



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & MAKHANDIA, J.J.A)

CIVIL APPEAL NO. 154 OF 2009

DELILAH KERUBO OTISO

Suing as legal representative of the state of

CHARLES OTISO GETUGI.....APPELLANT

AND

RAMESH CHANDER NDINGRA.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Ojwang, J) dated 7th October, 2005

in

H.C.C.C. No. 1930 of 1997)

JUDGMENT OF THE COURT

The facts that form the basis of the dispute now before this Court go back in time to 10th May 1989. On this occasion, the parties to this appeal entered into a lease agreement for an education institution known as Gusii Highlights High School together with the premises therein. The appellant was the Lessor, whereas the respondent was the Lessee. By a variation of the lease agreement dated 22nd February, 1994 the rent payable until the year 2002 was mutually agreed. Further the parties agreed that the respondent could at his own expense build more classrooms and other supporting or necessary amenities. Pursuant to that agreement, the respondent constructed 19 buildings at a cost of Kshs. 2 million valued at Kshs. 12,800,000/- as at June 1998. This expansion transformed the school into a prestigious learning institution within the then Kisii District.

In or about October 1995, the appellant requested and was advanced a sum of Kshs. 300,000/- by the respondent on the premise that he would sell and transfer the School to the respondent. By an agreement dated 24th November 1995, the parties formally entered into a sale agreement for the sale of the two schools; Gusii Highlights High School and Gusii Highlights Academy (*the academy*) and the premises all of which were erected on **LR No. NYARIBARI CHACHE/B/B/BOBURIA/1448, 2780, 2995 and 3328** (*the suit premises*) for the price of Kshs. 10,500,000/-. At the time, the appellant was running and managing Gusii Highlights Academy. The respondent paid Kshs. 2 million to the appellant towards the purchase price and later Kshs. 15,000/- as further part payment of the purchase price. Under the said agreement, the respondent was to acquire immediate possession of the academy and other premises therein following the execution of the sale agreement. With that understanding, the respondent embarked on advertising the academy.

Following an advertisement campaign by the respondent aforesaid that the Academy was now associated with Gusii Highlights High School, it led to improved intake of students. The appellant, contrary to the agreement, refused to hand over the academy after he realized an improved intake of students in the academy and the resultant income. The appellant since then has continued to manage the academy and refused and or neglected to transfer it to the respondent thereby depriving him of substantial income, amounting to Kshs. 12,755,250/- as at the time of filing the suit. According to the respondent, the appellant, upon execution of the sale agreement and receiving payments aforesaid suddenly became unavailable, frustrating the performance or completion of the contract. The foregoing notwithstanding, the appellant requested the respondent to release a sum of Kshs. 868,435.40 to Kenya Commercial Bank Limited, (*KCB*) for the redemption of the suit premises which he had charged to the Bank and which the appellant was obligated to discharge pursuant to the sale agreement. The respondent went ahead and redeemed the charges and had the suit premises transferred to himself pursuant to **section 73** of the **Registered**

Land Act (now repealed). Despite the respondent complying with the appellant's instructions, he in vain, pressed the appellant to complete the transaction vide his demands in letters dated 5th July 1996 and 11th September 1996. It is instructive that at all material times, the respondent was ready and willing to perform his part of the contract.

It is on that premise that the respondent instituted the suit leading to this appeal. The respondent sought from court, orders of; specific performance of the sale agreement; vacant possession of the academy and all the residential houses built on the academy land; all necessary and consequential accounts, directions and inquiries; damages for breach of contract and in the alternative, rescission of the contract between the parties and repayment of Kshs. 2,886,107.40 paid to the appellant under the agreement with interest at 35% per annum from 24th November, 1995 until payment in full; costs and interest on damages.

In his defence, the appellant admitted the sale agreement between him and the respondent and acknowledged receipt of Kshs. 2 million as deposit on account of the purchase price thereunder. He however denied receiving a further Kshs. 15,000/- as alleged. His main defence, though, was that the respondent failed to pay the balance of the purchase price within 120 days as stipulated in the sale agreement and was therefore only entitled to a refund of Kshs. 2 million paid under the contract. That in view of the respondent's alleged breach of contract for failing to pay the balance of the purchase price within the completion period; the appellant claimed he was entitled to withhold possession of the suit premises. He admitted having authorized the respondent to release Kshs. 868, 435.40 to KCB but denied that the same was for redemption of the suit premises that were then charged to KCB. In a nutshell, the appellant's defence was that the respondent was not ready, willing and able to complete the contract within the time frame stipulated in the sale agreement and was therefore undeserving of the reliefs sought.

The suit fell for determination before **J.B. Ojwang', J** (as he then was) who found that; as soon as the respondent had cleared the mortgage obligations upon request by the appellant, the appellant deliberately became unavailable at a crucial stage when he was required to sign the Land Control Board consent forms, to enable consent for the transaction to be granted under the provisions of the Land Control Act. The said forms had already been executed by the respondent but not the appellant because of his unavailability. The Judge too found that, though transfer to the respondent of the suit premises could not be effected in the absence of the Land Control Board consent, the appellant still bore liability in contract to the respondent. According to the Judge, the appellant having committed himself to a valid legal instrument in contract, had obligations to perform towards the respondent, failing which he was required to make good the loss occasioned to the respondent in the form of damages. On that, the judge ordered the appellant to refund to the respondent Kshs. 2,886, 107.40 with interest at the rate of 35% with effect from 24th November 1995 until payment in full; Kshs. 20 million as general damages with interest at court rates from date of judgment till payment in full, for breach of contract, and costs of the suit with interest thereon at court rates from the date of filing suit.

Aggrieved by the judgment and decree aforesaid, the appellant lodged the present appeal challenging the Judge's award of general damages for breach of contract when according to him such damages were untenable; the Judge's finding that there was breach of contract as the contract, in his view, was void pursuant to the provisions of the Land Control Act. Further, the appellant faulted the Judge for awarding interest on the refund of Kshs. 2,886,107.40 at the rate of 35% which he termed as void for all intents and purposes. According to the appellant, that sum was only recoverable as a civil debt and not pursuant to a void contract. The appellant accused the Judge of misapprehending the gist and tenor of the Land Control Act thus arriving at a wrong decision. Finally, the appellant contested the award of costs to the respondent. Whilst the appeal was pending, the appellant passed on and was subsequently substituted by his wife, the current appellant.

This appeal was canvassed by way of written submissions with no oral highlights. According to the appellant, the key issue for determination before this Court relates to interpretation of the **Land Control Act "the Act"** as it was not disputed that the transaction was a controlled transaction within the meaning of the Act. It was also not in dispute that the requisite Land Control Board consent was not obtained. The appellant cited a plethora of authorities to advance the proposition that where consent is not obtained in a controlled transaction, monies paid in the course of such transaction is only recoverable as a debt. The appellant hinged his argument on **section 6(1) and 7** of the Act which provides as *inter alia*;

"6(1) Each of the following transactions –

(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area. is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act.

(7) If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22." (Emphasis added)

Therefore, and according to the appellant, the court could not ignore clear and express aforesaid provisions of the Act and invoke common law, the doctrines of equity and or the statutes of general application in finding for the respondent. In essence, the appellant's argument was that since the transaction was controlled and falling within sections 6 and 7 of the Act, the only available remedies to the respondent were those provided therein; and that the Judge therefore erred in granting common law reliefs or reliefs outside the purview of the Act.

The appellant challenged the general damages awarded from the point of view that section 7 of the Act did not envisage an award of general damages as relief to a party of avoided transaction. He also added that the Judge went beyond the prescriptions of general contract law where general damages are not recoverable as a remedy for breach of contract. Since the Judge had awarded interest at the rate of 35% to the sum of Kshs. 2,886,107.40, the appellant in his submissions considered whether interest was recoverable pursuant to an avoided transaction under section 7 of the Act. The appellant contended that no such intention could be discerned from a reading of that provision and argued that if Parliament desired such intent, then nothing would have been easier for it than to simply to say so. In the appellants view such interest could not in fact be awarded since the clause in the contract providing interest is part of what is 'void for all purposes'.

In conclusion, the appellant argued that since the contract had been rendered void for all purposes for want of Land Control Board consent, there was nothing for him to be held in breach of, and so the damages awarded for such breach were untenable. For those reasons the appellant prayed that the appeal be allowed.

The respondent in his written submissions in opposition to the appeal supported the findings of the learned Judge. He submitted that the Judge in his determination had undertaken an appraisal of the evidence tendered; considered the provisions of the Act and further made a distinction of the public purpose in administration of agricultural lands under the Act and private law principles such as sanctity of contract which was binding between the parties to a contract *in-personam* which entailed contracting parties, contractual and equitable rights. That in balancing the two notions the Judge proceeded to award the respondent general damages for breach of contract and loss. He declined to order specific performance for want of consent of Kisii Land Control Board. Accordingly, the respondent argued that the appellant's ground of appeal that such damages were untenable must fail. More so, since the transaction between the parties was more than a transaction involving just land, it also involved running and managing schools on the suit premises. The respondent was of the view that economic or commercial consequences emanating from operating the schools were pleaded and proved before the trial Judge.

In response to the appellant's ground of appeal that the Judge erred in holding the appellant in breach of the contract for the sale of the suit premises, the respondent submitted that the Judge after consideration of the evidence found the appellant dishonest and deceitful as he had no reasonable excuse for failing to execute the consent forms before lapse of six months as stipulated under the Act. This was based on the evidence that the appellant disappeared after the execution of the sale agreement and only re-surfaced in May 1996, to claim that the six months stipulated under section 7 of the Act for the application for the consent be made, had expired and the contract was therefore void, despite having received a substantial amount of money from the respondent towards the purchase price.

The respondent also contended that the interest awarded by the Judge on the sum of Kshs. 2,886,107.40 at 35% was proper since it was a term of the sale agreement which the respondent contended the court could not re-write or vary. According to the respondent therefore, the Judge was merely applying agreed contractual terms. The respondent further pointed out that the Judge had taken exception to the appellant's actions of being deceptively evasive to void a contract and then invoking the provisions of the Act to escape liability or obligations. According to the respondent therefore, the Judge fully apprehended the gist and tenor of the Act and came to a correct finding. The respondent asserted that he was rightfully entitled to the costs of the suit since costs follow the event and had succeeded in his claim.

The respondent also pointed out that he had been a tenant of the appellant since 1989 and had paid rent in advance up to end of 2002. The respondent claimed that the appellant in choosing to sell the suit premises to him in 1995 was partly because he had been unable to service the loans and the suit premises had been threatened with auction. He contended that these facts were never contested in the High Court.

The issues for determination in this appeal, in our view are; whether there was breach of the contract entered between the parties; the award of general damages for breach of contract; the order for the refund of Kshs. 2,886,107.40 with interest at 35 %, and costs.

This being a first appeal, this Court's jurisdiction is circumscribed by rule 29 (1) of its Rules. The Court has to re-evaluate and re-appraise the evidence tendered before the trial court and reach or come to its own conclusion(s). In **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212**, this Court stated *inter alia* that: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

See also **Selle & Another v. Associated Motor Boat Company Ltd & Others (1968) EA 123**; **Jivanji vs Sanyo Electrical Company Ltd. (2003) KLR 425**.

The appellant has challenged the trial court's conclusion that there was breach of the agreement of sale dated 24th November 1995 by him. The facts of the suit were fairly straightforward and undisputed. The parties executed a sale agreement for the sale of the suit premises with the development thereon being schools and residential house and other amenities. The respondent had prior to the agreement been a lessee of the appellant since 1989 when he leased, took possession and the management of Gusii Highlights High School situate on the suit premises. In 1995 the two entered into negotiations of sale and purchase of the Academy from the appellant at a cost of Kshs. 10.5 million. The appellant had then been unable to service loans secured by the suit premises and upon threats of auction negotiated to sell the Academy and the suit premises to the respondent. Pursuant to the agreement, the respondent paid the appellant Kshs. 2 million being deposit on account of the purchase price. Material facts were that the completion date was to be within 120 days, time being of the essence. The agreement was in respect of the academy, the boarding house and the residential house situate on the suit premises. The agreement also contained a clause to the effect that;

“IF THE VENDOR FAILS TO COMPLETE THE TRANSACTION WITHIN COMPLETION DATE HE SHALL REFUND THE STAKEHOLDER SUM OF KSHS. 2,000,000/- FORTHWITH ALONG WITH 35 % PER CENT INTEREST FROM THE DATE OF THIS AGREEMENT. ”

The respondent alleges that after the execution of the agreement he embarked on an aggressive advertising campaign to market the academy and his efforts paid off through improved students' intake. The appellant seeing the improvement in enrolment and accompanying income suddenly became evasive and unavailable with the sole purpose of frustrating the sale agreement. He only reappeared in May 1996 well after the six (6) months period within which time to procure the consent of the land control board had expired. The above facts were not disputed by the appellant and even where he attempted to, the rebuttal was less than satisfactory. For instance, he attributed the non-performance or frustration of the contract to the respondent on account that he did not pay the balance of the purchase price. The appellant did not claim or demonstrate that he was ready, able and willing to complete his part of the bargain were it not for the actions or omissions of the respondent. He also did not dispute that he was to furnish and obtain the necessary documents to complete the transaction or that he failed to produce the same. The appellant did not or could not give a reasonable excuse to explain his failure to furnish the completion documents; nor could he explain his disappearing acts. Further, the appellant had not even disclosed to the respondent that the suit premises had a charge by the income tax for non-payment of tax. On the other hand, the respondent demonstrated attempts he made to complete the transaction by paying the deposit of the purchase price, a further Kshs. 15,000/- and even paying for the discharge of the charge from KCB. Finally, he prepared and signed the Land Control Board forms which he passed over to the appellant for execution but he did not. In the circumstances of this case, to find that the appellant was not in breach of the contract would be preposterous. Without belaboring the point, in our view, the appellant was clearly in breach of the sale agreement dated 24th November 1995 as rightly held by the trial Judge.

The appellant has challenged the trial Judge's award of general damages to the respondent as compensation for breach of contract from two fronts. First, that section 7 of the Act did not envisage the award of general damages where a controlled transaction was voided and secondly, that the general law of contract did not provide for general damages as a remedy for breach of contract. It is clear from the Judge's determination that he awarded general damages as compensation for breach of contract. So how did the learned judge arrive at the award? The Judge delivered himself as follows;

"I therefore hold that, notwithstanding that the transfer of the suit properties, namely L.R Nos NYARIBARI CHACHE/B/B/BOBURIA/1148, 2780, 2995 and 3328 to the plaintiff cannot take place in the absence of the consent of the Kisii Land Control Board, the defendant still bears liability in private contract towards the plaintiff. It is precisely the conduct of the defendant, who has definite contractual obligations to the plaintiff, which has rendered the transfer process void under the public land management law, the Land Control Act (Cap.302). The defendant committed himself in a valid legal instrument to perform certain obligations toward the plaintiff, in return for considerations and commitments from the plaintiff. The law of contract requires the defendant to make good the loss which he had thus occasioned to the plaintiff. I hold that the defendant must make recompense in the form of damages.

Learned counsel for the defendant has set store by both the Land Control Act and a set of judicial decisions being on that statute. I would distinguish all those decision, firstly because they had not been made in the context of facts such as the very detailed ones of the instant case, which I have fully recorded and attempted to summarise. At the end of the day, the outcome of a judicial decision must be, and be seen to be, fair. The reality and appearance of fairness is inseparable from the specific details and nuances of a particular case. In the present case I have considered much detail, and it shows wrong on the side of the defendant, and right on the side of the plaintiff. The defendant has acted deliberately to deal a death blow to the plaintiff's interests such as would have ensued from a binding contractual undertaking. I hold that even as the statute law governs the property-holding situation which would have followed if the defendant did not renege on his obligations, the sanctity of the original contract must be upheld, and damages paid for breach.

Such are not considerations that featured in the learned decisions cited by counsel: *Kariuki v. Kariuki* [1983] KLR 225; *Richard Kamiri Gachwe Kahia v. Edward Kamau Ng'ang'a*, Civil Appeal No. 16 of 2001; *Rioki Estate Co. Ltd v Kinuthia Njoroge* [1977] KLR 146.

From the foregoing analysis it follows that this suit is won by the plaintiff and lost by the defendant. The only question left is, what remedy is to be awarded?

It is equally clear that I cannot award remedies on the basis that the transactions contemplated in the sale agreement of 24th November 1995 did take place or did achieve the intended result; their taking place was frustrated and nullified by the acts of the defendant. The defendant is, firstly, to refund with full interests all the moneys he received from the plaintiff, on the pretension that he would perform the contract as agreed. Secondly, the defendant is to pay general damages for his breaches of the said contract. Although it is well known that damages in contract are normally special damages, because of the preciseness of contractual undertakings and the fact that the damage flowing out of the breach would be ascertainable, the contract herein was to lead to relatively less well-defined processes, such as the management of education in primary and secondary school. The open-textured scope of such activities would rule the suitability of special damages. But it must be noted at the same time that general damages, being compensatory in nature, cannot be arbitrarily derived; there must be an objective reference-point for the relevant figures. In the context of this case, it will be entirely proper to derive figures to support an award of general damages from activities of the parties which may well have become void on account of want of consent of the Land Control Board."

The Judge then proceeded to order general damages in the sum of Kshs. 20 million with interest at court rates till payment in full. The issue then becomes whether the Judge was justified in the award of general damages. As can be gleaned from the above extract, the Judge was alive to the issues of voiding the agreement for want of consent of the land control board; that ordinarily breaches of contract do not attract general damages; and that there were exceptions to that general rule. We entertain no doubts that the Judge was right in his conclusions. It is instructive to note that the agreement was not all about land. It encompassed commercial undertakings as well, the respondent having leased the suit premises up to the year 2002. See the Nigerian case; Marine Management Association & Another v National Maritime Authority [2012] 18 NWLR 504. In similar vein this Court in Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited (2016) eKLR, the court of Appeal remarked as follows;

"For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had

been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages. The trial court's finding on that score can thus not be faulted.

On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the Nigerian case of Marine Management Association & Another vs National Maritime Authority (2012) 18 NWLR 504.

The respondent on the other hand maintained that there cannot be any award of general damages for breach of contract and placed reliance on the following authorities; Provincial Insurance Company EA Ltd v. Mordekai Mwangi Nandwa (supra), and Joseph Ungadi Koderu vs Ebby Kangisha Kawai, KSM C. A. No. 239 of 1997 (ur). The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent's conduct into the exceptions it alluded to above. ”

In Hadley v Baxendale (1854) 9. Exch. 341, the measure of damages is such as may be fairly and reasonably considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach. (See also Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB - Civil Appeal No. 37 of 2003 (2004) eKLR). As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the plaintiff is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. There is no doubt that in the circumstances of this case, the respondent did all he could to mitigate his loss; for instance, he discharged the charge and prepared the land control board consent forms for the appellant's signature which the appellant frowned upon.

In our view, the appellant's conduct was oppressive, highhanded, outrageous, callous and underhanded, to say the least. We could go further and suggest that what he was engaged in, bordered a fraud. The appellant from the word go never had the slightest intention of honouring the agreement. The appellant was paid a deposit of Kshs. 2 million and earlier, he had been paid Kshs. 300,000/- on the premises of purchase of the academy. He approached the respondent to redeem the charge held against the suit premises by KCB which was acceded to. He paid a further Kshs. 15,000/- on execution of the sale agreement, yet the appellant did nothing to advance the transaction. If any, he engaged in a hide and seek game with the respondent. He engaged in a disappearing act whenever it suited him only to re-appear and invoke section 7 of the Act and proclaim that the transaction was void. It even emerged from the evidence that the two properties had a charge to Income Tax, a fact he knew but never disclosed to the respondent. Despite receiving the money, the appellant never handed over the Academy and residential house as was required under the agreement; never obtained the discharge from Income Tax and further still, did not obtain the consent of the Land Control Board. In the circumstances, general damages would be tenable in our view. Given the foregoing, how can the judge be faulted for invoking the general principles of contract law as opposed to the provisions of sections 6 and 7 of the Act so as to annul the sale agreement? Had the judge taken that route the result would have been unjust and oppressive to the appellant. The court would have sanctioned the unacceptable conduct of the appellant and allowed him to benefit from his own mischief.

The appellant has further faulted the award of interest at the rate of 35% on the sum of Kshs. 2,886,107.40. In our view nothing turns on this contention as the parties had agreed on the interest rate in their sale agreement which as submitted by the respondent the court had no business interfering with, other than enforcement of the same.

On the issue of cost, it's been held previously that costs are in the discretion of the trial court though the generally accepted principle is that costs follow the event, unless the court has good reason to order otherwise. The successful party will always have costs of his success, which is the case herein. In the case of Attorney General v Halal Meat Products Limited (2016) eKLR,

“Generally, costs ought to follow the event unless the court otherwise orders for good reasons. The Supreme Court in Jasbir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & Others (2014) eKLR held,

‘It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure.’

In the present case, there are no exceptions apparent or advanced for this Court to interfere with the discretion of the trial court.

All factors considered, this appeal ought to fail in its entirety with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 31st day of July, 2018.

W. OUKO. (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR