**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE 2737 OF 1979**

**KURIA NJUGUNA ……..PLAINTIFF**

**VERSUS**

**DAVIS KIVUNDI …… DEFENDANT**

**JUDGMENT**

The plaintiff is related by marriage to the defendant, having married his brother's daughter. He claims specific performance of an alleged agreement between them for the sale of a half share in the defendant's property at Pangani, LR209/2389/56 (there is an error in the plaint in this respect). It is said that he paid the defendant a total of Kshs 95,000 as particularized in paragraphs 4 and 5 of the plaint which was filed on August 22, 1979. He has also claimed an account at Kenya Commercial Bank Murang'a, opened for this purpose, but in view of the fact that the plaintiff's notice to the defendant to produce all the correspondence, bank statements and rent receipts in respect of the property from January 1977 to date was only filed on October 25, 1982 two days before the hearing began by consent both sides reserved their positions as to that portion of the cae.

The evidence on the plaintiff's side was that at the beginning of the period the property was producing rent from twenty two rooms, presumably rent as separate residences, in the region of Kshs 7,000 per month or as said in paragraph 6 of the plaint Kshs 6,895. There is a slight inconsistence between that figure and the one at the end of the document 5 Ex 5 which is in Kikuyu but since the amount in the plaint is lower, I have to deal with that figure, even though the other one is more likely to be correct on the additions. Accordingly the hearing before me proceeded on the issues raised in paragraphs 1 to 5 of the plaint which are, in essence, denied by the defendant in his defence. He says there was an agreement to sell half the property to the plaintiff and that he received Kshs 95,000 but that due to a family disagreement the sale was "rescinded". The defendant has not mentioned any question of rents, but says that the joint account was opened for the purpose of the defendant depositing money so as to be able to effect the refund to the plaintiff represents the total amount due to the plaintiff. Accordingly the defendant submits that judgment should be given to the plaintiff for Kshs 95,000 only.

The plaintiff's account was that at the end of 1973 the defendant was in difficulties with his property which was liable to be put up for auction to satisfy a debt. As in early 1974 the plaintiff granted a loan of Kshs 40,000 to purchase property (Ex 1) his wife, Irene approached her husband with a view to helping the defendant and as a result Kshs 800 was paid by the plaintiff into the defendant's bank account. Shortly after, it seems in gratitude for the plaintiff's assistance the defendant said that he would treat the plaintiff as his son and transfer the half share in the property to him, in return for a total of Kshs 95,000 (of which Kshs 8,000 had already been paid). However the plaintiff could not afford the whole Kshs 95,000 but managed to withdraw from his own bank account Kshs 45,000 which was credited to the defendant. So by September or October 1974 the plaintiff had caused the defendant's account to be credited with a total of Kshs 53,000. By his letter Ex 3 dated October 16, 1974 the defendant expressly acknowledged the receipt

of the Kshs 53,000.

> "For having sold to you half share of my house at Pangani Nairobi and purchase price of the half share being the sum Kshs 95,000."

There was initially some dispute about the translation Ex 31 but I think it is fair to state that the defendant was asking the plaintiff to do his best and pay the remainder quickly, as he needed it urgently.

The plaintiff was able to support the three last payments in paragraph 5 of the plaint by receipts Ex 6, 7 and 8 to totaling Kshs 30,000. The plaintiff said a further Kshs 7,000 was paid, presumably that stated as being on July 1, 1975 but that he could not produce the receipt. Though asked more than once he failed to support either by oral or documentary evidence the first payment of Kshs 5,000 on December 23, 1974. I may have to consider in due cause whether this affects the consideration for this transaction or any question of part performance thereof.

After the Kshs 53,000 had been paid, see the receipt Ex 2, the parties went to the defendant's advocate, Mr Gachuchi as he then was but he informed them that the cost of registering the plaintiff as half owner would be Kshs 34,000.Accordingly he would draw up an agreement to effect the parties wishes, but could not do so at that time. Mr Gachuchi was therefore left to draw up the agreement which they would return to sign it in due course.

In the event, probably due to the family dispute no argument was ever drawn and the plaintiff admitted to Mr Kimani in cross-examination that there was nothing in writing to support it, the payment of the balance by installments over two years were inconsistent with the defendant's urgent need of the money, but he maintained there was such and agreement and he knew nothing of the defendant being forced to raise another loan. The defendant's case was that the delay in paying the balance was a breach entitling the defendant to avoid his agreement to transfer a half share to the plaintiff.

It was elicited from the plaintiff's wife that she was present during most of the dealings between the parties but never when money was actually handed over or credited. She said that although she was on good terms with the defendant he refused to transfer the half share to the plaintiff but offered to bequeath it to him. She also spoke of a joint account being opened for the rent but said the arrangement was that if either party was engaged in a viable project each could withdraw the money for the assistance of their children. The plaintiff however said that both their signatures were necessary to the account. He also made the significant remark "the defendant would like her to withdraw but always refused."

This must at first sight support the defendant contention that the joint account was opened only for the refund. Much of the plaintiff evidence was directed to showing the quantum of rent due in respect of the property and the shortfall by reason of the lesser balance at the bank see Ex 4. No question of entitlement to rent by the plaintiff will arise unless I find in his favour regarding the agreement to transfer the property to him. Earlier he said that no money was in fact withdrawn from the account. When the defendant came to give evidence he gave an account of his various financial dealings with the Kenya Commercial bank in relation to his properties from 1975 onwards. He said that he purchased the suit property at Pangani for Kshs 190,000. This I note is double the amount which both sides agree, though under different circumstances, the plaintiff paid to the defendant over the years therefore supports a fact which as I understand it has not been seriously disputed namely the original arrangement between them was that the plaintiff was to have a half a share in LB209/2369/56. Although the plaintiff had said that he understood this Pangani house was being sold by auction for a debt of only Kshs 12,000, the defendant said that his debt to the bank at that stage and I presume this must mean the Kenya Commercial Bank, Nairobi, was no less than Kshs 76,125 which he had borrowed from them in order to effect the purchase. After some discussion the plaintiff lent him Kshs 8,000 and the defendant borrowed the remainder from a business associate.

In due course the plaintiff began to ask for his money back and so the defendant raised a further loan Kshs 75,000 from the Murang'a branch of the bank to pay his other business associate "though not the plaintiff as he was his on in-law." At all events the defendant was enabled to pay off his bank arrears for

the past five months and when the plaintiff approached the defendant again he said that he had better "add me some more money as I would sell him a half share of the building."

The defendant reluctantly agreed and the plaintiff made up the total amount Kshs 53,000 by adding Kshs 45,000. Though the defendant initially sought to say that this Kshs 45,000 (as opposed to the subsequent Kshs 42,000) was paid in small amounts, under cross-examination he eventually agreed, when faced with transfer slip Ex 9, that the Kshs 45,000 was paid in one lump sum into his account. I note that that transfer slip is dated September 17, less than one month before the defendant's letter of October 16, Ex 3.

In due course the defendant found he was still short of funds and again approached the plaintiff, who insisted upon an agreement before making any further payment. As a result Ex 3 was written and they both went to an advocate to effect the transfer of half share of the building. The defendant gave a completely different reason from the plaintiff as to why that transfer was not drawn up then and there. Apparently, it was because the advocates adviced them that the bank debt on the property should first be cleared. Accordingly, as I understand the defendant, the Murang'a branch of the same bank lent him a further Kshs 45,000 so that he could clear the Pangani property from the charge over it in favour of the Kenya Commercial Bank, Nairobi. It was therefore the discharge of this second charge over different property at Murang'a which the defendant produced as Ex 4 and which did not relate directly to any charge over the Pangani property.

As regard the remaining Kshs 42,000 the defendant's evidence was that the plaintiff had deposited these various amounts, though he did not specifically relate them to those set out in the plaint, into his bank account without his knowledge over the next two years. When asked how the plaintiff could have known his bank account number the defendant alleged that the plaintiff had previously worked for him at a hotel in Murang'a and in the course of his duties had paid money into his account on his behalf. That is how he knew the defendant's account number. I find this very difficult to believe, because under cross-examination by Miss Mwaura the defendant said the plaintiff was his employee as far back as 1952 to 1959 and it seems to me unlikely that there would have been the same account number over the years. The defendant denied that the joint account was opened for the purpose of paying rents into it from the Pangani property, but said that it was after the argument he had with the plaintiff, when the plaintiff abused him as described in front of his wife about his daughter (a matter confirmed by his wife Isabel in evidence) and it was arranged that he would refund the plaintiff's Kshs 95,000 to him. That was why the account was opened. He said there was now Kshs 60,000 in that account and he was able and willing at any time to pay the balance on top of that over to the plaintiff. I note that figure does not agree with the balance given in Ex 4 (which is not dated) nor that amount referred to in paragraph 4 of the defence, which by inference would be Kshs 61,000.

At all events the defendant said that this section by the plaintiff was useless so far as he was concerned as he needed the money urgently because the bank were "on his neck" and a payment over two years particularly as it was done secretly would be of no use to him. Accordingly this was to transfer a half share to the plaintiff. Under cross-examination the defendant specifically denied an occasion put to him by Miss Mwaura, which was that in March, 1977 he and his three wives and son had gone to the plaintiff's house, slaughtered two goats and declared that he had sold half a share in the property to the plaintiff. The document Ex 5 of which the translation was never produced was said to support this. It seems that the defendant did go to the plaintiff's house on an occasion at which there were a number of people present, including the plaintiff's wife and mother and the question of opening an account for the defendant to deposit his repayments to the plaintiff arose. However Kabiri Mahugu, who was called to be present at that meeting which was at the end of 1976 not December 1978, when asked about the matter admitted the plaintiff had not agreed to this arrangement, though that is what we decided. I do not know if this witness was referring to a committee or a gathering of elders who made this decision but all events the plaintiff did not agree to it. Finally the defendant did agree that there was a meeting between that he could not transfer a half share in property to the plaintiff but to his wife of son Njuguna. He denied ever saying that he would bequeath it to any of them.

The question therefore for decision is whether the arrangement between the parties was enforceable agreement and noted upon by both sides or whether it was validly rescinded because of this argument and

dispute. This has to be decided against the background of the defendant being under some financial pressure from the bank and being perhaps understandably reluctant to make over a share of this potentially valuable property to any one else.

After assessing and carefully considering the evidence of the witnesses and their relative credibility, I have no hesitation in accepting the plaintiff's account as being correct clearly the defendant was in need of money to save his Pangani property and sought assistance from the plaintiff who, wisely from his point of view required something in return. Indeed it is not disputed that there was an original agreement to transfer half property to the plaintiff as consideration for the Kshs 95,000. None of the amounts which the defendant states are now in the account is consistent with having opened or used it for the purpose of effecting a refund to the plaintiff. I accept the plaintiff's evidence that it was intended for the rents of the property.

Neither do I believe that the defendant rescinded the agreement because the plaintiff did not pay the remaining Kshs 42,000 loan over to him promptly. I think it was the arrangement, which is partially supported by the transfer documents Ex 6, 7 and 8 that the plaintiff should pay the balance of the agreed sum for a half share in the property over a period of time and this is what he did. I reject the defendant's evidence that this was a breach of their agreement. He showed by his own evidence that he was able to raise money from one bank or another or even an outside source, when necessary. Clearly, also, since I accept the evidence of Kabiri Mahugu, the plaintiff did not agree to rescind the contract when they all left the plaintiff's house in late 1976. It may be that there was an occasion though this was not mentioned by the plaintiff or his wife, when harsh words came from the plaintiff to the defendant. That may have given great offence and have been quite unjustified, but I do not think in this case it amounted to a repudiation or a valid avoidance of the contract that they had mutually and freely, as I find, entered into. In making by finding on credibility I have borne in mind the terms of the letter Ex 3 with its translation. Ex 3 that the defendant require the balance quickly but he accepted the amounts paid into his account subsequently and I am perfectly satisfied that these were done with his knowledge and not secretly. To add to the foregoing there is one fact that the plaintiff has performed on his part of the bargain, paying Kshs 53,000 to the defendant within a reasonable period and the balance over two years and the total is not disputed so the first Kshs 5,000 does not have to be deducted therefrom.

These then being by findings, what is the result for the agreement I disregard paragraph (b) of the prayer in the plaint, because by agreement we dealt with the question of whether a half share in property itself was to be transferred and left the question of apportionment of the rent until after that question had been dealt with. There is support for the view that in this case the plaintiff should get specific performance – *see Subrock v Eggleton* Times July 15, 1982 where Diplock said that damages for refusal to convey is normally an inadequate and unjust remedy (particularly, as Miss Mwaura said, in these days of inflation) so the normal remedy is specific performance. However at the end of her address she did query the wisdom of such a source, in view of the dispute that has arisen between the parties; that they should now be part owners of the same property let alone the question of the abuse which the plaintiff is said to have offered to the defendant. Of course the plaintiff has claimed in the alternative not only the return of the Kshs 95,000 but an order for general damages.

The case of *Johnson v Agnew*, New Law Journal, March 222, 1979 292 laid down the following rules as regards specific performance for a contract for sale of land:

> "First in a contract for the sale of land, after time has been made or has become of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchase as having repudiated the contract accept the repudiation and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract of he may seek from the court an order for specific performance with damage for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for the above remedies (viz specific performance of damages) in the alternative. At the trial he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the

> repudiation he cannot thereafter seek specific performance. Fourthly if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance is not complied with the purchaser, the vendor may either apply to the court for the enforcement of/dissolve the order and ask the court to put an end to the contract. There only remains the question whether, if the vendor takes the latter course ie of applying to the court to put an end to the contract, he is entitled to recover damages for breach of the contract. The vendors should have been entitled, on discharge of the contract, on ground of normal and accepted principle, to damages appropriated for a breach of contract. Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles."

I would answer the above questions by saying that time became of the essence to the extent that I have indicated, there has been no valid repudiation of the contract up to the time of this case, but that the plaintiff has in effect applied to the court now to put an end to the contract.

Accordingly in my view, the purchaser namely the plaintiff is entitled to damages. After due consideration of these principles and all the circumstances in this case I have decided that it would be wrong to make an order of specific performance of transfer of half the property at Pangani to the plaintiff. I think the correct result is that he should have a refund of that which he already paid, Kshs 95,000 plus damages which will be the difference between the value of a half share in October 1974 and the value of a half share at the date of the filing of this action.

There will be an inquiry in default of the agreement, as to the value of the Pangani property as of August 1979. The difference between half that and Kshs 95,000 is the measure of damages which in my judgment to the plaintiff should get, in addition to the refund of his money. Costs reserved until after the decision on the rent.

**Dated and delivered at Nairobi this 5th day of November, 1982**.

**ARW HANCOX**

**JUDGE**