IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Potter JJA & Kneller Ag JA)

CIVIL APPEAL NO. 49 OF 1981

Between

ISAAC KAARA WAGICIENGO .....APPELLANT

AND

KATHLEEN GERRARD.....RESPONDENT

JUDGMENT

Madan JA In addition to filing a suit for specific performance against the respondent (defendant), the appellant, claiming purchaser's interest, registered a caveat against the title of the defendant's property LR No 7660/35 - Tigoni, Kiambu, which he claimed the defendant agreed to sell to him at the purchase price of Kshs 1,200,000. Upon the defendant's application, the Registrar of Titles served the plaintiff with a notice to withdraw the caveat within forty five days unless it was extended by order of court made under Section 57 of the Registration of Titles Act (Cap 281).

The plaintiff has appealed against the refusal by the High Court to extend the caveat.

In his affidavit to support the application for extension, alternatively for an order restraining the defendant from disposing of the property until the determination of the suit, the plaintiff deponed that after he had viewed the property, he expressed a wish to buy it. The defendant and her husband agreed to sell it to him, and the purchase price of Kshs 1.2 million was agreed. The defendant expressed a wish that £ 20,000 out of the purchase price should be paid overseas into her and her husband's joint bank account in Jersey. The plaintiff wrote to his bank in Cardiff on January 5, 1981. Also on the same day, he wrote to his bank in Cambridge, Ohio, USA, which sent a cheque for $ 15,000 to the Gerrards. His Cardiff bank sent a cheque for £ 4,420.67 to the Gerrard's joint account in Jersey after the defendant's husband on February 13 telephoned and requested the manager of the bank to send the cheque to their joint account in Jersey. The plaintiff further paid Kshs 900,000, Kshs 800,000 the proceeds of a loan and Kshs 100,000 from his own resources, to Kaplan and Stratton Advocates, who were acting for both parties in the sale transaction. The Gerrards left the title deeds of their property when on February 18, they, together with the plaintiff, visited Mr Aronson, a partner in Kaplan and Stratton, who agreed to act for both parties, and also undertook to hold the documents of title to be handed to the plaintiff upon completion by him of payment of the purchase price. On March 21, the defendant gave the plaintiff a document in her husband's handwriting containing "some material terms of the sale agreement in respect of LR 7660/35". On March 22, the Gerrards confirmed to him that March 31 should be the last day for the payment of the purchase price. The defendant wrote on a piece of paper which she handed to the plaintiff the amounts she had received and the balance due £ 4,480. Neither of these two documents is signed by anyone.

The plaintiff further deponed that on March 30 the defendant telephoned at 6 am and informed his wife

> "that they had cancelled the sale of their property to me and they were selling it to someone else who would pay them more money."

As soon as the plaintiff received this information, he immediately contacted his lawyer who on his behalf sent the outstanding amount of Kshs 75,000 to Kaplan & Stratton. He also lodged his caveat on the same day. Mr Aronson did not accept the cheque for Kshs 75,000. Kaplan and Stratton also purported to return the money already paid as the purchase price of the property. The plaintiff deponed that he paid the total of the purchase price pursuant to his agreement with the defendant save for the sum of Kshs 75,000 which was tendered but not accepted, and which he was willing and ready to pay to the defendant or her lawyer.

The defendant replied to the plaintiff's application by her own affidavit. She deponed that the plaintiff expressed a wish to buy the farm. As she and her husband had doubts as to his ability to meet the price, they wanted some evidence that he had funds in England and in America as claimed by him. Her husband told the plaintiff that before they could embark upon any negotiations, he must deposit £ 20,000 sterling in their joint account in Jersey. Both she and her husband made it clear that the deposit of this money was a pre-condition for any further negotiations. It was not quite right to say that they expressed a wish to be paid £ 20,000 overseas. Their joint account in Jersey was credited with a total of sterling £ 11,145.06 being the proceeds of $ 15,000 and sterling £ 4,420.67 but not £ 20,000. She was never ready to sign any document relating to the proposed transaction until £ 20,000 had been deposited in Jersey. On March 19, she visited Mr Aronson with the plaintiff. The plaintiff said that he wanted to take up a loan of Kshs 100,000 and deposit it with Kaplan and Stratton. Mr Aronson told him it was unnecessary until £ 20,000 was paid in Jersey. In fact the plaintiff paid a cheque for Kshs 100,000 and received a receipt for it from Mr Aronson's secretary.

The defendant further deponed that she wrote the document of March 22 but she did not write the word "price" which had been put in. There is not and there was never a concluded agreement between the parties for sale of the property. It was her husband who telephoned on March 30 and told the plaintiff's wife that as the plaintiff could not raise the money, it was not possible to continue with the negotiations, and not because another purchaser had offered more money. In fact, she was negotiating to sell the property to somebody else at approximately the same price.

The defendant's husband swore an affidavit confirming the defendant's statements made in her affidavit concerning him.

The plaintiff filed a replying affidavit. He deponed that the payment of £ 20,000 overseas was clearly understood by the parties to be part payment of the purchase price and not a pre-condition for further negotiations.

This was communicated to Mr Aronson and that was why he continued accepting money locally. Mr Aronson never talked to him about the payment of £ 20,000. He paid him Kshs 500,000 with the understanding that he was paying it, as stated in Kaplan & Stratton's receipt therefor, as "part purchase price of LR 7660/35, Tigoni". The plaintiff accepted that he wrote the word "price" on the document of March 22 when discussing the financing of the transaction with his financiers, and not in order to show that there was an agreement for sale.

Section 3(3) of the Law of Contract Act reads as follows:

> "(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some person authorised by him to sign it ..."

The learned judge said that there was no formal contract and the plaintiff relied on the documents of March 21 and 22 to satisfy the requirement in Section 3(3).

The learned judge said the object of a caveat is to maintain the status quo which could not be done in this case because the plaintiff was not in possession of the property. This was a misdirection. In a case of this nature the purchaser is rarely, if ever, in possession of the property. The object of a caveat in a case of this nature is to preserve the status quo by preventing the defendant from disposing of the property to another purchaser pending the hearing of the suit, as the defendant, indeed, did by entering "into a sale negotiation with another purchaser who is now in possession". The learned judge further erred by taking into account a factor which was totally unrelated to the decision to be made on the plaintiff's application, ie if the caveat remained against the title, it would prevent the defendant from dealing with the potential purchaser who was already in possession.

True, as the learned judge said, the agreement of sale, (qua agreement), was in dispute, and the plaintiff would have the burden of establishing that there was a memorandum or note thereof to charge the defendant which would satisfy the provisions of Section 3(3). The learned judge went on to say that the plaintiff had not made out a *prima facie* case and dismissed the application. Another misdirection. The correct direction would have been that it would be wrong at that stage to order the removal of the caveat unless he was satisfied that the plaintiff could not succeed: (Simpson J) in *Sat Assanand v Raymond Walter Petitt*, HCCC No 2567 of 1977 (unreported). The learned judge knew about the foregoing although he let it slip away from him for he himself pointed out that the plaintiff had to show that he had a chance of success in the suit, and the first issue to be determined would be whether or not there was a valid contract of sale between the parties on evidence to be adduced, an issue which he could not determine on what was before him without going into the evidence at the hearing.

The plaintiff's contention is that the two documents of March 21 and March 22 and the two receipts for Kshs 500,000 and Kshs 100,000, which are all in writing, constituted a memorandum or note of an agreement upon which a suit can be founded to charge the defendant for the disposition of her interest in the suit property. I will not concern myself with the two receipts as it is not clear who signed the receipt for Kshs 500,000 and the receipt for Kshs 100,000 does not appear to have been signed by a person authorised by the defendant. The document of March 21 which is in the husband's handwriting carries the heading "Notes of Isaac (plaintiff) and NWG (husband's initials)". The document refers to several details concerning the deal, and in items one and nine thereof the husband talks as an authorised person as follows:

> "(1) No action until confirmation of arrival of funds with my Bank (their advice to me). 1. If final settlement delayed by default of purchaser beyond three months deal off. Loss of deposit etc."

According to the defendant's own affidavit, she and her husband were acting together in concert in the negotiations with the defendant; it was the husband who told the plaintiff that he must deposit £ 20,000 in their joint account in Jersey which was in fact credited with £ 11,145.06 to their joint benefit; also, in fact it was the husband who telephoned the plaintiff's wife on March 30 to say that it was not possible to continue the negotiations.

The document of March 22 is in the defendant's own handwriting. I said in *Mawji v US International University and Another* [1976] KLR 185 at page 192 and 193:

> "A document, though it does not actually bear the signature of the party to be charged or the signature of some person authorised by him to sign it, can constitute a valid agreement or a memorandum or note thereof to satisfy Section 3(3) …
>
> The court ought to accept the *prima facie* evidence of the handwriting of the party to be charged, until it is displaced …
>
> A memorandum or note need not be in any particular form so long as it is otherwise sufficient to satisfy subsection (3)2."

In my opinion the two documents of March 21 and 22, which are in the handwriting of the husband and

wife respectively are "signed" by them even though they do not bear their individual signatures. The handwriting of each of them is the signature of each of them. In addition the initials of his name written by the husband constitute his signature on the document. The defendant's affidavit, to which she has attached her husband's affidavit, purports to ratify whatever was done by him as her agent. As such, and she being the principal, the husband's signature on the document of March 21 becomes her own signature.

The two documents of March 21 and 22 are memoranda or notes of an agreement between the parties, upon which the plaintiff's suit may be founded, and they both, together as well as severally, satisfy the requirement in Section 3(3), to charge the defendant for the disposition of her interest in the suit property. There is no ambiguity in this case about the parties to the agreement, the property and the price. Being agreed, these three essentials are satisfied. Whether the contract is enforceable is a matter for the trial court. Both sides are making claims which may lead to the suit succeeding or failing. The issues in controversy between them require to be decided at the trial.

The question which remains to be answered by this court is whether the caveat ought to be vacated.

In *Tiverton Estates Ltd v Wearwell Ltd* [1974] 2 WLR 176, both Denning MR and Stamp LJ expressed the opinion that in some circumstances, it would not be right to vacate a caution, for instance, if the cautioner has a substantial point in his favour, and it would be unfair to him to vacate it.

Has the plaintiff made out any substantial points in this case? Yes, he has; first, that he has an agreement in writing upon which a suit may be founded, in the shape of two memoranda or notes, one signed by the party to be charged, and the other by a person authorised by her to sign it. Secondly, he has shown that, taking into account the tender of Kshs 75,000, he paid the whole of the agreed price except a sum of Kshs 560, partly into the defendant's and her husband's joint account in Jersey and partly locally to her advocates, Kaplan & Stratton; thirdly, the defendant handed the title deeds of the property to Kaplan & Stratton on March 19; fourthly, the completion date is stated to have been March 31 fixed by the defendant and her husband, as also confirmed by Mr Aronson in his letter dated April 6 to the plaintiff's advocates.

The defendant's husband notified the cessation of negotiations on March 30. In paragraph 9 of her defence filed in the suit, the defendant states that the plaintiff was not able to complete that date. In paragraph 11 of her affidavit, she claims her husband told the plaintiff's wife that as the plaintiff could not raise the money, it was not possible to continue with negotiations. The plaintiff still had two days to go and just over three months according to the document of March 21. However, he claims to have paid the entire purchase price before the completion date; fifthly, it is not hard to fathom the reason, if the defendant is negotiating a fresh agreement at approximately the same price which has not been disclosed, why she does not wish to sell to the plaintiff any more; sixthly, although mentioned before him, the learned judge does not seem to have considered whether the provisions of Section 52 of the Transfer of Property Act, 1882 entitled the plaintiff to the order which he was seeking.

At this stage the court can only look at the various matters for their apparent substance, theoretically, and for their *prima facie* value for the suit has not yet proceeded to trial *Mawji* (supra, 195).

It was for these reasons that at the close of the arguments addressed to us, we are unanimously of the opinion to allow the appeal with costs as stated in the order we made then.

Potter JA. I have had the advantage of reading the judgment in draft of Madan JA. I agree with it and have nothing to add.

Kneller Ag JA. I agree with what has fallen from Madan JA and I have nothing useful to add.

Dated and delivered at Nairobi this 16th day of June, 1982.

C.B MADAN

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

A.A KNELLER

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A.G JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR