



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1243 OF 1980

SHASHIKANT RAMJI SACHANIA)

GULSHAN SHASHIKANT SACHANIA) PLAINTIFFS

VERSUS

GULAMHUSEN NURMOHAMED CASSAM)

NURBANU GULAMHUSEN CASSAM) DEFENDANTS

RULING

This is a motion on notice by the plaintiffs in an action for specific performance of a written agreement for the sale of them by the defendants of the undivided one half share of a piece of land known as L.R. No. 1/646 situated in Wood Avenue, Nairobi together with the buildings thereon for Shs.400,000. The plaintiffs also claim damages and other alternative and ancillary reliefs.

A defence was filed in which the defendant either expressly or impliedly admit the material facts and rely on matters of law. In this motion under O. XII r. 6 and O. VI r. 13 the plaintiffs/applicants seek summary judgment on the admissions of fact and the striking out of the defence on the ground that it discloses no reasonable defence, is vexatious, tending to delay fair trial of the action or is otherwise an abuse of the process of the Court.

A notice of preliminary objections was filed by Mr. Khan as advocate for the defendants. He complained that the joinder of several applications under several different rules of court was prejudicial and embarrassing to the defendants, that the application being in part under O. 6 r. 13(a) the affidavit annexed was inadmissible as were many of the "main grounds" of the application since they also constituted evidence. As it became apparent that a lengthy argument would develop or there preliminary objections I decided that time might be saved by considering them in the course of the hearing of the motion. As it turned out Mr.D. K. Khanna who appeared with Mr. Bakrania for the plaintiffs/applicants did not consider it necessary to deal in detail with all the grounds set out in the notice of motion. The facts on which he relied are not in dispute. He argued questions of law arising from these facts including the construction of the agreement for sale. Mr. Nowrojee who appeared with Mr. Khan for the defendants/respondents I thought with respect gave no indication in his submissions that he found the joinder of several applications in the one motion to be prejudicial or embarrassing to the respondents.

No evidence is admissible on an application under O. VI r. 13(1) (a) but the present application was made under paras (c) and (d) also of that sub-rule as well as under O. XII r. 6. The reference to paras (c) and (d) was in this case not included merely to enable an affidavit to be filed. In any event the affidavit was

unnecessary except in so far as it was a vehicle for the introduction of relevant correspondence. The facts set out in the main grounds of the application are a repetition of these averred in the plaint. I find there was no merit in the preliminary objections.

I turn now to the substance of the application.

The agreement for sale was signed by the plaintiffs and the defendants on 15th January, 1980. On the same day the 1st defendant handed copies of the title deeds of the property to the plaintiffs' advocate to enable them to prepare the necessary transfer. The had asked the defendants for them on 14th December, 1979, and again on 10th January, 1980. Clause 1 of the Agreement provides as follows:-

"1. The Purchase price shall be KShs.400,000/- to be paid to the vendors by the Purchasers by Bank's Draft made out to the Vendors in the following manner:-

(a) Kenya Shillings Two hundred thousand (KShs.200,000/-) on the execution of this Agreement.

(b) Kenya Shillings Two hundred thousand (KShs.200,000/-) being the balance of the purchase price on the execution of the transfer of the one-half undivided share hereinbefore described on or before 31st January, 1980."

Clause 4 provides -

"4. In the event the Purchasers failing to pay as required in Clause 1 and 1(a) and 1(b) then this Agreement for Sale shall be null and void and deemed to have been cancelled and of no effect and the following provisions hereby agreed between the parties shall come into effects:-

(a) The vendors shall repay the Purchasers all sums paid to them by the Purchasers under the terms of this agreement for sale less the sum of Kenya Shillings Forty thousand (KShs.40,000/-) which amount the Vendors shall retain absolutely as liquidated damages for breach of contract by the Purchasers in failing to comply with the terms and conditions of this agreement.

(b) The amount payable by the Vendors to the Purchasers under the sub-clause (a) hereof shall only become payable upon the Purchasers transferring to the Vendors any lease that may have been drawn between the Purchasers and the Tenant and subject to acceptance by the Vendors of the terms and conditions of the aforesaid lease and the Vendors to receive rents and profits directly from the Tenants from 1st February, 1980 without any deduction.

(c) If after signing this agreement the Purchasers shall fail to pay any part of the purchase price as set out the agreement for sale shall be null and void and the Vendors shall be entitled to recover from the Purchasers the sum of Kenya Shillings Forty thousand (KShs.40,000/-) by way of liquidated damages save as aforesaid, the provision of sub-paragraph (b) will apply.

The first payment of Shs.200,000 had already been made when the Agreement was signed.

On 29th January, 1980, the plaintiffs' advocates wrote to the defendants' advocates in Mombasa enclosing a draft conveyance in duplicate for approval.

They added —

"We also enclose our cheque for Shs.200,000/- being the balance of the purchase price. Please do not release this sum to your clients until we are able to confirm to you that the Conveyance herein in favour of our clients has been duly registered. Please confirm this."

Clearly these requests are not in accordance with the terms of clause 1 of the Agreement and one might have expected the defendants' advocates to query them. Instead of doing so they wrote the following letter strictly in accordance with their clients' instructions (as appears from subsequent correspondence):-

"Our ref : ACS/1943

Date : 31st January, 1980.

Messrs. Velji Davshil & Bakrani

Advocates,

P. O. Box 45087,

NAIROBI.

Dear Sirs,

L.R. NO. 1/646 NAIROBI - MR. & MRS. CASSAM

TO MR. & MRS. SACHANIA

We refer to your letter of the 29th January, 1980 in the above matter, enclosing therewith the draft of the transfer and your cheque in the name of our firm in the sum of Shs.200,000/-.

Your also requested us in your letter to hold this amount and not to release it to our clients until the conveyance has been duly registered.

Such a request is in breach of the Agreement for sale which provides for completion by the 31st January, 1980 by payment of Shs.200,000/- by Bankers cheque in favour of the vendors against execution and delivery by them of the conveyance.

Your cheque is returned herewith. Your clients are in breach of the Agreement for Sale and in these circumstances, on the instructions of our clients and on their behalf, we hereby rescind the sale. We hereby require of your clients, immediate delivery of vacant possession of the premises subject of the sale and upon such delivery, our clients will repay to yours all sums so far paid towards purchase. Please notify your clients that they should comply with our clients' requirements by the close of business on the 5th February, 1980. Henceforth, time is to be regarded as being of the essence.

yours faithfully,

ATKINSON CLEASBY & SATCHU

(SGD)

MANSUR SATCHU

CC Mr. & Mrs. G.N. Cassam,

P.O. Box 48782, NAIROBI.

Mr. & Mrs. Sachania

P.O. Box 10082, NAIROBI.

The draft conveyance was not returned for engrossment approved or with comments.

It is apparent that had payment been due on or before 31st January irrespective of execution of the conveyance there was substantial compliance and withdrawal of the request of the plaintiff's advocates could no doubt have been obtained by a telephone call.

It is convenient at this point to consider whether or not time was of the essence of the agreement. Mr. Khanna submitted that it was not Mr. Nowrojee who argued that it was by reason of the specification of a date in clause 1 coupled with the provisions of clause 4. He cited *Barclay v messenger* 1874 L.J. 43 where a clause in a contract similar to clause 4 was held to make time of the essence. Clause 4 provides that the Agreement for Sale shall be null and void and deemed to have been cancelled and of no effect in the event of the purchasers failing to pay as required in clause 1. Under clause 1 however the balance of the purchase price payable not simply on or before 31st January, 1980, but on the execution of the transfer on or before that date.

In *Barclay v messenger* the vendors were required neither to make out a title nor to execute a conveyance. There was no question of receiving money on the execution of a conveyance. The provision of clause 4 take effect on failure to pay on the execution of the transfer, not on failure to execute the transfer on or before 31st January, 1980, which is an obligation of the vendors as well as the purchasers. There is not express stipulation in the contract that the time fixed for performance must be exactly complied with. It was not suggested that the circumstances of the contract or the nature of the subject matter indicated that the fixed date must be strictly complied with. In my view time was not of the essence of the contract, the plaintiffs were not in breach by failing to pay Shs.200,000 in the manner and by the date specified in clause 1 since no payment was due before execution of the conveyance and the defendants were not therefore entitled to rescind the agreement. While it may indicate an admission of non-compliance with the agreed method of payment the plaintiffs' advocates letter dated 4th February 1980 enclosing bankers' draft for Shs.200,000 payable to the defendants does not represent an admission that the plaintiffs were in breach of contract.

On 29th February the plaintiffs' advocates having no doubt given the matter further consideration wrote to the defendants' advocates requesting the return of the draft conveyance duly approved to enable them to proceed further. The replied to the effect that they were no longer dealing with the matter which henceforth would be dealt with by Mr. M. A. Khan, Nairobi. This letter was copied to Mr. Khan who took no action.

The 1st defendant then seems to have taken the matter into his own hands and on 18th March he wrote to the plaintiffs' advocates requesting the return of the documents of title. On the following day he wrote direct to the defendants to the effect that he was holding their cheque for Shs.200,000 against receipt of vacant possession of the premises, the plaintiffs having as provided in the agreement installed tenants in the premises, and indicating that he would be claiming damages and costs. This was followed by a letter from the plaintiffs' advocates to the defendants dated 26th March, 1980, denying that there had been any breach of the contract on the part of the plaintiffs and calling upon the defendants to complete the sale in terms of the agreement within 21 days failing which the plaintiffs could seek out relief as they might be entitled to by law. At the time they pointed out the documents handed to them on 15th January were copies only. This letter was copied to Mr. Khan who replied that he had no instructions. The defendants have taken no action to complete the sale as I think they were bound to do. The notice expired on 16th April, 3 1/2 months after the draft conveyance was sent for approval to the defendants' advocates. If as averred in the defence the draft was incorrect they could and should have made appropriate amendments. I think reasonable time was given for completion.

Mr. Nowrojee stressed the delay in preparing the draft conveyance and sending it to Mombasa for approval with the result that completion by 31st January, 1980, became impossible but the agreement was rescinded not on that ground but for failure to pay in the required manner by that date. This delay did not affect the failure of the defendants to complete by 16th April.

The question now to be considered is whether or not in view of the foregoing the plaintiffs are entitled to judgment on this application. Mr. Nowrojee submitted that the defendants were entitled to have not only matters of fact but also questions of law dealt with in the normal process, that is at a hearing. To strike out the defence would I think be wrong having regard to the matters of law pleaded therein which raises triable issues. These questions however have now been fully agreed. As Lord Denning said in *Tiverton Estates v.*

These courts are masters of their own procedure and can do what is right even though it is not counted in the rules If the point defers to the correct interpretation of correspondence, then the court can decide the matter then and there without sending it for trial. There is no point in going formally to trial when the discussion at the trial would be merely a repletion of the discussion on the summary procedure.”

He was of course referring to applications for summary judgment under the English equivalent of our O. XXXV but I see no reason why an application under O. XII r. 6 should not be similarly treated. Admissions have been made in the defence which, as I have held, having regard to the construction of the agreement for sale and the law in relation to time being of the essence of a contract entitle the plaintiff to judgment. Although it would be illogical to give judgment on admissions contained in the defence and at the same time strike out that defence it does appear to me that the defence at least in part tended to prejudice, embarrass and delay the fair trial of the action.

If the specific performance is granted on this application the plaintiffs waive their claim for damages.

There will be judgment for specific performance of the agreement dated 15th January, 1980, the transfer to be executed and delivered to the purchasers within 21 days from the date hereof failing which the plaintiffs will be at liberty to apply for a vesting order. The defendants will pay the plaintiffs' costs. For mention on 18th December 1980.

Dated and delivered at Nairobi this 5th day of June 1981

A H SIMPSON

JUDGE.