Republic of Kenya

Court of Appeal, at Nairobi

Madan, Potter & Kneller JJA

Civil Appeal No 20 of 1982

Gatere Njamunyu v Joseck Njue Nyaga

MADAN JA

This appeal turns upon the interpretation of a written agreement dated February 7, 1976, entered into between the appellant (hereinafter referred to as the plaintiff) and the respondent (hereinafter referred to as the defendant) for the sale of a portion of agricultural land comprising 1.2 hectares known as Ngandori/Ngovic/209 by the defendant to the plaintiff at the agreed purchase price of Kshs 9,000.

Paragraph 2 of the written agreement provided: “2. The consideration of the sale shall be Kenya Shillings nine thousand (Kshs 9,000) only inclusive of all customary claims of which a sum of Kshs 1,300 is paid to the Vendor on signing hereof receipt whereof is hereby acknowledged and the balance of Kshs 7,700 is to be paid to the Vendor on any time completion that is the date the consent of the Divisional Land Control Board/Appropriate Authority is obtained to subdivision and transfer.” On February 12, 1976 the plaintiff paid a further sum of Kshs 2,020 which made a total amount paid by him to the defendant Kshs 3,320. The Land Control Board gave consent to the transaction on 19 February 1976: “Nature of transaction:

subdivision of 4.86 hectares into two portions of 1.21 hectares and 3.65 hectares and thereafter transfer 1.21 hectares.”

The plaintiff did not pay the balance of the purchase price upon consent. On July 24, 1976 the defendant returned the sum of Kshs 3,320 to the plaintiff's advocates Njiru and company. The plaintiff deposited Kshs 9,000 some 14 months later on April 6, 1977 with his advocates without any notice to the defendant either by him or his advocates. The advocates accepted the deposit subject to the caution 'if Joseck Njue (defendant) accepts'. There was also no explanation why the plaintiff paid the full amount of the purchase price having already paid more than one third thereof.

The plaintiff filed a suit in the court of the resident magistrate, Embu in which he asked for a vesting order in respect of the portion comprising 1.21 hectares agreed to be sold to him by the defendant. The magistrate made an order that upon necessary survey for the sub-division being done the portion 1.21 hectares be registered in the name of the plaintiff by the land registrar, Embu District. The plaintiff is now appealing to us against the judgment of Gachuhi J who, upon appeal to him by the defendant, reversed the magistrate's decision and dismissed the plaintiff's suit. At this point I would temporarily break contact with the plaintiff's appeal in order to refer to certain erroneous expressions of opinion relating to provisions of the Land Control Act in the judgment of the magistrate in the hope that the same will not be adhered to or repeated. With respect the magistrate erred in holding that once consent of the Land Control Board has been obtained, then irrespective of anything else the transaction must be concluded for, according to the magistrate, thereupon a dealing in agricultural land, which is otherwise void for all

purposes, becomes legally binding, it cannot be questioned in court, and the parties cannot rescind the agreement. True the decision of the Land Control Board is final, there is no appeal against it, and it cannot be questioned in court, save that the court has supervisory jurisdiction to examine whether consent was validly given.

The agreement does not become binding because consent is given, and there is no appeal against it. The agreement is binding between the parties who make it though it is not enforceable until consent has been given. If consent is refused the dealing in agricultural land becomes void for all purposes under Section 6 of the Act. Specific performance cannot be claimed in respect of a dealing which becomes void, and only recovery of the consideration paid under the agreement is allowed under Section 7. Consent does not impose any obligation upon the seller or buyer to perform the agreement, though it cannot be performed without it. The parties are free to cancel the agreement mutually even after consent and not proceed to completion. A party to the agreement may also rescind the agreement but he does so at his own peril. The cancellation or rescission of the agreement as aforesaid is not prohibited because consent has been given. Consent has no bearing upon it. Consent is the statute's approval of a proposed dealing in agricultural land.

The magistrate also said that while accepting that the defendant was entitled to refuse a transfer of the land, after consent it was tantamount to the court questioning the decision of the Land Control Board; further that on reading together Sections 6 and 22 of the Act the procedure should be: “the purchase price should be paid after consent of the Land Control Board has been obtained otherwise such payment contravenes the provisions of Section 22 of the Act … this means that consent of the Land Control Board has to be obtained before payment of the purchase price is made if the parties have to avoid making or receiving money in furtherance of avoided transactions or agreements in contravention of Section 22 ... if a transfer had been effected after consent and before the purchase price is paid in full, and if the vendee defaults in payment, the vendor has a remedy in recovering the purchase price or the balance as a civil debt through a court of law. That was the remedy available to the defendant in this case … “

Section 22 did not apply in this instance. The transaction was not avoided because consent was in fact given. There is also no bar to payment of the entire purchase price before consent. If consent is refused the consideration paid under the agreement is recoverable under Section 7. To refuse to sign a transfer after consent is not tantamount to questioning the decision of the Land Control Board. A refusal to sign a transfer may be made for a variety of reasons, the party so acting taking the risk of becoming burdened with an order for specific performance, possibly damages and costs also if the refusal is unlawful. The defendant had other remedies also, one being to rescind the agreement as he purported to do. A sensible purchaser would pay the purchase price or the balance thereof and a sensible seller would sign a transfer only upon payment of the purchase price, after consent. I now return to consideration of the appeal immediately before us.

In his written statement the defendant stated that as a result of the plaintiff's failure to pay the balance of Kshs 5,700 despite a number of verbal reminders he ultimately on July 24, 1976 repudiated the contract and refunded the part purchase price of Kshs 3,320 to the plaintiff's advocates. Also that the defendant demanded payment of the balance of the purchase price immediately after consent of the Land Control Board was obtained but it was not paid. The agreement was that it would be paid within ten days of obtaining consent. The plaintiff told the defendant to wait for two weeks, and then for a further two weeks. After several further demands without success the defendant returned the money. He changed his mind about selling the land because the purchaser never paid him the balance of the purchase price. The plaintiff has appealed on the grounds that the learned judge erred in holding that the word ‘after' was superfluous, in holding that time was of the essence of the contract and that it was waived by the defendant by accepting part payment of the purchase price, in holding that the plaintiff did not complete his part of the contract and, in also holding that an agreement to become a party to a controlled transaction can become 'voidable' after consent. I do not think it fair criticism to say that the learned judge treated the word 'after' as superfluous. This word which appears in para 2 of the reply to defence was intercalated by the magistrate into clause 2 to make it meaningful, as he said.

The learned judge's observation was that an agreement ought to be interpreted as the parties appear to

have intended it.

I think the parties intended that completion should take place upon consent being obtained but without making time of the essence. The nature of the subject matter as well as the surrounding circumstances indicate that this would fulfill the intention of the parties. The agreement also so indicated in the following lay language: “the balance of Kshs 7,700 is to be paid to the vendor on any time completion that is the date the consent of the (board) is obtained ..." It could not be that the balance of the purchase price was to be paid at a time when the plaintiff thought fit to pay, as contended by him, even as distantly as 14 months later. Consent having been obtained the defendant was not to be left standing indefinitely saying like Henry V: “How long, O Lord, how long.” The principle to be acted upon in such a case is stated in 9 Halsbury 's Laws (4th edn) p 338, para 482, ie: “Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties.” Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. 9 Habbury's Laws, para 481 (ibid). The return of the money by the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. The plaintiff must have known that the only reason for rescission by the defendant was non-payment by him of the balance of the purchase price upon consent or within ten days thereafter.

The plaintiff therefore had notice of the default which he was required to rectify within a reasonable time. He did not rectify it.

The manner of making time of the essence and the rescission may not have been done with the nicety of a firm of professional advocates. It was however sufficient for the purpose and adequate for the two unsophisticated parties like the plaintiff and the defendant; it also has the blessing of the proviso to Section 3(1) of the Judicature Act which provides: “Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.” If the plaintiff had paid the balance of the purchase price within a reasonable period thereafter, say within 30 days, equity would in all probability have come to his aid if the defendant refused to complete. As it was the plaintiff waited for 14 months after the agreement and about nine months after the defendant purported to rescind the agreement. He waited too long. It was too late. To give him relief would destroy the defendant’s right in law effectively to make time of the essence.

“there must be a point when the length of time must stop and reasonable time should be inferred from the conduct of the parties and reconstruction of clause 2.”

There was no waiver on the part of the defendant after he returned the money and rescinded the agreement. He did not accept any further payment or otherwise conduct himself in a manner indicating waiver.

I would dismiss the appeal with costs. As Potter and Kneller JJA agree, it is so ordered. Potter JA. I also agree.

Kneller JA. I concur in the order proposed by Madan JA.

March 14, 1983