**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, WARSAME & GATEMBU, JJ.A.**

**CIVIL APPEAL NO. 184 OF 2004**

**BETWEEN**

**PETER MUJUNGA GATHURU……......................................................…APPELLANT**

**AND**

**HARUN OSORO NYAMBUKI…..……….……..……….….…..1ST RESPONDENT**

**ESTATE BUILDING SOCIETY…….…….………….…………..2ND RESPONDENT**

***(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Kuloba, J.) dated 17th June 1999***

***in***

***HCCC NO. 2874 OF 1987)***

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**JUDGMENT OF THE COURT**

About three decades ago, on 22nd February 1983 **Peter Mujunga Gathuru (appellant)** and **Harun Osoro Nyambuki (1st respondent)** entered into an agreement of sale in which the appellant was purchasing from the 1st respondent 2½ acres of land to be excised from **L.R No. 12767/11** which measures seven (7) acres or thereabouts.

From the agreement produced in Court as Exh 6, the sale price was Kshs. 150,000/= which had already been paid in full as at the time of executing the agreement. Clause five of the agreement stipulated that the completion date was to be 'three *months after registration of final sub-division approval*'.

The agreement was nonetheless subject to the Law Society conditions of Sale. Among the special conditions was that the costs of the sub-division and survey fees were to be shared equally by the vendor and the purchaser. There was a default clause which provided that the party in default would pay the other damages equal to the market value of the plot and 10% thereof.

About three months later, on 11th May 1983, the 1st respondent at the request of the appellant acknowledged in writing having received a total of Kshs. 200,000/= with a balance of Kshs. 25,000/=.

The letter of acknowledgment has not indicated the specific purpose of the money in question other than that the same was in reference to the purchase of L.R. No. 12767/11. It was the appellant's contention that he was given vacant possession of the 2½ acres even as they waited for the official survey and subdivision to be carried out.

Evidence was however adduced before the trial court to the effect that the Director of City Planning in his letter dated 10th March 1983 acknowledged that the City Council of Nairobi had recommended the intended sub-division for approval to the Commissioner of Lands. The approval was nonetheless subject to provision of wholesome water, a right of access for sub plot A through sub-plot B, and the submission of a landscaping and tree planting scheme to the Director of City Planning for approval.

Everything appeared to have been on course and on 29th October 1986, the respondent wrote to Mr. Maeke, a Surveyor, asking him to carry out the intended sub-division of the two plots. According to the appellant, this survey and sub-division was never done and instead the respondent proceeded to mortgage the entire parcel to East African Building Society (2nd respondent) to obtain a loan of Kshs. 500,000/= and that is how the 2nd respondent came into the picture.

After waiting for the transfer of the 2½ acres to him to no avail, the appellant moved to the High Court by way of a plaint dated 15th July 1987, which was amended on 19th July 1988. In the amended plaint, the appellant faulted the 1st respondent for breaching the terms of the agreement, by failing to transfer the 2 ½ acres to him and also for mortgaging the same to the 2nd respondent.

He implored the court to make an order of specific performance of the sale agreement and damages for breach as against the 1st respondent, and a permanent injunction as against the 2nd respondent to restrain it from exercising its power of sale over the property in question and from advancing any further sums of money to the 1st respondent on the security of the parcel of land in question until the suit was heard and determined.

In his amended defence and counterclaim dated 5th November 1983, the 1st respondent admitted the existence of the agreement of sale. He nonetheless averred that the sale price was Kshs. 275,000/= of which the appellant paid Kshs. 200,000/= leaving a balance of Kshs. 75,000/=. His defence therefore was that the appellant was also in breach of the agreement of sale for failing to pay the balance of the purchase price. He contended that this failure to clear the entire purchase price entitled to him to treat the contract/agreement of sale repudiated/rescinded. He stated that he informed the appellant of the said repudiation. It was his contention therefore that he was the one entitled to the 10% of the sale price and damages on account of the appellant's breach.

He counterclaimed for Kshs. 200,000/= which he said was the 10% of the properties' market value as at the time the amended defence and counterclaim was filed. He urged the court to dismiss the appellant's claim; a declaration that he be discharged from further performance of the contract and a declaration that he is entitled to retain the payments made to him by the appellant inter alia.

In their evidence before the trial court, the appellant and 1st respondent amplified the contents of their pleadings. The appellant also produced as exhibit several documents which we have referred to in this judgment. A document examiner was called by the appellant to authenticate the transfer which was undated but purportedly signed by the 1st respondent in favour of the appellant. According to this witness, the acknowledgment dated 4th March, 1983 (Exh '6B'), the agreement of sale itself, the transfer (undated); and the letter to the surveyor dated 29th October 1986, were all signed by the 1st respondent.

It was the 1st respondent's testimony that although the agreed sale price was originally Kshs. 150,000/=, the same was revised later to Kshs. 275,000/=. He said that this variation was agreed on orally and was later confirmed in writing which is what culminated in the acknowledgment produced in court as Exhibit 3.

We have considered the whole pleadings of the parties, documents exhibited and submissions by the Advocates who appeared before us. Having done so, our view of the dispute is as follows: We note that this matter is remarkably one of the oldest cases in our court. We do not understand what caused the inordinate delay in the hearing and determination of the dispute. We however, must commend the parties for their patience and faith in the administration of justice. We think we owe them a word of gratitude for keeping their faith, belief and appreciation in the administration of justice. Be that as it may, we note that letter of acknowledgement dated 11th May 1983 which was not disputed indicates the total amount paid as Kshs. 200,000/= with a balance of Kshs 25,000/= for which a personal cheque had already been issued. This letter does not however state what the extra Kshs 75,000/= was meant to be for. Was it for the additional purchase price? Or was the extra money meant to meet the survey and other costs agreed to be shared by the parties as per the sale agreement?

We also observe that the document marked Exhibit 6B which articulated the purpose for which the extra Kshs 75,000/= was to be applied was disallowed by the court as it had some erasures which had not been countersigned and which according to the trial court were not sufficiently explained. We shall therefore ignore the said document. The learned Judge nonetheless made a finding that the parties had agreed to vary the sale price from the initial Kshs. 150,000/= to Kshs. 275,000/= by their conduct as there was no further written agreement or addendum to the original agreement to that affect. Having so found the court went further to find that the appellant had not paid the balance of the Kshs. 75,000/= and was therefore in breach of the terms of the contract of sale. The court consequently dismissed the appellant's claim for specific performance and further denied him an order for refund of the purchase price already paid and acknowledged by the first respondent on grounds that the appellant had not prayed for a refund of the purchase price in his plaint.

This was notwithstanding the fact that the learned Judge did acknowledge "*the obvious injustice of leaving the defendant with the land as well as the money*". In perpetrating that injustice, the learned Judge referred to some decisions of this Court which he did not nonetheless specify or cite for purposes of reference. We can only assume that such decisions do not exist as it is never the purport and objective of this court to render itself in a manner that results in any kind of injustice. Our primary and foremost obligation and duty is to cure an injustice and a legal misdirection committed by a lower court. We hold the view that it was incumbent or obligatory on the part of the lower court to specifically cite cases decided by this court, which in its opinion may have propounded bad jurisprudence or a departure from a known concept and/or a trodden path of the law. In the absence of such citation, we think, what the learned judge purported to introduce in order to dismiss the case of the appellant was a fundamental misrepresentation or putting words (decisions not made) into the mouth of this court. To say the least, the honourable Judge was out of place and consequently fell into error.

At this stage, we wish to categorically assert that a court of law is a court of justice. A court cannot therefore abdicate from its paramount duty of doing justice and mete out blatant injustice to a party before it, ostensibly on account of some nonspecific decisions of a higher court, which if they ever existed could have been distinguished from the current situation. That in our view was a most unpropitious finding in the circumstances of the case. The learned Judge made no findings on the counterclaim and we shall therefore steer clear of that area.

Aggrieved by this judgment, the appellant moved to this Court by way of this appeal in which he has proffered eight grounds of appeal. He challenges the High Court's judgment on grounds that he had proved on a balance of probabilities that he was entitled to an order of specific performance; that the learned Judge erred in finding that a written agreement could be altered by conduct of the parties; that the learned Judge had failed to consider that the contract of sale had not been rescinded; that the appellant's evidence had not been considered; and finally that the learned Judge erred in failing to order the refund of the purchase price.

We have already upheld this last ground and will now proceed to consider the other grounds. We have earlier on analysed the evidence adduced before the trial court as expected of us as a first appellate court (see **Selle vs Associated Motor Boat Company Limited [1968] EA 123**.

What remains is for us to now critically reconsider this evidence with a fresh and independent mind and come to our own conclusion as to whether the learned Judge's decision should be upheld.

When this matter came up for hearing on 30th October 2014 Dr. Khaminwa, learned counsel appearing for the appellant and Mr. G. M. Mwangi, learned counsel appearing for the 2nd respondent proposed to the court that the appeal be disposed of by way of written submissions. They further told the court that they did not wish to highlight the submissions once filed and would await the judgment of this Court.

As is the practice of this Court, they were given timelines within which to file the said submissions. Judgment was then reserved for 18th December, 2014. The appellant's submissions were filed on 24th November 2014, and the court waited for the respondents' submissions, but none had been filed even as at 18th December, 2014 when delivery of the judgment fell due. We have therefore had to prepare this judgment without the benefit of the respondent's submissions.

The appellant's submissions amplify the grounds of appeal listed above, and more particularly the error attributed to the learned Judge for holding that the appellant went to equity with unclean hands for refusing to pay the balance owing, and hence the refusal by the court to grant the order of specific performance. The appellant called in aid **Sections 97** and **98** of the **Evidence Act** which in a nutshell provide that a written agreement cannot be varied or amended by an oral agreement. We shall revert to that shortly.

Our starting point is whether the evidence on record was indeed sufficient to prove the appellants case on a balance of probabilities. We start by observing that even the trial court made a finding to the effect that Kshs. 200,000/= had been paid towards the purchase of the property in question. That fact is stipulated by the first respondent.

The crux of this appeal is actually whether there was breach of the sale agreement by the appellant or not. If indeed, there was no breach on his part, then an order for specific performance ought to have been made in his favour. The appellant's stand was that the sale price for the subject parcel of land was Kshs 150,000/= as clearly stipulated in the sale agreement. His evidence was that he paid the entire purchase price in full and final settlement upon executing the agreement. He said that following the payment, he was given vacant possession of the 2 ½ acre, and further that the 1st respondent signed the transfer forms which were produced in court as exhibit. Although the 1st respondent denied having signed the transfer form in question, it was the evidence of the documents examiner that the signature on the document belonged to the 1st respondent.

In our view however, that document does not change the substance of the case much. The fundamental issue is whether the appellant had paid the purchase price in full as per the parties' sale agreement, and if so, was he entitled to an order of specific performance?

According to the 1st respondent, there was an oral agreement to vary the sale price from the agreed Kshs 150,000/= to Kshs. 275,000/= which was paid and acknowledged at the time of execution of the agreement of sale. We agree with learned counsel for the appellant that an oral agreement cannot alter or vary the terms of a written agreement unless by consent of the parties or by conduct.

The agreement of sale dated 22nd February, 1983 which was signed by both parties in the presence of Vincent Muguku Advocate, and which is admitted by both parties, stated at paragraph 3:-

> ***"The purchase price is Kshs 150,000/= has been paid to the vendor in full and final settlement of the purchase price."***

As stated earlier on in this judgment, that clause was never modified or varied subsequently in writing. The claim that there was an oral agreement varying this amount later flies in the face of **Sections 97** and

**98** of the **Evidence Act** which for ease of reference provide as hereunder:-

S**ection 97(1) of the Evidence Act Cap 80 Laws of Keny**a

> ***"when the terms of a contact, or a grant, or o any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under provisions of this Act."***

Further;

**Section 98 of the Act provides;**

> ***"When the terms of any contract or grants or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to Section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms."***

The alleged oral agreement does not fall within the provisos under **Section 98** and is outrightly disallowed under **Proviso (iv)** of the said provision which provides:-

> ***"The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or deposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force……."***

In this case, the oral agreement was never proved. Secondly, pursuant to **Section 3(3)** of the **Law of Contract Act**, the agreement for sale of land is required to be in writing.

It is our finding therefore that the Judge erred in his conclusion that:-

> ***"It is probable that the agreed purchase price settled by express formal written agreement and by conduct of the parties was Kshs. 275,000/=."***

The learned Judge did in our view fall into more and abundant error when he made a finding to the effect that:

> ***"There is nothing on the record to show that the plaintiff was required to help the defendant in defraying any survey or sub-division expenses, and if so how much and when."***

This finding was in direct contradiction with special condition 1in the parties agreement for sale which provides expressly that:-

> ***"Sub-division costs and survey fees shall be shared equally by the vendor and the purchaser."***

Contrary to the learned Judge's finding, the appellant was not just meant to fold his hands and wait for the sub-division and survey to be done without any contribution on his part. He was meant to meet half the costs. It was in evidence that a surveyor had already been engaged to start the process of the sub-division. This could not have been done without the contribution from the appellant. That would explain the payment of the sums over and above the Ksh. 150,000/= which was acknowledged by the 1st respondent

as the “*full and final settlement of the purchase price*”.

In sum, we find that the evidence on record supported the appellant’s claim that he had paid the entire purchase price upon execution of the agreement and any surplus was meant to meet the survey, subdivision and other charges. He was therefore justified in his adamant refusal to pay the extra Kshs. 75,000/= which unfortunately was held against him and used to disentitle him of the order of specific performance.

It is also instructive to note that although the 1st respondent claimed that he had sent a notice of termination of the agreement to the appellant, such notice was not proved as there was no proof that any notice was ever received by the appellant. It is further noted that the completion date for the contract was “*three months after registration of final sub-division approval*.” No evidence was presented before the High Court to show that the final sub-division had been approved and registered, so the agreement was still open even as at the time the 1st respondent charged the property in question to the second respondent. If any party was in breach, then it was the 1st respondent. The evidence and circumstances clearly points in the direction of the 1st respondent.

We think we have said enough to show which party was at fault. It is our finding that the appellant had proved his claim before the High Court on a balance of probabilities and was entitled to an order of specific performance. If that was not possible, the court ought to have invoked its inherent jurisdiction and meted out justice by ordering that the purchase price be refunded to the appellant notwithstanding the fact that such a relief had not been sought. We think that it is unjust for the 1st respondent to keep both the land and money without any consequences, since he is the one who is solely responsible for the non-completion of the agreement for sale. On our part, we cannot countenance such a conduct.

Accordingly, we allow this appeal and order that the suit property i.e. the 2½ acres out of parcel No. L.R. 12767/11 be transferred to the appellant herein if it has not been transferred to a third party. The respondent to sign all necessary documents to effect the said transfer within 30 days of this judgment, failing which the registrar of this Court is hereby authorized to sign the same.

In the event that the suit land has been transferred to a third party, we order that the appellant be refunded the current market value of the said property to be determined upon valuation by a competent licensed Land valuer to be agreed upon by the parties, failing which the valuation will be conducted by the Chief Government valuer or his nominee, who will then be given the necessary instructions by the Registrar of this Court.

In the meantime, we order that a caveat be registered against the parcel of land till completion and satisfaction of our order. The costs of the valuation to be borne by both parties equally.

A copy of the valuation report if any be sent to the Registrar of this Court to form part of this record.

The appellant is also awarded costs of this appeal.

***Dated and delivered at Nairobi this 30th day of January, 2015.***

**W. KARANJA**

**………………………….**

**JUDGE OF APPEAL**

**M. WARSAME**

**………………………….**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

**…………………………….**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***