completion date. But for these delays on the part of the lawyers, the appellant and the respondents were at all material time ready, willing and also able to complete the contract before the completion date.

Mr Gatonye urged the Court to hold that the respondent purchasers were not ready and willing to complete the agreement as stipulated in the agreement. For our part, we do not think so. The charge, on

the property having not been discharged before completion date, how else could the respondents have beaten the deadline. The appellant was in a better position to speed up matters with Kenya Re-Insurance Corporation to release the documents to the common lawyer. This he did not do. As Mr Ndegwa for the respondents put it, they had done all within their power by the completion date. We agree with the learned judge that the respondents were not entirely to blame. The evidence before the judge pointed to the fact that the respondents were ready, willing and able to perform their part but for the delay beyond their control. On the other hand, the appellant too was ready and willing but for the delay occasioned by the lawyers in completing documentation in time. If he had waited for a little longer, this matter would not have come to court.

The trial learned judge in his crisp short judgment stated:-

> "In the circumstances, can he (appellant) resist specific performance of the contract? I am reinforced in that view by the judgment in CA No 42 of 1981, Openda v Ahn referred to by Mr Gatonye for the defendant. The plaintiffs are accordingly entitled to an order for specific performance of the contract of 12th October, 1989."

Mr Gatonye criticized this finding stating that the judge erred in failing to apply his mind to the principle governing the grant of specific performance. He cited the decision in *Isaac Kara Wagiciengo v Mrs Kathereen Gerald,* CA No 72 of 1984 and *Thomas Joseph Openda v Pehu Martin Ahn*, Civil Appeal No 42 of 1981.

It is well established law that a claim for specific performance is not granted as a matter of course. Being an equitable remedy, the Court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief.

We have examined in detail the record and the judgment of Shields, J and find nothing in the learned judge's finding warranting the criticisms as we think he reached his findings after consideration of all the surrounding circumstances including the conduct of the parties. We are satisfied that he reached a correct finding in the circumstances and we find no justification to interfere with that finding.

On grounds 7 to 11 of the Memorandum of Appeal, Mr Gatonye submitted that the trial judge misdirected himself firstly by considering the issue of vacant possession when it was not pleaded or one of the agreed issues. Mr Gatonye may be right but we do not consider it a fatal misdirection. (This Court is not bound to limit its consideration only on matters pleaded or agreed issues). We think that vacant possession was properly an issue to be considered when dealing with the grant or otherwise of the equitable relief of specific performance. The appellant could not have performed his part of the contract before the completion date if he could not deliver up vacant possession of the property on or before completion date.

We derived assistance from the decisions of this Court in *Isaac Kaara Wagiciengo v Mrs Kathereen Gerald* CA No 72 of 1984 and *Thomas Joseph Openda v Peter Martin Ahn* Civil Appeal No 42 of 1981. We consider the parties, through their lawyers, were to blame equally although the delay technically was due to what the learned judge called "mechanisms of conveyance".

Mr Gatonye did not press in the question of partiality raised in ground 8 of the Memorandum of Appeal. We think he was right in doing so.

Mr Gatonye complained further that the learned trial judge misdirected himself by awarding special damages without proof thereof. We appreciate that as a matter of practice, special damages should be pleaded and proved. However, there are cases where awards can be given as special damages. For instance in injury claims special damages may be awarded for future unquantifiable expenditure arising after judgments. These are contingent expenditures and although they may not be specific but basing such expenditure on proved medical expenses, it is possible for the Court to award special damages including those contingent and unquantified expenses.

In the instant case, the mortgagee was wiling to keep the mortgage alive if the respondents were prepared

to pay Kshs 5,400/- per month. For 11 months, this works at Kshs 59,400/-. The learned trial judge found that there was nothing unreasonable for the respondents keeping the offer open by paying the figure of Kshs 5,400/- to keep the mortgage alive. The figure is specific as claimed by the intended mortgagee and we find that this was specifically proved by the quotation given by the mortgage and which figure was regularly paid to the mortgagee by the respondents. We confirm this finding as reasonable award of special damages but we limit it to 11 months. It is most unreasonable to keep alive the mortgage for an indefinite period. The respondents must also be prepared to mitigate their damages.

Matters raised in most grounds of appeal are general in nature and we have considered them in the context of the entire appeal. Although the learned judge's judgment was short and crisp, we have found that he considered all the circumstances surrounding the case and arrived at the inevitable conclusion that the order for specific performance was proper, eligible. We confirm the order for specific performance.

The result is that this appeal must fail and it is hereby dismissed with costs here and in the Superior Court. It is so ordered.