



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan Ag CJ, Kneller & Nyarangi JJA)

CIVIL APPEAL NO. 21 OF 1985

KAIRUAPPLICANT

VERSUS

SHAW & 3 OTHERS.....RESPONDENT

JUDGMENT

This appeal arises out of a suit filed by the plaintiff in the High Court for specific performance of a contract for the sale of land at the alleged agreed purchase price of Kshs 7m. The record of appeal has been filed as supplied by the High Court.

At the trial in the High Court the plaintiff was represented by Mr Vadgama assisted by Mr Muttu. An application was filed in this court three days ago for leave to insert certain omissions into the record of appeal said to have been left out from the trial judge's notes of the trial, but which appear in the notes taken by Mr Muttu as the trial proceeded. It is said that the omissions not appearing in the record are vital, and they may well affect the court's decision on this appeal.

This is a novel application in our experience which when totalled runs into quite a long number of years. It is the practice, and a good practice it is, normally to accept the trial judge's notes as correct. It would not do to allow the record of trial to be attacked by the defeated party every time a suit is lost. We would not like it to be taken that the court would be willing to embrace applications to that effect freely.

In this instance the situation has a feature which makes it exceptional. It is that the omissions are backed up by Mr Muttu's notes of the evidence contemporaneously taken by him at the trial. When we add to it the submitted possibility of the omissions affecting the result of the appeal, we are of the view that this application ought to be allowed.

We are also of the view that an advisable manner of dealing with the situation is to give leave to the plaintiff to call additional evidence before the High Court, preferably before the learned judge who tried the suit. That way Mr Muttu and the plaintiff would both be able to testify further. And what is also important is that the defendants will have a full opportunity to battle the situation. We therefore order that the proceedings be remitted to the High Court for the hearing of additional evidence as indicated, and limited to the extent stated in the application. Costs in the appeal. So ordered.

Dated and Delivered at Nairobi this 9th Day of December, 1985

C.B. MADAN

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AG CJ

A.A KNELLER

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL