



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPEAL 23 OF 1983**

**JULIUS COSMAS MBITHI ..... APPELLANT**

**AND**

**JOHN WALLACE MATHARE ..... RESPONDENT**

(Appeal from the judgement of the High Court of Kenya at Nairobi (Cockar,J) dated December 9,1980

In

Civil Case 1356 of 1977

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**JUDGMENT OF KNELLER, J A**

I am in the unfortunate position of having respectfully to disagree. And I am impelled to set out what I believe this appeal is all about. Julius Cosmas Mbithi, the appellant, and Margella (Marcella?) Mbithi, his wife, were the plaintiffs in the action they brought against John Wallace Mathare, the respondent, in mid-1977.

The Mbithis alleged in their plaint they jointly purchased a feehold plot at Hardy Estate in Langata, Nairobi in January, 1967 and built part of a house and a room for servants on it and they were still in occupation of them.

And, then on November 5, 1976, Mbithi, without involving Marcella, signed an agreement to sell the plot and buildings on it to Mathare for Kshs 300,000.00.

Mathare paid Kshs 80,000.00 to Mbithi, which the latter used to pay back a loan he had been given by the National Bank of Kenya. Mathare also paid (for Mbithi) Kshs 16,750.00 for the fees and commission of Mbithis's advocate. The total of those two sums is Kshs 96,750.00 and, if they were paid on account, simple arithmetic would suggest Kshs 203,250.00 of the purchase price remained to be paid by Mathare to Mbithi for the premises. Somehow, or another, however, the Mbithis' advocate, reached the figure of Kshs 203,000.00.

Now, according to their amended plaint, the Mbithis alleged this Kshs 203,000.00 was to be paid to them by Mathare on or before February 15, 1977 ( that is 100 years after the agreement was signed ) and February 15, 1977 was the agreed date for the completion and, what is more, that date was made to be of the essence of the contract.

Mathare, however, continued the Mbithis, did not pay that Kshs 203,000.00 or any of it, by that date. He

was still searching for a loan of that amount from a bank or a financial institution. The Mbithis, while not overlooking his default, gave him until March 25, 1977 ( another 38 days ) to find the balance of the purchase price Kshs 203,000.00 (or Kshs 203,250.00).

And, because he had (more than) 21 days notice from February 15, 1977 and still did not pay the balance that amounted to another breach of the agreement. So Mbithi rescinded the agreement of sale in his letter of March 26, 1977, and served it on Mathare and Mr Bhailal Patel, an advocate who acted for both of them in this matter. Mbithi added, reassuringly, that he would in due course, repay Mathare the Kshs 98,000.00 he had paid the Bank ( and advocate).

The Mbithis went on to complain, however, that Mathare had unlawfully taken possession of the buildings on this parcel before the agreed completion date. He had also threatened their lives and damaged their property. They complained he was a trespasser, and he had also brought armed agents to the property to eject the Mbithis.

So, their prayers were for-

- (1) a declaration that the sale agreement was validly rescinded;
- (2) a declaration that Marcella Mbithi was a valid and legal co-purchaser of the suit premises;
- (3) an injunction to restrain Mathare, his agents, servants and friends from interfering with, trespassing on and or making any improvements to them;
- (4) an order that Mathare's occupation of the plot and buildings is illegal;
- (5) an order for vacant possession;
- (6) damages;
- (7) any other relief; and
- (8) costs.

Mathare's amended defence and counterclaim of September 26, 1978 denied all knowledge of what part Marcella Mbithi played in buying this Hardy Estate place.

He admitted signing the agreement for sale and added that it was for the parcel, buildings and improvements erected on it.

Mbithi was its registered owner and could, as legal owner, sell it so Marcella Mbithi's consent or signature to the agreement was unnecessary.

He denied that time was made the essence of the contract but admitted that the completion date had been extended (by consent).

The delay, according to Mathare, was due solely to Mbithi's failure to deliver within the stipulated period (or the extended one) the certificates of clearance of payment of the rates and exemption from capital gains tax.

Possession, according to Mathare, was given to him because he handed Mbithi that Kshs 80,000.00 to pay off the mortgage the Bank had on the property. So in December 1976, Mbithi let Mathare have possession of part of the buildings and plot, and Mathare spent another Kshs 100,00.00 on finishing the main house on it ( which Mbithi had begun ).

- (a) Mathare had paid a further Kshs 59,162.50 to Mbithi, on account, leaving Kshs

144,087.50, which was paid into court on August 12, 1977; and

(b) The conveyance had since been registered in the name of Mathare.

Turning to this counterclaim, Mathare alleged the Mbithis occupied the outbuilding, and about 3.60 acres of the parcel, so he still did not have vacant possession of all he had purchased. He denied damages for loss of use and income at the rate of Kshs 1,900.00 a month from August 24, 1977 until the Mbithis left.

Thus, his prayers, in the counterclaim, were for-

- (i) damages and or mesne profits;
- (ii) an order for vacant possession;
- (iii) interest on the damages; and
- (iv) costs of the counterclaim and interest on them

The Mbithis' defence to the counterclaim was they were not in breach of the contract of sale so they were in lawful occupation of part of the premises. They asked for the defence and counterclaim to be dismissed with costs.

When the pleadings were closed on October 27, 1978 the issues could have been framed as these-

1. was Marcella Mbithi a joint owner of the parcel and premises on it?;
2. was time ever made the essence of the contract?;
3. if so, by what date had the purchase price to be paid?;
4. if so, was it paid by then?;
5. if not so paid, who was to blame for the delay?;
6. Was the contract validly rescinded?;
7. Had the contract been performed?;
8. Should the Mbithis have an injunction against Mathare his agents, servants and friends restraining them all from trespassing on the suit premises?;
9. Should the Mbithis or Mathare have an order for vacant possession?
10. were the Mbithis or Mathare or both, liable in damages? And
11. if so how much?

The trial began before Mr Justice Cockar on September 23, 1980. He recorded the evidence of the Mbithis and Mathare, and had the benefit of submissions from Mr Kirithi for the Mbithis and Mr Muthoga for Mathare.

Having heard the evidence, and the submissions, Mr Justice Cockar held-

- (i) Marcella was not a joint owner of the parcel and premises;
- (ii) The contract was not validly rescinded;

(iii) No injunction would go forth against Mathare restraining him, his agents, servants and friends from interfering, trespassing and or making any improvements on the suit premises.

(iv) No order would be made to the effect that Mathare's occupation of the premises was illegal, and, therefore, he should give vacant possession to the Mbithis;

(v) The Mbithis were to vacate the premises forthwith;

(vi) The cross-claim for damages by consent of the parties, were adjourned for trial at a later date; and

(vii) Mathare was awarded the costs of the claims of the Mbithis and of his own counter-claim (save for the cross-claims for damages).

Only Julius Cosmas Mbithi appealed. And, then, only on the following grounds. Mr Justice Cockar had erred in holding that

1. Mathare was entitled to enter into possession of the suit premises on April, 1977 when Mathare had not paid the balance of the purchase price;

2. The balance of the purchase price was Kshs 144,087.50 but, during the trial, Mathare's advocate admitted it was more than that;

3. Mathare was entitled to vacant possession two months from August 24, 1977 ( which was when Mathare had paid Kshs 144,087.50 into court as the balance of the purchase price) when this was less than the balance due;

4. Mbithi caused Mathare not to pay the balance in time or delayed such payment by Mathare; and

5. Mbithi remained in possession unlawfully after Mathare paid Kshs 144,087.50 into court on August 24, 1977.

And, if the appeal were allowed, Mbithi wanted his costs here and below, Mathare's counterclaim dismissed with costs, together with declarations that he was entitled to vacant possession (and not Mathare) and he was entitled to damages ( and not Mathare).

But, before the appeal came on for hearing, the Mbithis vacated the plot, and the buildings on it, in obedience to the High Court's orders, thus leaving Mathare in possession of everything, and they did not wish to re-enter.

The learned trial judge wrote, at the end of his judgment-

"I have not dealt with the question of damages prayed for in prayer (e) of the plaint and prayer 9(a) of the counter-claim, consideration whereof is adjourned for a future hearing."

This means, I think, he will have to deal with who is liable to pay to the other damages and, therefore, he will answer these issues, namely whether Mathare has to pay damages or the Mbithis must, or both, and then how much? Liability and quantum seem to have been adjourned for his consideration. Whether or not the learned judge and the advocates can agree that liability can be discovered in his findings in his judgment is something that will have to be determined in this court for there was no agreement between the advocates for the parties during the hearing of this appeal that liability could be found in this way. It is, however, clear that in his notes during the trial he recorded that-

"The issue relating to quantum of damages claimed by either party to be reserved for evidence and argument at a later stage."

And so, it seems, as if only the quantum was to be adjudicated upon after liability was determined in the trial, which is a course that is sometimes taken, though in my experience it is wiser to decide everything in issue (on the pleadings) at the trial.

Anyway the judge found it was ‘common ground’ that Mathare, with his contractor, completed the main building on the plot and occupied by April 8, 1977 but the trial judge did not make any finding that he was entitled to do so or not entitled to do so, and, in my opinion, the first ground of appeal fails.

It is correct that he made a finding that the balance was available for Mbithi by August 24, 1977 (which is the date Mbithi paid Kshs 144,087.50 into court as the balance) and his advocate submitted during the trial Kshs 183,861.10 was the correct balance of the purchase price by August 24, 1977 if interest was due under the terms of the Agreement of Sale but I can find no merit in this point ( which is surely one for a simple account to be taken ) for, according to the evidence, all along the Mbithis could not, would not give clear title or accept the balance or any part of the balance after March 26, 1977 when Mbithi decided to ‘pull out of the agreement’.

An analogous situation was put in this way by Walton, J in *Rightside Properties v Gray*, [1974] 2 All ER 1169, 1183f –

“ ..... it appears to me pessimi exempli if the vendor was in a position to say:

‘Because on a particular day you were not ready with your finance, you cannot claim damages against me. True it is that it would have been perfectly useless for you to make the preparations, because I told you I was not going to complete, but I can now huff you for having failed to carry out this perfectly useless exercise’

This is the morality of a game, not of a serious legal contest.”

See also *Thomas Joseph Openda v Peter Martin Ahn* CA Civil Appeal 42 of 1981 Nairobi February 22, 1984. All most apt here, and on that score I would dismiss all the remaining grounds of appeal.

Turning back to the order Mbithi sought from this court, I would find that he was not entitled to at the time of the filing of the suit ( and we know he no longer even wants ) vacant possession, he should not have his declaration for it and nor may he have any order for Mathare’s counterclaim to be dismissed with costs but, instead, Mathare was entitled to his order for vacant possession against the Mbithis. Furthermore, because the crossclaims for damages have been expressly adjourned for another day by Mr. Justice cockar there was nothing to appeal from on those issues. In short, then, the judgment and orders of the High Court should be upheld and the appeal dismissed with costs. The parties are at liberty, however, to return to the High Court on all the issues in the crossclaims for damages if they are not exhausted by all this litigation or cannot agree them. As Gachuhi, Ag J A agrees, the order of the court is that the appeal is dismissed with costs.

Dated and delivered at Nairobi this 7th day of April, 1986.

**A A Kneller**

**Judge of Appeal**