REPUBLIC OF KENYA

Mbithi v Mathare

Court of Appeal, at Nairobi April 7, 1986

Kneller, Platt & Gachuhi JJA

Civil Appeal No 23 of 1983

Cases

1. *Rightside Properties v Gray*, [1974] 2 All ER 1169, 1183f

2. *Thomas Joseph Openda v Peter Martin Ahn* Civil Appeal 42 of 1981

April 7, 1986, **Kneller JA** delivered the following Judgment.

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 freehold 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.

Mathare paid Kshs 80,000 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 for the fees and commission of Mbithis's advocate. The total of those two sums is Kshs 96,750 and, if they were paid on account, simple arithmetic would suggest Kshs 203,250 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.

Now, according to their amended plaint, the Mbithis alleged this Kshs 203,000 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 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 (or Kshs 203,250).

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 So Mbithi rescinded the agreement of sale in his letter of March 26, 1977, and served it on Mathare and Mr Bhailal Patel, an advocate who acted for both of them in this matter.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 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 tresspasser, 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 f r i e n d s 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 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 on finishing the main house on it (which Mbithi had begun).

And, Mathare pleaded, in the alternative, the contract had been part performed, because -

(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 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 tresspassing on the suit premises?;

9. should the Mbithis or Mathare or both, liable in damages?; and

10. 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 that 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 reenter.

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 his 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 analagous 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 cross-claims for damages if they are not exhausted by all this litigation or cannot agree them.

As Gachuhi Ag JA agrees, the order of the court is that the appeal is dismissed with costs.

Platt Ag JA. The appellant, Mr Julius Cosmas Mbithi has appealed on what appears to be a part judgment of the High Court which was decided in a suit brought by Mr Mbithi and his wife, Mrs Mbithi against the present respondent, Mr Mathare. It is not easy to appreciate the thrust of this appeal. But perhaps, it can be summed up, at least as an introduction to the appeal, as being a case where certain findings of the trial judge are not in dispute and certain other findings are in dispute because they lay the wrong foundations to the issue of damages which is still outstanding for trial. It appears that purpose of this appeal is either to correct, or at least to leave open for further argument certain findings with regard to the completion of contract for sale, in order that the question of damages may be decided on at least an open basis. It is therefore, necessary for this court to leave the trial court in the best position possible and that is a difficult matter of balance.

It will be useful to set out a short statement of the facts and explain the absence of Mrs Mbithi in this appeal. Mr and Mrs Mbithi purchased a piece of land at Nairobi Embakasi to which they both contributed towards the purchase. In January 1967 they sold the Embakasi property, and purchased, and undeveloped parcel of land at Hardy Estate, Lang'ata known as LR 2327/88. Mrs Mbithi claimed that she had contributed some Kshs 42,000 to the cost of purchasing this new property and for that reason, when her husband sold this property she claimed to be a part owner. It was in evidence that Mr Mbithi had spent Kshs 200,000 in erecting a dwelling house and while the building was proceeding, Mr and Mrs Mbithi

lived in what had been designed as a servant quarter. The property extended to over 4 acres of land and Mr and Mrs Mbithi cultivated about 3 acres.Unfortunately, there was a mortgage on the property, and the mortgagee was calling in Kshs 80,000. It may be inferred that Mr and Mrs Mbithi were unable to pay this money. At any rate, Mr Mbithi entered into an agreement for sale of the property to the defendant, without the consent of Mrs Mbithi, on the November 2, 1976, at a price of 300,000.

Mr Mbithi pleaded in his amended plaint that the defendant paid Kshs 80,000 which cleared the bank debt, and this sum was by way of deposit.

In evidence he seemed to suggest that the defendant had paid Kshs 30,000 as a deposit and the defendant must have paid off the loan. Whichever way it was, the National Bank of Kenya Ltd has never demanded further payment, and it must be as the defendant stated that he paid off the bank loan. But the defendant claimed that it was not part of that deposit. It was a means of getting an extension of time. According to the agreement for sale, the completion date was to be November 30, 1976; but the learned Judge held that in consideration of the defendant paying Kshs 80,000 to clear Mr Mbithi's debt of Kshs 79,000 owing to the National Bank of Kenya of Ltd. and secured by a charge against the suit premises, Mr Mbithi extended the date of completion to the February 28, 1977. The defendant explained in evidence that he had difficulty in raising a loan to cover the purchase price, and he had to put two alternatives to Mr Mbithi.The alternative chosen was that the defendant should complete the building at his own cost, and after that Savings and Loans Limited would advance a maximum loan of Kshs 240,000. while Mr Mbithi accepted that proposal, it was agreed that if the defendant could be given time to complete the building, the defendant was at least to make part payment of Kshs 80,000 to the National Bank of Kenya to clear the mortgage and that is what happened.

But then there were difficulties over the plan and Mrs Mithi locked away some f the building material which it had been agreed the defendant could use. These delays prevented the house from being completed by, February 28, 1977; and this was discussed with Mr Mbithi on February 15, 1977.The contractor had agreed to complete the building on March 21, 1977 and in those circumstances Mr Mbithi gave the defendant an extension up to March 25, 1977. The agreement of February 15, 1977 as put in writing addressed to the defendant (letter No 17 in the bundle of exhibits), and confirmed that the completion date was to be extended to March 25, 1977, and in consideration, the defendant would allow Mr Mbithi to stay in the house where he was living at present for two months, with effect from the date of the receipt of the payment of the proceeds of the balance of the sale price. Mr Mbithi was to stay in the house without payment of rent and share water charges with the defendant. The building was in fact completed on the March 21, 1977 but the occupation certificate was only issued on March 30, 1977 after the City Council had been satisfied over certain objections.

However, on March 26, 1977 Mr Mbithi wrote to the defendant rescinding the contract. Mr Mbithi pointed out that the agreed extended period for completion expired on March 25, 1977, since the defendant had failed to pay the balance of the price. The said agreement must be rescinded and deemed cancelled from March 25, 1977. Mr Mbithi went on to point out that the cause of rescission was the failure of the defendant to pay the purchase price on time. As a result, the defendant was to withdraw all other considerations as cancelled , as he was to forthwith hand over the premises to Mr Mbithi. He warned Mr Patel to hold that title deeds in trust for him, and instructed Mr Patel not to execute the transfer documents.Mr Mbithi wished to discuss the refund of the deposit and the expenditure made by the defendant in constructing the premises. They would also consider the question of damages for the breach of sale agreement, as well as some action by the defendant's contractor. The learned judge came to the conclusion that the letter of rescission dated March 26, 1977 was not valid notice, in accordance with Condition 25 of the Law Society Conditions of Sale, which was part of the agreement of sale. There appears to be no appeal on this point, and therefore the position is that the contract was not rescinded.

No one seems to have been impressed by Mr Mbithi's letter of rescission, neither Mr Bailal Patel, his advocate, nor the advocate for the defendant. What seems to have happened is that Mr Mbithi continued to act as if the sale was going forward; but Mrs Mbithi lodged a caveat. On April 29, 1977 the caveat was discharged. On April 21, 1977 Mr Mbithi swore an affidavit in connection with the application for exemption from Capital Gains Tax. The purpose was to enable the registration of the transfer of the

property to the defendant. The learned judge held that had Mr Mbithi not executed that affidavit, the defendant would not have been able to obtain registration of the transfer in his favour. Without that transfer, the mortgage in favour of Savings and Loan who had promised to advance Kshs 240,000 to the defendant could not have been registered. But as Mr Mbithi was taken to have transferred the property to the defendant, the mortgage could be registered and the money was made available to the defendant. The transfer to the defendant occurred on July 7, 1977. The balance of the purchase price was deposited in court on August 24, 1977. Mr and Mrs Mbithi then decided to challenge the sale.

It is now possible to deal with the situation of Mrs Mbithi. It is not clear how Mrs Mbithi proposed to act as a co-plaintiff since her case was essentially a matter of attacking Mr Mbithi's right to sell the property registered in his name. The dispute between husband and wife had nothing to do with the dispute between Mr Mbithi and the defendant. If Mrs Mbithi considered that Mr Mbithi held the property on resulting trust, then she should have brought a suit against Mr Mbithi, and if necessary against the defendant as well, so as to seek a declaration of her position as a coowner, and the rectification of the register, and in the meantime to stop the sale to the defendant. But merely to join the plaintiff, Mr Mbithi in his dispute against the defendant over rescission was of no use to her. Indeed she had nothing to do with the agreement for sale and its subsidiary agreements. She was not the registered owner and it would have been better had she been **(missing line)**

The learned judge, however, took prayer (b) of he amended plaint seriously, but declined to make a declaration in favour of Mrs Mbithi that she was a valid and leg purchaser of the suit premises. He said there was not proof that she was a purchaser at all. In my view Mrs Mbithi's part of the case was irrelevant to the matter which really lay before the learned judge. At any rate, I find it satisfactory that Mrs Mbithi is not a party to this appeal and I agree with the advice Mr Kivuity gave her on that point.

Unfortunately, Mrs Mbithi did not take the course which was open to her to safeguard her interest, if she had one, at the right time. Now that Mr and Mrs Mbithi have given up the possession of the property, there is not need for Mrs Mbithi to be present in this appeal.

The learned judge answered the other prayers in the plaint as follows:

" (a) Mr Mbithi to whom I shall simply refer as the plaintiff," did not lawfully rescind the contract of sale with effect from March 25, 1977 by his letter of March 26, 1977. That was because this letter did not conform with condition 25 of the Law Society Conditions of Sale.

(c) An injunction was refused which the plaintiff had asked for to restrain the defendant and his agents from interfering, trespassing and making any improvements on the suit premises.

(d) The Court refused to declare that the defendant's occupation of the suit premises was illegal. On the contrary, it was held that the plaintiff had no right of occupation.

On the other hand, the defendant was upheld on his prayer in the counter – claim and the plaintiff was ordered to vacate the premises.

(missing Line) the purchaser of the suit premises was upheld and the defendant granted possession of the whole land.

That now brings me to describe the manner in which the parties had occupied the land. The plaintiff and his wife occupied the small rear house or houses and over 3 acres of land, while the defendant occupied the rest of the land and the building which at first had not been completed. When he had completed the building the defendant moved into possession of it on April 8, 1977. During the course of completion, he had naturally brought workmen on the site, and when the parties to the sale agreement disagreed with each other, the difficulties about their occupation of their respective portions of the land broke out. It will be appreciated that when the plaintiff wrote his letter of rescission dated March 25, 1977 and he demanded possession, he meant that the defendant should leave the portion of the land he occupied, with the building he had completed on March 21, 1977.On the other hand, it will be understood that when the

defendant considered that the land had been transferred to him and the contract completed, the thought that the plaintiff should leave the latter's portion of the land. As a result of their possession of different portions of the suit premises, so the parties claimed damages from the other.

The plaintiff claimed that the defendant without any legal right forcefully took possession of the premises before the completion date and in breach of the Conditions of Sale Agreement. The defendant unlawfully trespassed on the property, molested the plaintiff and damaged the property. Hence the plaintiff suffered damage. On the other hand, the defendant claimed that he had gone into possession of his portion of the land with agreement of the plaintiff, and that having (**missing line**), Kshs 144,087.50 in court, the plaintiff then failed to give possession of the whole premises.Consequently, the plaintiff wrongfully occupied a portion of the suit premises as a result of which the defendant was entitled to damages for use and occupation as the rate of Kshs 1,900 per month.

The learned judge recorded an agreement with regard to these rivals' claims to damages during the course of the trial. In his judgment he observed.

"During the hearing of the evidence it was ordered by consent that the issues relating to the question of damages was to be reserved for further evidence and arguments to put forward at a later state."

Thus the learned judge having left these issues open, it is now claimed that he unfortunately made findings with regard to prayer (d) and possibly prayer (c) which would affect the legal basis on which damages are still to be assessed. Therefore, whilst the plaintiff and his wife have given up possession of the suit premises and it is not prayed in this appeal that the order for vacant possession in prayer (d) should be set aside, so that possession may be returned to the plaintiff, nevertheless the findings on which the order for possession was made in prayer (d) are impugned.

Similarly it is not sought to overturn the refusal of an injunction under prayer c.

The issues raised in the Memorandum of Appeal are that:

(1) The learned judge was wrong to hold that the defendant was entitled to enter into possession of the suit premises on the April 8, 1977 when the balance of the purchase price had not been paid.

(2) Kshs 144,087.50, which had been deposited in court on August 24, 1977 was not the balance of the purchase price, since, should be Kshs 183,861.10.

(3) As the balance of the purchase price had not been fully deposited, the learned judge was wrong to hold that the defendant was entitled to vacant possession two months from Augut 24, 1977.

(4) It follows that the plaintiff did not unlawfully remain in possession of the suit premises after the payment of the above money in court.

It will be seen that these grounds of appeal raise two main issues. The first is that the learned judge was wrong to hold that the defendant went into lawful possession of the main house on April 8, 1977 after the defendant had completed it; and that is the basis of the plaintiff's claim for damages. The second main issue is that when the purchase money was paid by the defendant, he thus purported to complete the contract, after which the plaintiff would have two months to vacate, and if he did not vacate, then he would continue to occupy his portion of the premises unlawfully, and so give rise to a claim for damages or mesne profits.

Under either of these rival claims there would be points of fact and law to be decided. It would appear that the basis of the plaintiff's claim for damages, arising from the defendant's unlawful occupation of part of the premises from April 8, 1977 was decided by the learned judge in favour of the defendant. If that finding was correct, then all that the plaintiff could claim by way of damages would be the disturbance to his occupation of the other part of the premises on which the plaintiff lived. That aspect was probably not dealt with fully by the learned judge.

On the other hand, in relation to the defendant's claim (missing line) in unlawful occupation of premises at least from August 24, 1977 on which date Kshs 144,087.50 was paid into court, which, it appears, the learned judge assumed was the sum of the balance of the purchase price. Apart from these findings, the quantum of damages was not decided.

In the case of either claim, it is plain that the court, could not finally assess the quantum until it had ascertained the period of unlawful occupation as well as the correct rate to apply to that period. The problem which faced the plaintiff on this appeal is that he considered that the defendant was wrongly in possession of his part of the premises from April 8, 1977 and that the defendant was held to have been entitled to possession of the plaintiff's portion from August 24, 1977. Therefore , the period of unlawful possession in either case was not correctly decided.

Consequently he had appealed to vary the periods of unlawful possession.

Indeed the plaintiff/appellant would seem to have been so confident in this matter that he prayed for a declaration that he was lawfully in possession (I have corrected the obvious typographical error in prayer (2) of the Memorandum of Appeal which reads,'"unlawfully in possession") and that the defendant/respondent's counter-claim be dismissed. During the argument however it was agreed that it would be wrong to dismiss the defendant's counter-claim until the issue of damages was decided.

The difficulty which this court faces, is that as the parties agreed that there is to be a further hearing on the question of damages how far this court should intervene at this stage. When the learned judge came to deal with prayer (c) for an injunction and prayer (d) for an order of possession he noted that he had not dealt with the question of damages prayed for in prayer (e) of the plaint and prayer (a) of the counter-claim; (missing line) superficially easy to understand, it is not easy to fit in with this appeal.Whether the learned judge thought that all he had to do in the prayers for damages was simply to assess the quantum is not clear because no issues were drawn up. The plaintiff/appellant sees the situation as giving him the chance of bringing evidence and arguments on the legal basis for damages as well as the quantum. I am not quite sure that the defendant / respondent sees the agreement as covering all those matters, but the result seems to be this: that whatever the parties intended by their agreement, it is wide enough for both the legal basis and the quantum to be considered.The question that remains is whether that interpretation is still open in view of their submitting to judgment in prayers (a) to (d) in the plaint and the prayer (b) in the counter-claim. The way the plaintiff approached that question is like this. The plaintiff says that he has given up possession whether he was bound to do so or not. He does not wish for the order for possession to be reversed, and therefore the order for the possession given by the learned judge may stand; but the reasons therefore should be set aside and allowed to be properly considered with regard to damages. The defendant objected to that course being taken, or so it seems. Mr Muthoga contended that possession had been given on April 8, 1977 by consent and and so no issue arose. No issue arises on the short-fall in what the defendant thought was the balance of the purchase price. No issue arises on the rescission of the contract. If the High Court found that vacant possession had to be given two months after August 24, 1977 then that finding was not challenged. Consequently the appeal should be dismissed and the matter left for hearing as to damages. The implication appears to be that all the judge's findings should stand and only other issues concerning damages should be considered.

It is often difficult to ascertain how much has been left for further hearing, when the whole of the case has not been heard at one time, and a part left for further evidence and argument later. Indeed it is usually better to hear the whole case, because findings of fact and law on one part of the case very often over-lap and are involved in the part still to be heard. It is usually necessary to define very clearly what issues are to be decided and what issues are not to be decided in the first instance and left for later decision; as well as deciding what has to be the fate of those decisions in the first instance which play a part in the second hearing. I would agree that the parties had no doubt attempted to save time in court and by their agreement, no doubt they will now see that they did not define accurately what issues were over-lapping; but in order to give as much scope to their intentions as possible it would seem that the best course for this court to adopt would be as follows:

(1) The agreement between the parties should be deemed to cover both the legal basis as well as the

quantum of damages.

(2) That in so far as there is an acknowledgment on the record tht Kshs 144,087.50 was not the true balance of the purchase price, the finding of the learned judge which appears to suggest that Kshs 144,087.50 was the true balance of the purchase price is at fault;

(3) The effectiveness of the agreement of the February 15, 1977 after the rescission of the whole contract may require consideration as to whether it is spent;

(4) The order for vacant possession should be allowed to stand on the grounds that the plaintiff and his wife have agreed to give up vacant possession, but that the reasons given by the learned judge should adduce all relevant evidence and arguments on the question of damages claimed in prayer (a) of the counter-claim both on liability and quantum: and

(5) That similarly the parties be allowed to adduce all such evidence both on liability and quantum for the decision on damages claimed by the plaintiff in prayer (e) of the plaint.

If this is done it will, of course, mean that the parties will go over some of the grounds already on record. But that seems inevitable in view of the lack of clarity of the agreement of the parties. It seems a better course to allow the parties to decide on the merits of the issues raised at this stage.It would be better to tackle any appeal emanating from this dispute once and for all after the High Court has decided the whole matter.

Therefore I would allow this appeal to the limited extent of setting aside the findings of the learned judge which relate to damages apart from the decisions that Mrs Mbithi was not a co-purchaser of the suit premises; that the plaintiff had not validly rescinded the sale agreement; and that the plaintiff was not entitled to an injunction on the grounds that plaintiff does not wish to possess the land. I have indicated the order I would make with regard to prayer (d) above. I would order that the costs of this appeal be costs in the cause in accordance with the decision of the High Court on the question of damages.

Gachuhi Ag JA. The facts of this suit are analysed in the judgments of Platt AG JA and Kneller JA. I have read both judgments in draft. I would however, add that the main issue in the plaint was the rescission of the agreement of sale. The trial judge held that there was no rescission from which finding there is no appeal.

From the evidence, the issue of the payment of the balance of the purchase price featured prominently. This has to be clarified for the purpose of liability on damages. In fact the entire appeal is based on the issue of damages arising from the continued agreement of sale. I find it difficult to deal with these grounds effectively due to the fact that the question on damages was reserved for evidence and argument at a later date. It is not clear whether it was the liability or the quantum that was reserved. In the judgment, the trial judge reserved this issue to himself. It therefore becomes otiose to list to the argument on points for which no specific finding was made.

At the beginning of the hearing Mr Muthoga for the respondent stated that the appeal was premature because the question of damages was for further hearing. I am persuaded to accept m Muthoga’s view because the only issued that was dealt with from the pleading was of the validity of the agreement of sale. The appellant should have waited for the findings on the issue of damages.

I would dismiss this appeal with costs. The parties should go back to the High Court o continue with the determination of the issue on liability and quantum of damages both as claimed in the plaint and in the counterclaim.