IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, AZANGALALA & SICHALE, JJ.A)

CIVIL APPEAL NO. 81 OF 2007

BETWEEN

BUTULI HASSAN……APPELLANT

VERSUS

JAMES NJUGUNA NJOROGE…….....RESPONDENT

(*Appeal from the judgment of the High Court of Kenya at Nairobi (**Ang'awa, J**) dated 27th February, 2007*)

JUDGMENT OF THE COURT

[1] This appeal arises from a suit that was filed in the High Court (Milimani Commercial Courts), by James Njuguna Njoroge (*herein the '**respondent**'*). He had sued Butuli Hassan (*herein the '**appellant**'*) seeking *inter alia* an order for specific performance of a sale agreement dated 27th August, 2005, and an order that the appellant do execute the transfer of lease pertaining to title for property known as Nairobi/Block 125/124 (*hereinafter referred to as '**the suit property'***).

[2] The respondent's suit was anchored on a written agreement allegedly entered into between him and the appellant. In the agreement the appellant who is the registered owner of the suit property agreed to sell the suit property to the respondent at a consideration of Kshs.1.7 million out of which the appellant acknowledge receipt of Kshs. 1,120,000/-. Although in accordance with the agreement, the balance of the purchase price was to be paid on 7th October, 2005, the appellant became evasive and the respondent only managed to successfully deliver the money to her on 7th January, 2006. However, the appellant failed or refused to execute the necessary transfer documents in favour of the respondent thereby rendering the suit necessary.

[3] The appellant having been served with summons, failed to file a defence within time, as a result of which interlocutory judgment was duly entered in favour of the respondent. Subsequently the matter was listed before Ang'awa, J for formal proof. It was agreed by the parties that several documents be put in evidence without calling the maker. Accordingly several documents including the sale agreement dated 27th August 2005, and certified copies of the cheques for payment were admitted in evidence. In support of his case the respondent testified that he was originally a tenant in the suit property when he came to learn that the suit property was in the process of being sold because of a loan of Kshs. 670,000 that the appellant, who was his landlady was unable to pay. It was then that the respondent negotiated and agreed with the appellant for the appellant to sell the suit property to him at a consideration of Kshs.1.7 million.

[4] The respondent made a down payment of Kshs. 670,000/= through a bankers cheque drawn on National Bank. Subsequently the respondent made further payments of Kshs. 50,000/= and Kshs. 400,000/=. The appellant acknowledged all these payments in the written agreement. After these payments, the appellant became evasive, and although he finally received the balance of the purchase price, refused or failed to sign the necessary transfer documents. The respondent called one witness, Thomas Mulinga Masaai, who testified that he witnessed the agreement between the appellant and the respondent. The witness explained that part of the payments to the appellant, were made through cheques drawn by the witness on his company account, as the witness owed the respondent some money.

[5] Although the appellant had not filed any defence she was allowed to testify during the formal proof. She admitted having entered into an agreement with the respondent for the sale of the suit property and also agreed having received Kshs.1,120,000/= as part of the agreed consideration of Kshs.1.7 million. She explained that it was not her intention to sell the house but needed money because she was in debt. She changed her mind about the sale because her husband and children objected to the sale. She therefore offered to return the money to the respondent.

[6] In her judgment the learned Judge gave judgment in favour of the respondent noting that there was an offer and an acceptance; that the contract was duly signed; that the purchase price duly paid; and therefore the respondent was entitled to enforce his rights by way of specific performance of the contract. The learned Judge declined to grant damages on the ground that the respondent having been a tenant in the suit property did not suffer any damages as he was not paying any rent to the appellant.

[7] Being dissatisfied with that judgment, the appellant lodged this appeal. In the memorandum of appeal the appellant contends that the learned Judge erred in law in holding that there was a contract between the parties when there was no legal contract; and in holding that the respondent had performed his part of the contract. The appellant also faulted the learned Judge contending that the evidence on record was incomprehensible and difficult to understand, and that the learned Judge granted the orders sought in the plaint without giving proper grounds.

[8] In response the respondent filed grounds for affirming the decision of the learned Judge. The grounds included *inter alia*: that the appellant had admitted before the trial court that there was a formal agreement for the sale of the suit property and that she had received the purchase price from the respondent; that the appellant admitted that the purchase price was mutually negotiated and agreed at Kshs.1.7 million and she is therefore estopped from denying the sale; that the appellant failed to file a statement of defence and is therefore deemed to have admitted the respondent's claim; and that the appellant had ceased to collect rent from the respondent because possession of the suit property had been handed over to the respondent in part performance.

[9] Hearing of the appeal proceeded by way of written submissions that were duly highlighted. For the appellant it was submitted that the substantive issues for determination in the appeal included: whether the respondent performed his part of the contract subject of the appeal; whether the orders issued by the learned Judge were premised on grounds or reasons anchored on the evidence adduced in court; and whether the learned Judge recorded proceedings that are incomprehensible. Relying on ***Nyeri Civil Appeal No. 22 of 2013*** **Peter Mbiri Michuki vs Samuel Mugo Michuki**, it was submitted that part performance of a contract is a doctrine entrenched in law and founded on an argument that a contract which is not in adherence to **section 3(3)** of the **Contract Act,** can still be deemed to be lawful and/or enforceable if it can be proved that a purchaser of a property had exercised part performance. It was argued that the respondent did not tender any proof or evidence upon which part performance could be inferred.

[10] Regarding the substance of the judgment, it was submitted that a Judge must give reasons for his decision to prefer particular evidence that is adduced by the respective parties to a suit. The English case of **Flanner v Halifax Estate Agencies Ltd [2000] 1 ALL ER** was relied upon for the proposition that failure of a Judge of first instance to give reasons for a conclusion essential to his decision may of itself constitute a good ground of appeal. It was further reiterated that **Order 21 Rule 4** of the **Civil Procedure Act** envisaged a judgment that contains a concise statement of the case, the points for determination, the

decision thereon and the reasons for such decision; that the judgment of the learned Judge dated 27th February, 2007 neither contained points for determination nor reasons for the said decision; and that the judgment was therefore defective.

[11] Finally, it was submitted that the record of proceedings as maintained by the learned Judge was not precise or clear, but was inconclusive, incomprehensive and incoherent and could not therefore be relied upon to pronounce a sound judgment. The court was therefore urged to allow the appeal and set aside the judgment of the lower court.

[12] For the respondent, it was submitted that the respondent filed a plaint in which he clearly set out the circumstances giving rise to his claim; that the appellant did not file any defence to the respondent's claim; that during the formal proof the appellant confirmed the existence of the agreement and acknowledged having signed the agreement and received part of the purchase price; and that the findings of the learned Judge that there was a contract between the parties was thus supported by evidence of part performance.

[13] Citing **Lucy Njeri Njoroge vs Kaiyahe Njoroge** ***Civil Appeal No. 161 of 2002,*** the court was reminded that it cannot interfere with findings of facts by the first appellate court unless the facts were not based on evidence or were based on a misapprehension of the evidence, or the learned Judge is shown to have acted on a wrong principle in arriving at his findings. It was argued that the learned Judge properly considered the facts and came to the right conclusion as the appellant received the full purchase price and has made no attempt to cancel the contract or refund the purchase price to the respondent.

[14] As regards the substance of judgment it was submitted that on page 98 of the record the learned Judge considered and evaluated both the appellant's and the respondent's testimony and gave reasons for her decision stating that there was a contract of sale which was duly signed and delivered, and that the purchase price was paid in full, hence the order for specific performance.

[15] It was reiterated that the record of proceedings confirmed that there was a handwritten contract that was later typed and signed by all the parties and witnessed by Thomas Musau, and that the appellant herself confirmed these facts. It was argued that there was overwhelming evidence that the appellant offered her house for sale, and that the respondent who subsequently made payments toward the purchase of the suit property accepted the offer. Relying on **section 3** of the **Law of Contract Act** and **Neepe Autospares Limited vs Narendra Changanlal & 3 Others** ***Civil Appeal No. 217 of 2012,*** it was maintained that the contract between the appellant and the respondent was legal as the same was in writing. Further it was submitted that in the circumstances of this case, specific performance that is a discretionary remedy that compels a party in breach to perform its contractual obligation was appropriate.

[16] Finally as concerns the record, it was pointed out that although there are errors on the record, the record cannot be said to be gibberish and totally incomprehensible. Relying on **Mohammed Abdulrahaman Said & Another vs Republic** ***Criminal Misc. Application No. 66A and 66B of 2011*** it was submitted that the errors complained of were minor and only consisting of spelling and typographical errors that were of no consequence. The court was therefore urged to dismiss the appeal and affirm the judgment of the trial court.

[17] We have considered this appeal, the written submissions and the authorities cited. The appeal before us is a first appeal and not a second appeal as intimated by the respondent in the written submissions. Therefore this Court has the jurisdiction as stated in **Peters v Sunday (1958) EA 424;** and **Selle v Associated Motor Boats Company Limited (1968) EA 123,** to reconsider the evidence, re-evaluate and draw its own conclusion, though that jurisdiction must be exercised cautiously bearing in mind that the learned trial judge had the advantage of seeing and assessing the demeanor of the witnesses. It is not disputed that the appellant never filed a defence to the respondent's claim and that interlocutory judgment was entered in favour of the respondent. The effect of the interlocutory judgment was that liability in regard to the respondent's claim was no longer in issue as the appellant had failed to dispute the facts pleaded by the respondent in the plaint. The respondent's claim not being one for a liquidated sum, there was need for taking evidence in order to establish the loss, if any, arising from the appellant's breach of

the agreement, and the justification for the reliefs required by the respondent.

[18] The taking of such evidence is what is commonly referred to as "formal" proof. That term is appropriate because it applies where as in the respondent's case the foundation for the claim has already been laid through the undisputed pleadings and in the hearing envisaged liability is not in issue. To that extent, the proof is formal as the court is only concerned with the extent of the loss and the appropriateness of the relief sought.

[19] We note that apart from the fact that the appellant did not file any defence to the respondent's pleadings, during the formal proof hearing, the appellant admitted having entered into the agreement with the respondent for sale of the suit property, and conceded the fact that she changed her mind after being paid. She pleaded that she wished to retain the suit property because she had not consulted her husband and children who upon learning of the sale, were totally against the sale. It was also not disputed that the respondent was in possession of the suit property.

[20] The learned judge granted the respondent an order of specific performance, which is a discretionary remedy. The circumstances under which an appellate court can interfere with the exercise of discretion by a trial court are clear having been stated in **Shah v Mbogo [1968] EA 93;** and **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75** and adopted in **Kenya Shell Co Ltd v Charles [2003] eKLR** amongst other cases. An appellate court can only interfere with the exercise of discretion where it is satisfied that the Court has misdirected itself or acted on extraneous matters, or failed to take into account relevant matters that it should have taken into account

[21] In our view the circumstances before the learned Judge showed that there was sufficient justification for granting the order of specific performance. The appellant's property was at the verge of a forced sale. The respondent offered her the opportunity to negotiate a sale that was favourable to her. In addition to the respondent having paid the agreed consideration to the appellant, there was also part performance on the part of the appellant as possession was ceded to the respondent who continued to live in the suit property free of rent. Clearly there was a legally binding contract, and it would be against public policy to allow parties to enter into binding agreements, reap the benefits of the agreement and then change their mind. We are satisfied that the learned Judge properly exercised her discretion as in the circumstances it would have been inequitable to award damages and allow the appellant to wriggle out of the agreement. An order for specific performance was thus appropriate.

[21] Under **Order XX Rule 4** of the former edition of the **Civil Procedure Rules (***now repealed***)**, the learned Judge was obliged in her judgment to outline the facts of the case, identify the points for determination, and give reasons for her decision. The impugned judgment of the trial Judge shows that the learned Judge outlined the background facts and the dispute before giving her analysis as follows:-

> ***"This suit falls under the law of contract and the sale of land/house agreement. There was an offer and acceptance. The contract was duly signed, sealed and delivered and thereafter the purchaser paid the sale agreement price in full. The seller/defendant original landlady declined to proceed with the sale transaction. In this case the law is entitled to enforce the rights of the plaintiff where he prays for specific performance of the contract.***
>
> ***I accordingly give him his prayers as prayed...***
>
> ***Held: contract was complete, plaintiff entitled to the sale agreement terms by way of specific performance. Damages not granted. I do not award damages on the grounds that the plaintiff has all along as a tenant been in possession of the suit premises. The damages would have been by way of mean profit which he in fact did get by being in the house and not paying any further rent to the defendant. I award costs of this suit to the plaintiff."***

[22] In our view, although the analysis of the learned Judge could have been framed in a more comprehensive language, clear reasons emerge for the Judge's decision, and therefore the judgment satisfies the requirements of **Order XX Rule 4** of the former edition of the **Civil Procedure Rules**. The

contention that no reasons were given for the Judge's decision must therefore be rejected. It is evident that the learned Judge's decision was based on the undisputed facts that were before her. As regards the recording of the proceedings, it is obvious that this could also have been done better. Nonetheless the record was substantially coherent and one can easily deduce facts upon which the judgment is based. We concur with the respondent that the poor recording of the proceedings has not in any way prejudiced the parties.

[23] For these reasons we come to the conclusion that this appeal lacks merit, it is accordingly dismissed with costs.

Dated and Delivered at Nairobi this 12th day of August, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify this copy as a true copy of the original

DEPUTY REGISTRAR