IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Kneller JJA)

CIVIL APPEAL NO. 42 OF 1981

BETWEEN

THOMAS OPENDA.....APPELLANT

AND

PETER MARTIN AHN.....RESPONDENT

RULING

When this appeal was called on for hearing on June 17, 1982, Mr Nagpal for the respondent raised a preliminary objection, of which notice had been given, taking objection to 11 of the 22 grounds of appeal as raising points not raised in the pleadings or canvassed in the High Court. We allowed Mr Nagpal to extend his notice of objection to include three further grounds of appeal as in our view these further grounds were substantially covered by the objections of which notice had been given. In the result we heard objections to grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 17 and 20. Mr DN Khanna for the appellant argued in support of those grounds being retained in the memorandum of appeal, and Mr Nagpal replied. These arguments occupied most of the two days allotted to the appeal, which in the event has had to be adjourned by consent to a date to be fixed. We reserved our ruling on the preliminary objection, which we are now delivering.

The appeal is from the judgment of the High Court in Civil Case No 1193 of 1978. By his plaint in that suit, the plaintiff, who is the respondent in the appeal and to whom we will refer as “the plaintiff”, sued the appellant in the appeal, to whom we will refer as “the defendant”, for an order that the defendant do specifically perform a written agreement for the sale of a property known as LR No 2951/62 Lower Kabete Road, Nairobi, which the defendant had allegedly contracted to sell to the plaintiff, and the plaintiff to purchase, in terms of the agreement, which was executed by the parties on January 25, 1977. A copy of the agreement was annexed to the plaint and expressed to be part of the pleadings. By his amended defence, the defendant pleaded:

1. That it was clearly understood by the parties that the sale was conditional on the defendant building another house for himself on another piece of land before the agreed completion date stipulated in the agreement for sale, which was March 31, 1978, fifteen months later than the date of execution.
2. That it was a condition precedent to the agreement for sale that if the new house was not built by the agreed completion date, the plaintiff “would not insist on the legal rights given to him under the said agreement”. We stress the words quoted in inverted commas, as they appear to recognise that the agreement for sale gave rise to legal rights and liabilities.
3. That the completion date in the agreement for sale was inserted at the plaintiff’s request to enable

him to raise the purchase price by means of a loan from a building society.
4. That time was not of the essence of the contract. 5. That it was a condition precedent that the agreement for sale was conditional on alternative accommodation being available to the defendant.
5. That the agreement for sale was void for uncertainty.
6. That specific performance should not have been ordered without tender of the balance of the purchase price by the plaintiff.

By his reply, the plaintiff joined issue with the defendant on the various defences raised by him in his amended defence. At the trial of the suit, an agreed bundle of documentary evidence was put in, and the plaintiff gave evidence and called a witness. Both these witnesses were cross-examined at length by Mr Satish Gautama who then appeared for the defendant, after which the plaintiff closed his case. This was on March 27, 1980. The hearing resumed on May 8, when Mr Gautama informed the court that he was unable "for certain reasons" to continue to act for the defendant, and Mr Gautama applied for leave to withdraw.

The trial judge granted the defendant an adjournment until May 14, when the defendant informed him that he had engaged another advocate who was not present as he had not had sufficient time to prepare the case. The judge was not willing to grant a further adjournment, and invited the defendant to conduct his own defence. The defendant declined the invitation and did not even give evidence. The hearing then closed, and the learned judge proceeded to deliver his judgment, which consisted largely of a recital of the pleadings and of the evidence recorded, including the cross-examination of the plaintiff and his witness, to whom Mr Gautama had put the defendant's case very thoroughly. Then followed the judge's findings. He accepted the plaintiff and his witness as witnesses of truth. He held that the fifteen months allowed to the defendant by the agreement for sale represented the period contemplated by the parties as sufficient to enable the defendant to build his new house. The defendant then "dragged his feet" and presumed on the plaintiff's goodwill to extend the date of completion for an unreasonable period of time, so that the plaintiff's patience was "understandably exhausted" and he was left "with no alternative but to pursue his legal and equitable right." He then decreed specific performance of the contract of sale and ordered the defendant to execute and deliver the conveyance and give vacant possession within ten days, together with damages at the rate of Kshs 2,850 a month from April 1, 1978, representing interest paid by the plaintiff on the money borrowed by him from the Building Society to enable him to pay the balance of the purchase price on the stipulated completion date, April 31, 1978, and also ordered the defendant to pay interest on the damages and the costs of the suit.

From this judgment and the resulting decree the defendant has appealed, in a memorandum of appeal containing 22 grounds, 14 of which are the subject of the objections raised by Mr Nagpal which we are now about to consider and rule on separately. Before doing so, we have refreshed our minds as to the principles applicable to objections of this nature, in the light of cases decided by this court's predecessor. These are, in chronological order –

1. *Girdhari Lal Vidyarthi v Ram Rakha* [1957] EA 527 in which it was held that a plaintiff who had relied in his pleadings exclusively on a resulting trust in his favour could not on appeal be heard to allege an express trust, especially as the whole conduct of the proceedings below made it clear that only a resulting trust was in issue.
2. *Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd* [1960] EA 620, in which it was held that although an appellate court has a discretion to allow an appellant to take a new point on appeal it will not do so if the matter had not been properly pleaded or if all the facts bearing on the new point have not been elicited in the court below. The court cited with approval and followed three English authorities to the same effect, *Ex parte Firth* [1882] 19 Ch Div 419, *North Staffordshire Railway Co v Edge* [1920] AC 254, and *The Tasmania* [1890] 15 AC 223.
3. *Alwi A Saggaf v Abed A Algeredi* [1961] EA 767, in which it was held that a new point which had not been pleaded or canvassed should not be allowed to be taken on appeal, unless the facts, if fully investigated, would have supported it.
4. *Warehousing and Forwarding Co v Jafferali* [1963] EA 385. This was an appeal to the Privy Council from a decision of the Court of Appeal for East Africa which had allowed an appellant to

raise a new point of law for the first time on appeal. Lord Guest delivering the opinion of the Board said that there would have been no objection if the facts had been fully investigated and would have supported the new case, but as the question was never investigated, the new point should not have been allowed to be argued. Lord Guest did however cite an extract from the speech of Lord Watson in *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 to the effect that if the question is one of law turning on the construction of a document it may be not only competent but expedient to entertain the plea, but only if the facts, if fully investigated, would have supported the new plea. This proposition was accepted and followed by this Court in *Madhavdi and others v Sardarilal and others* (Civil Appeal No 5 of 1976) (unreported).

5. *Visram & Karsan v Bhatt* [1965] EA 789, in which the former Court of Appeal held that where an issue which has not been pleaded or canvassed is raised for the first time on appeal, it should not be allowed to be argued unless the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue.

With these authorities in mind, we now turn to a consideration of the specific grounds of appeal to which Mr Nagpal has taken objection.

The first of these grounds are 1 and 2, which relate to clause 9 of the agreement for sale, which reads:

> "9. This agreement is subject to the vendor showing and delivering a clear title."

The first two grounds of appeal contend that this clause was overlooked by the judge, and that such a clear title had to be shown before the date for completion, or at the latest before the order for specific performance was made. Mr Khanna, in support of these grounds, submitted that ground 1 raised a pure question of interpretation of a document, and ground 2 questions of interpretation and law. The agreement for sale was pleaded, annexed to the plaint and made part of the plaint, and was produced in evidence. Mr Khanna submitted that this court was in as good a position as the High Court to decide a question of construction, which does not involve the investigation of facts, and he relied on Lord Watson's dictum cited in the *Warehousing* case (supra) that it was not only competent but expedient for this court to entertain such a question.

We agree with Mr Khanna's submissions on this point, and dismiss the objections to grounds 1 and 2. Ground 3 is to the effect that the appellant was unable to clear his wife's beneficial half-interest in the suit property, or to repay a mortgage on the property. These are entirely new points, unpleaded and uncanvassed at the trial. No evidence whatsoever was adduced at the trial in relation to these points, and we see no justification for allowing them to be raised for the first time on appeal. We hold that the objection to ground 3 is well founded, and order that it be struck out. The same applies to grounds 4 and 5, which relate to the mortgage, a matter which was not pleaded or canvassed, and which we also order to be struck out. Ground 6 alleges that the plaint was defective and disclosed no cause of action for failure to plead that the plaintiff was willing and able to carry out his part of the contract. We think, without deciding the point at this stage, that this matter was sufficiently pleaded in paragraph 8 of the plaint, in the words that "the plaintiff has always been able and willing to pay over the balance due of the agreed price". By paragraph 3A of his amended defence, the defendant pleaded that the plaintiff was not entitled to seek specific performance without tendering the balance of the purchase price" "which he has not done." We think, again without deciding the point at this stage, that the question of the plaintiff's ability and willingness to carry out his part of the bargain was sufficiently made an issue in the suit, and that ground 6 should be allowed to stand.

Grounds 7, 8 and 9 all relate to the defendant's alleged difficulties in raising additional loans from the bank so as to enable him to pay off the original mortgage on the suit property, and appear to be directed at establishing that it was impossible for him to carry out his part of the bargain. Impossibility of performance by the defendant was not pleaded by him, nor was it canvassed in evidence. Even if he had difficulties in discharging the original mortgage, this could have been paid off by the plaintiff and deducted from the purchase price. We think that the objections to these grounds of appeal are well-founded and order that grounds 7, 8 and 9 be struck out as raising issues for the first time on appeal. The same considerations apply to grounds 13, 14 and 15 which raised the point of "impossibility" or "well-

high" impossibility on the part of the defendant in carrying out his obligations under the agreement. Impossibility of performance was not pleaded, nor did it become an issue at the trial. We order that these grounds of appeal be struck out.

Mr Nagpal conceded that ground 17 was arguable. We order that it do stand. Ground 20 again raises points concerning the defendant's wife's alleged rights and those of the mortgagee bank, matters which were never pleaded or canvassed, and which are covered by our decision on ground 3. We order that it be struck out.

To recapitulate, the preliminary objection has succeeded to the extent that 10 of the 14 grounds of appeal objected to have been struck out. We will now hear submissions as to what order for costs should be made with reference to the objection proceedings. We consider that the respondent, whose objections have substantially succeeded, is entitled to the costs of the objection proceedings, such cost to be the respondent's costs in the appeal in any event, and we so order.

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

E.J.E LAW

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JUDGE OF APPEAL

C.B MILLER

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR