IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NUMBER 130 OF 2009

BETWEEN

SHAFFIQUE ALIBHAI.....APPELLANT

AND

KARIM JAMAL.....RESPONDENT

(An appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Azangalala, J) delivered on 13th December, 2007

in

H. C. C. C. NO. 295 OF 2000*)*

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JUDGMENT OF THE COURT

1. This is an appeal from the judgement of the High Court (F. Azangalala, J as he then was) dated 11th December 2007 and delivered on 13th December 2007 awarding the respondent Kshs, 5,000,000.00, interest and costs on the basis that the consideration for which the parties had entered into an agreement for sale of land had failed.

Background

2. By a plaint dated 18th February 2000, the respondent instituted suit against the appellant before the High Court at Nairobi seeking an order for rescission of an agreement for sale of land; a refund of the purchase price of Kshs. 5,000,000.00 with interest at 25% per annum; and damages for fraud. The respondent pleaded that he entered into an agreement for sale with the appellant dated 18th April 1997 (the agreement for sale) in which the appellant agreed to sell to him a portion of the property known as L. R. No. 21288 comprising one (1) acre or thereabouts in the city of Nairobi (the property) for the purchase price of the Kshs. 5,000,000.00 which he paid.

3. The respondent asserted that the appellant induced him to enter into the agreement for sale by falsely representing that he held a leasehold title over the property; that he would cause the property to be subdivided into separate portions one of which would be transferred to him; that he was in a position to deliver to him all necessary completion documents and to transfer the property to him.

4. Upon discovery that the said representations were false, the respondent averred, he repudiated the agreement for sale by a letter dated 21st May 1998 and demanded refund of the purchase price.

5. In his amended defence and counterclaim, the appellant invoked the doctrine of *caveat emptor* and pleaded that the respondent should have been aware and should have carried out an official search over the property to a ascertain "*if ever it existed was (sic) Karura Forest or where in Nairobi and if Karura Forest the Defendant was in a possible position to so subdivide and transfer within the 90 days*." The appellant also pleaded that the respondent had approached the court with dirty hands and his claim should be struck out because: the agreement for sale did not indicate who his advocates were; the plaint did not disclose when "10% stakeholder (sic) was ever received" by the appellant; that if indeed there was an agreement for sale, oral statements are irrelevant; and that the plaint did not disclose when the last payment was completed.

6. The appellant pleaded further that the respondent breached the agreement by making it impossible for him (the appellant) to comply with the terms of the agreement; and that the respondent breached the contract and the sale was voided. The appellant averred that the agreement

for sale was "conditional on payment of Kshs. 5,000,000.00" which the respondent failed to pay.

7. In his counterclaim, the appellant sought judgement against the respondent for Kshs. 2,400,000.00 on the basis that the respondent defrauded him of the said amount "*by way of procuring insurance policy abroad which turned out to be nonexisting and if at all existed worthless*." (sic).

8. The trial of the action commenced before Hewett, J in January 2001 but subsequently started de novo before Azangalala, J in December 2005. The respondent testified on his own behalf and called one Amin Akberali Manji as his witness. The appellant on the other hand testified on his own behalf. He did not call any other witnesses.

9. The trial judge considered the evidence and the submissions and found as a fact that the agreement for sale was entered into on the basis of representations made by the appellant to the respondent in respect of the property ***"which representations were in fact not true"*** in that the appellant ***"had not perfected his title in the suit property and could not…comply with the terms of the agreement at all."***

10. The Judge also found as a fact that the respondent had paid the purchase price of Kshs. 5,000,000.00 to the appellant and pronounced that:

> ***"I find that the plaintiff*** (respondent) ***has proved on a balance of probabilities that he is entitled to the sum of Kshs. 5,000,000.00 being refund of the purchase price of the suit property."***

11. The Judge however rejected the respondent's claim for damages for fraud as well as the appellant's counterclaim.

12. Aggrieved by the judgment, the appellant lodged this appeal.

The appeal and submissions by counsel

13. Although in his memorandum of appeal the appellant challenged the judgement of the High Court on 12 grounds of appeal, there are, in essence, two issues that arise from the grounds of appeal. The first issue is whether the learned Judge was right in concluding that the agreement for sale was procured through false representations and whether the respondent was in the circumstances entitled, as the learned Judge held, to rescind the agreement. The second issue is whether the respondent established that he paid the purchase price and whether he was entitled to a refund of the same as ordered by the court.

14. During the hearing of the appeal counsel relied entirely on their respective written submissions. Miss Kethi Kilonzo, learned counsel for the appellant submitted that the Judge failed to appreciate that the function of the court is to enforce what was agreed upon by the parties as opposed to what the court thought ought to have been fairly agreed between the parties; that whereas the agreement for sale described the interest in the property as leasehold, the appellant did not describe himself as the holder of that leasehold interest; that neither did the appellant represent that he was selling as the owner; that even though the agreement for sale did not describe the capacity in which the appellant was selling the property, there was no misrepresentation as to his capacity or the interest in the property; and that perfection of the title was indicated in the agreement for sale as 90 days after the subdivision and issue of a Deed Plan in respect of the portion that was being sold.

15. Counsel submitted further that a Transfer dated 6th February 1996 registered against the title as well as a Trust Deed bearing the same date were produced; that the appellant's evidence that he showed those documents to the respondent prior to execution of the agreement for sale was not disputed. According to counsel, when inquiry was made by the respondent regarding the capacity in which the appellant was selling the property, the appellant showed the respondent the Trust Deed and informed him that the title was in the name of Acro Traders Ltd and Noorudin Nanji.

16. Counsel urged that it was not open to the respondent to repudiate the sale on the basis of advice received 7 months after execution of the agreement for sale; that a party is not entitled to repudiate an agreement on the basis of advise received after the fact; and that there was no evidence to show that the appellant was unable to achieve sub division, obtain a Deed Plan and transfer the portion the subject of the sale to the respondent or was otherwise in breach of the agreement so as to justify repudiation.

17. Counsel cited a House of Lords decision, **Woodar Investment Development Ltd vs. Wimpey Construction UK Ltd [1980]1 All E R 571,** for the proposition that an erroneous attempt at rescission does not amount to repudiation and that repudiation should only be held to arise in clear cases of refusal to perform contractual obligations in a matter going to the root of the contract. She also cited the English Court of Appeal decision of **Howe and another vs. Smith [1881-5] All E.R 201** to support the argument that a party in breach who repudiates, will lose their deposit as they are not entitled to a refund of it.

18. As regards payment of the purchase price, Ms. Kilonzo argued that the Judge was wrong in concluding that the full purchase price had been paid; that the agreement for sale made no reference whatsoever to payment in advance or to set off for insurance refunds; that parole evidence was not admissible to vary or modify or supplement the terms of the agreement for sale; that the minutes of a meeting which the Judge relied upon to support his finding made reference to a purchase price of Kshs. 6,000,000.00 as opposed to Kshs. 5,000,000.00 and referred to land in Naivasha as opposed to the property and that the minutes were "tailor-made" for purposes of the court proceedings.

19. Opposing the appeal, learned counsel Ms. Wangari Kamau holding brief for Mr. A. Wandabwa for the respondent submitted that the Judge's decision was well founded; that a beneficiary under a trust deed, such as the appellant, has no capacity to transfer property; that without capacity, the agreement for sale was void for all intents and purposes and unenforceable; that the appellant, as the Judge correctly found, misrepresented that he held a leasehold interest in the property and could undertake subdivision and complete the transaction within

90 days.

20. As regards payment of the purchase price, it was submitted that there was overwhelming documentary evidence in the form of the agreement itself, correspondence, copies of cheques, debit notes and minutes of a meeting that established beyond doubt that the respondent had paid the purchase price of Kshs. 5,000,000.00.

Analysis and Determination

21. We have considered the appeal and the submissions by counsel. This being a first appeal, we are obliged to review and analyse the evidence and draw our own conclusions. We cannot, however, interfere with the findings of fact by the learned Judge unless such findings are not based on evidence or are based on a misapprehension of the evidence or if it is shown that the Judge acted on wrong principles in arriving at those findings. In the frequently cited case of **Selle and another versus Associated Motor Boat Company Limited & 2 others [1968] EA 123** this Court stated that:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanour of the witness is inconsistent with the evidence in the case generally."***

22. With that in mind, there are, as already stated, two closely interlinked questions for resolution in this appeal namely, whether the learned Judge was right in his determination that the appellant did not have capacity to transfer the property and that the respondent was therefore entitled to repudiate the agreement for sale and whether the finding that the respondent was entitled to a refund was supported by the evidence.

23. On the question whether the respondent was justified in repudiating the agreement on the basis of misrepresentations, the learned Judge, as already indicated, stated that the appellant

> "***had not perfected his title in the suit property and could not in my view comply with the terms of the agreement at all***." He went on to state that the appellant made representations to the respondent in respect of the suit property "***which representations were in fact not true***" and then concluded that:
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> ***"In view of the fact that the defendant was not in a position to transfer the suit property to the plaintiff by the completion date and is not now in such a position, the plaintiff was entitled to repudiate the agreement of sale of 18.4.1997."***

24. In his testimony before the trial court, the respondent (who was the plaintiff in the lower court) stated that the appellant was his friend and a member of his community; that he entered into the agreement for sale with the appellant and agreed to purchase the property for Kshs. 5,000,000.00; that "*when i paid to the defendant* [appellant] *I did not know that property in (sic) different names*." In that regard, he referred to an instrument of Transfer dated 6th February 1996 between Mamburui Investments Limited, as vendor, (Mamburui) of the first part, The President of the Republic of Kenya of the second part, and Acro Traders Limited and Noorudin Nanji as joint purchasers of the third part. Under that instrument, Mamburui agreed to transfer the property to the joint purchasers. By the same instrument, Acro Traders Limited covenanted to transfer to Noorudin Nanji by way of partition a sub-plot of the property marked as B immediately a valid Land Survey Deed Plan for the same was issued by the Director of Surveys.

25. The respondent also referred in his testimony to a Declaration of Trust also dated 6th February 1996 made between Noorudin Nanji and the appellant that was expressed to be "supplemental" to the Transfer dated 6th February 1996 in which it was indicated and acknowledged that the purchase price paid to Mamburui as well as all costs, expenses and disbursements in connection with the said Transfer "*were in fact provided and paid by*" the appellant as beneficiary. By the same Deed, Noorudin Nanji confirmed and declared that he held the property in trust for the appellant.

26. When, over one year later, the appellant entered into the agreement for sale on 18th April 1997 with the respondent agreeing to sell a portion of the property to the respondent, beyond the statement in the agreement for sale that the "*interest sold is leasehold*," no reference was made, in the agreement, to

the Transfer from Mamburui or to the Declaration of Trust dated 6th February 1996. The capacity in which the appellant was selling a portion of the property was not indicated in that agreement.

27. The appellant on his part agreed in his testimony that he indeed entered into the agreement for sale with the respondent. He stated that "*the property was to* (be) *sub-divided and I transfer 1 acre to the plaintiff*." He however contended that he was not bound to transfer if the purchase price was not paid. He maintained during the trial that he was not in breach of the agreement for sale and that if the respondent "*pays the said balance, I will complete the transaction*."

28. The completion date under the agreement for sale was expressed to be 90 days from the date of issue of the Deed Plan. The obligation to provide the Deed Plan, under special condition 1 of the agreement for sale, lay with the appellant. However, according to the appellant, he "could not complete without payment of balance" of purchase price.

29. The respondent asserted that he approached the appellant for the title and that the appellant, rather than obliging, told him **„to do what he liked.?** The appellant did not contest this claim. On 21st May 1998, notably over one year after execution of the agreement for sale, the respondent through his advocates wrote a demand letter to the appellant demanding a refund of the purchase price paid on the basis that the subdivision of the property and transfer to the respondent was overdue and further that "*it has since transpired*" that the appellant "*was not in a position to sell the land*" he had contracted to sell to the respondent.

30. In a response dated 29th May 1998 from his advocates, the appellant stated that the time for completion had not begun to run, that the Deed Plan had not been issued as the sub-division had not yet been approved and that there had been a delay that was not originally anticipated. In the same letter, the appellant sought evidence that the purchase price of Kshs. 5,000,000.00 or "of some or all of this amount" had been paid.

31. In light of that evidence, the finding by the learned Judge that the appellant "*had not perfected his title in the suit property and could not…comply with the terms of the agreement at all*" is well founded.

We accept, as submitted by counsel for the appellant, that the appellant did not expressly represent in the agreement for sale that he was the holder of the lease over the property but he undoubtedly represented that he would be in a position to transfer the property to the respondent, when in fact, he was not in a position to do so.

32. According to the respondent, the appellant told him, on enquiry regarding the position of the land, that he should do what he liked. In effect, the appellant thereby evinced an intention no longer to be bound to perform his obligations under the agreement for sale. That was in our view tantamount to a repudiatory breach on the basis of which the respondent elected, through its advocates' letter dated 21st May 1998, to treat the agreement for sale as at an end and to demand a refund of the purchase price. In our judgment therefore, the learned Judge was not only right in his determination that the appellant did not have capacity to transfer the property but was also right in holding and that the agreement for sale was repudiated. We are accordingly unable to interfere with the finding of the Judge in that regard.

33. We turn now to the issue of the payment of the purchase price. In his amended defence and counterclaim dated 27th November 2003, the appellant pleaded that the respondent breached the agreement for sale in that the sale was "conditional on payment of Kshs. 5,000,000 million which the [respondent] has failed to comply with." The question therefore is whether there was evidence before the learned Judge to support the finding that the purchase price was paid.

34. In his testimony before the trial court, the respondent asserted that "*I paid the* [appellant] *the Kshs.5 million*." He produced copies of cheques for a total of Kshs. 2,550,000.00 issued between June and September 1997 and drawn on his account with Imperial Bank Limited in favour of the appellant. He maintained that other payments were made prior to execution of the agreement for sale. He produced, for instance, a copy of a letter dated 16th July 1996 in which the appellant acknowledged receipt of Kshs. 1 million as purchase price for "*sale of 1.0-acre plot in Wispers-Gigiri sub plot L.R. No. 21288*." Instructively, the appellant stated in that letter that "*a sale agreement and transfer of the above plot will follow shortly. The advocates for the sale is (sic) Messrs. Mohammed Madhani & Company Advocates*." He conceded that no reference was made in the agreement for sale to such payments. Indeed, the agreement for sale provided that the purchase price "*shall be paid to the vendor upon exchange of contract*."

35. In a letter under the subject reference "Portion of L. R. No. 21288" dated 2nd March 1998 addressed to Ms. Archer & Wilcock advocates by Shapley Barret & Co advocates, the latter advocates demanded refund of the purchase price stating:

> "*We understand that Mr. Shaffique Alibhai has agreed to refund to Mr. Jamal full purchase price i.e. Kshs. 5,000,000.00 together with interest thereon*."

36. In their response to Shapley Barret & Co advocates dated 6th March 1998, Ms. Archer & Wilcock advocates whilst stating that inquiries would be made with the appellant stated that "*the money was paid directly from you (sic) client directly to Mr. Alibhai*."

37. The respondent also produced minutes of a meeting held during the pendency of the suit in which the appellant agreed to pay to the respondent an amount of Kshs. 6. Million in settlement.

38. In light of these evidence, the finding by the learned Judge that the appellant admitted having received the purchase price is well supported. We do not have any basis for interfering with that finding. We are not persuaded that reliance on such admissions as forming the basis of the finding amounted to a modification of the agreement for sale.

39. The result of the foregoing is that the appeal is devoid of merit. It is accordingly dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of February, 2018.

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR