



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MADAN, LAW AND POTTER, JJ.A.)

CIVIL APPEAL No. 47 OF 1981

BETWEEN

HITENKUMAR AMRITLAL Trading as

TRIANGLE INVESTMENT COMPANY..... APPELLANT

AND

CITY COUNCIL OF NAIROBIRESPONDENT

Appeal from the ruling and order of the High Court of Kenya at Nairobi (Simpson, J.) dated 24th June, 1981

in

Civil Case No. 776 of 1980)

JUDGMENT

MADAN, J.A There is in Nairobi a valuable commercial site lying between Kigali and Tubman roads. Originally the sit comprised ten different parcels of land which were the subject of acquisition by the Commissioner of Lands on behalf of the City Council of Nairobi (hereafter referred to as the City Council). The City Council provided the money for payment of compensation to the former owners of the various parcels. Although entitled to it the City Council did not obtain a grant to itself of the

After acquisition the City Council demolished the existing buildings on the suit land, and operated it commercially, and still does, as a public car park.

In March, 1978, the City Council agreed to allocate the suit land to the appellant "to construct car parking development and shopping facilities", subject to payment of the stand premium of Kshs 726,000, and ground rent Kshs 145,200 per annum, and subject also to acceptance by the Commissioner of Lands the duration of the term and the principal conditions. The appellant accepted the City Council's offer. He paid the stand premium and the proportionate ground rent for the year 1978 assessed by the City Council's Chief Valuer who also sent him a site plan of the suit land with his letter dated 14th March, 1978.

On March 20, 1978 the Town Clerk of the City Council wrote to the Commissioner of Lands asking him to expedite the allocation letter of the land to the City Council because, as the Commissioner was award,

the Council had already entered into an agreement to lease the suit land to the appellant. The City Council was very anxious to see development commence as soon as possible. The Commissioner replied on April 7, 1978 to say that he had already informed the Town Clerk by his letter of 20th March that he had been directed to allocate the area in question to Plaza Mansions Limited to whom a Letter of Allotment had already been sent. He would refund the money which the City Council paid for the suit land.

On November 13, 1979 the Commissioner wrote to the Town Clerk: "It is true that the land in question was acquired way back in 1954 on your behalf for the purpose of a car park..... This plot has also been subject to two allocations one by the Council ...through instructions of the President I cancelled allocation of the plot to Plaza Mansions Limited. As far as the Council is concerned, you had no authority to allocate the plot because the plot has not been formally allocated to the Council though the Council paid the Government for compensation....." On January 30 1981 the Commissioner informed the Town Clerk that His Excellency the President had agreed the proposed development of the suit land by the City Council and Sheraton Hotel. On March 5 1981 the appellant's advocate Mr. Sharma wrote to the Town Clerk to say that he had noted with great concern a report in the two daily newspapers of that day circulating in Nairobi – the standard and Nation – that the City Council was negotiating sale of the suit land to Sheraton Management Corporation, while in fact it had been sold to the appellant, and a suit for specific performance of the contract of sale was already pending in the High Court between the parties. In the plaint filed by the appellant as the plaintiff in the suit in the High Court be referred to the agreement for sale of the suit land by the City Council to him; that the City Council had broken the agreement of sale by failing to hand over possession of the suit land as provided therein. It has published its intention of retaining and developing the site in participation with an American chain known as Hotel Holdings Limited as Hotel Complex and call it "Sheraton Hotel, Nairobi". The appellant claimed specific performance of the agreement of sale and certain other reliefs including an injunction to restrain the City Council from selling, disposing of, leasing, parting with possession of the land etc., otherwise than by selling it to or by duly and effectively vesting the same in the appellant; alternatively, damages for breach of contract.

The City Council filed its defence raising several different defences. The appeal before us is only concerned with whether the ruling of Simpson, J. (as he then was) was right in refusing the injunction, until the judgment in the action, to restrain the City Council from doing any of the acts, or to do them in manner, outlined in the plaint. At the hearing of the appeal before us Mr. Kwach who appeared with Mr. Abajal for the City Council conceded that although the City Council stands in breach of its agreement to sell the suit land to the appellant, it is unable specifically to perform it.

The learned judge said in his ruling that the appellant had a prima facie case with a probability of success in his alternative prayer for damages. Having regard to the decision of the Government taken at the highest level even if the court were to take the view that the appellant had shown good ground for grant of specific performance it would be unlikely to grant an order with which the City Council could not comply with and which would be worthless in the absence of the necessary approval which clearly would not be forthcoming. Although damages would be heavy and no doubt difficult to assess, the City Council would be financially capable of paying them and the plaintiff could be adequately compensated.

The situation that faces us in that the City Council would be financially capable of paying them and the plaintiff could be adequately compensated.

The situation that faces us is that the City Council is not the registered owner of the suit land. I accept Mr. Khanna's proposition, which Mr. Kwach did not challenge, that the Government holds the suit land in trust for the City Council which is entitled to call for and receive a grant thereof to itself. In view however of the decision made by His Excellency the President that the suit land be developed by the City Council in collaboration with Sheraton Hotel, we must assume with full knowledge of the agreement of sale with the appellant, there is no way the City Council could obtain a grant from the Government direct or by a suit in court because the provisions of section 16 of the Government Proceedings Act (Cap. 40) prevent the grant of injunction or specific

performance against the Government, so as to enable the City Council to specifically perform its

agreement. It would be quite useless to order the injunction asked for by the appellant. It is not a practical proposition in this case. The court will not make an ineffective order.

Damages in an appropriate remedy in this case, in particular as the city council would be financially capable of paying them. The learned judge was right in so thinking and refusing the injunction. If the appellant succeeds in his suit, true damages would be heavy and difficult to assess but they could be assessed. There is a great deal of practice and experience in this field; damages are assessed for personal injuries, legs of film stars, intangible items such as shock, pain and suffering. If not satisfactory we, or some of us, will still be her to put the matter right. I would dismiss the appeal with costs.

As Law and Potter, JJ.A., agree it is ordered.

LAW, J.A. The appellant filed suit in the High Court against the respondent (hereinafter referred to as the City Council) claiming specific performance of an agreement to sell land, an injunction restraining the City Council from disposing of the land to other persons, and other reliefs, and alternatively damages for breach of contract. By its defence, the City Council denied the creation of any valid contract for the sale of the land to the appellant and pleaded that the land had been allocated to a third party by the Commissioner of Lands; alternatively it pleaded that if there was an agreement between the parties, the same was abrogated or frustrated by a Government directive as to the user of the land in question. The defence went on to deny that the appellant had suffered any loss or damage or was entitled to any of the reliefs claimed in the plaint.

The appellant then applied to the High Court by Chamber Summons, under Order XXXIX rule 2(1) of the Civil Procedure Rules, for the issue of an injunction to restrain the City Council from selling or in any way dealing with the suit land otherwise than by selling or transferring it to the appellant. The application was heard by Simpson J. (as he then was) who dismissed it with costs. From that decision the appellant has appealed to this court.

The suit land, which is situated in the centre of Nairobi, consisted originally of a number of plots which were acquired by the Government in 1954 on behalf of the City Council, in the exercise of compulsory powers. The City council has paid full compensation to the former owners, and has used the land as a car park. It is common ground that in these circumstances the City Council is the beneficial owner of the suit land, but that the legal title vests in the Commissioner of Lands, on behalf of the Government, as trustee for the beneficial owner.

By an exchange of letters between the parties in February and March, 1978, the City Council offered to sell its beneficial interest in the suit land to the appellant on payment of stand premium and ground rent. These were calculated by the City Council's Chief Valuer at Shs. 798,600/- which the appellant promptly paid on 15th March, 1978. The City Council then asked the Commissioner of Lands for a grant of the legal title. The Commissioner of Lands refused to issue a grant "through instructions from the President". Apparently the late President had directed the land be "allocated" to Messrs. Plaza Mansions Limited (whoever they may be) but subsequently cancelled that allocation. We are now informed that, as reported in the local press in April, 1981, the suit land has been "allocated" to "Hotel Holdings Limited" who are proposing to build on the land a hotel to be known as the Nairobi Sheraton Hotel. It is apparently on these matters that the City Council relies as "abrogating" or "frustrating" their contract with the appellant.

In his "Ruling" dismissing the appellant's application, the learned judge held that the appellant's case for specific performance had no probability of success, "having regard to the decision of Government taken at the highest level", and that the City Council could not comply with an order for specific performance "in the absence of the necessary approval which clearly would not be forthcoming". In his view, the appellant's remedy lay in his alternative claim for damages. On appeal to this Court, Mr. Khanna for the appellant, took us through the relevant law and expounded it so clearly and (if I may respectfully say so) correctly, that I do not find it necessary to refer to the many authorities on which he relied, especially as Mr. Kwach for the City Council conceded, for the purposes of this appeal, that there was a binding contract between the parties, but one which in his submission could not be specifically enforced, as the Government, the legal owner, has made it clear that it will not do anything to enable the transfer of the

suit land to the appellant. Mr. Khanna's submission on this point is that the Government, through its Commissioner of Lands, holds the legal title on trust for the absolute benefit of the beneficial owner, in this case the City Council, and as a bare trustee is bound to convey or transfer the property when required to do so by the beneficial owner; see Halsbury's Laws of England, Vol. 38, paragraph 1495. That is undoubtedly so, but we are not dealing here with an individual trustee, but with a Government department acting on the instructions of the Head of State. The City Council is powerless in the matter. It cannot force the Government to transfer the legal title, although it is entitled in law to such transfer. An order by the court would be futile, as it could not be enforced. The appellant, as first purchaser, may have rights against a subsequent purchaser with notice. That is not a matter for decision in this appeal, which is solely concerned with whether the learned judge correctly exercised his discretion in refusing to issue an injunction which could only appropriately be issued if the appellant had established a probability of success in his claim for specific performance. The learned judge gave sound reasons for this decision, and has not been shown to have erred in law or in principle.

I would dismiss this appeal. I concur in the order proposed by Madan J.A.

POTTER, J.A. I agree that this appeal should be dismissed, and concur in the order proposed by Madan, J.A. I would only add a few words.

It should not be forgotten that the general rule at common law was that no action or suit by a private person against the King was maintainable in the King's courts. The common law has been modified by statute, both in England and in Kenya. The Petitions of Right Ordinance, 1910 (Cap 7,1948), was followed by the Crown Proceedings Act, 1956, now called the Government

Proceedings Act, Cap. 40, which is modelled on the English Act, the Crown Proceedings Act, 1947. Under Section 16 of the 1956 Act, as under section 21 of the English 1947 Act, no relief is available against the Government by way of injunction, specific performance, order for the recovery of land or the delivery of property, but the Court may make an order declaratory of the rights of the parties. Under subsection (2) of section 16 (as under s.21) of the English Act) the court may not in civil proceedings grant an injunction or make an order against an officer of the Government if the effect of the injunction or order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

The effect, in the circumstances of this case, of granting an injunction or specific performance to the appellant would be to put the respondent in a position in which it could not obey the order of the court. The proper remedy in this case is damages.

Delivered at Nairobi this 23rd day of April, 1982.

K. D. POTTER

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JUDGE OF APPEAL

E. J. E. LAW

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JUDGE OF APPEAL

C. B. MADAN

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR