IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, G. B. M. KARIUKI & M'INOTI , JJ.A.

CIVIL APPEAL NO. 270 OF 2005

BETWEEN

THE DA GAMA ROSE GROUP OF COMPANIES.…….....APPELLANT

AND

STOKMAN ROZEN KENYA LIMITED…….…..…..RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Waweru, J.) dated 15th July 2005

in

HCCC NO. 1168 OF 2001)

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JUDGMENT OF THE COURT

The **Da Gama Rose Group of Companies Ltd (appellant)** through Casa Rosa Estates were in the flower farming business in the late 1990s and presumably thereafter. The period that concerns us is between 1997 when the cause of action in the suit leading to this appeal arose and 2005 when the impugned judgment was delivered.

Stokman Rozen Kenya Limited (respondent) on the other hand was also in the flower growing business. From the pleadings herein, it used to grow various types of young flower plants which would then be sold to other flower farmers for replanting. Among the respondent's customers was the appellant. Sometime in early 1997, the appellant placed an order with the respondent for 240,000 plants as

tabulated
below:-

- Golden Times 60,000 plants
- First Red 60,000 plants
- Dream 60,000 plants,

and

- Cream Prophyta 60,000 plants

The prices are indicated in the order confirmations but we need not go into the details of the prices per plant as that is not in dispute.

It is worth noting however, that there are several "*order confirmations*" in the pleadings all dated different dates. The first such confirmation order is contained in the fax letter dated February 5th, 1997. There are two other order confirmation letters dated February 6th 1997 which are slightly different. There are other subsequent orders for the same number and variety of flower plants but with slight changes on the dates of delivery.

According to Mr. Ngatia, learned counsel for the appellant, the order confirmation that was acted on was the revised one dated June 13th, 1997 which indicates the date of delivery as May, 1998. We shall therefore concentrate our focus on that order as it is the same order that was the basis of the impugned judgment. The appellant was supposed to pay a down payment of 10% of the purchase price to enable the respondent start growing the plants in question for it. It is not disputed that the appellant confirmed the order on 5th September 1997 and seven days thereafter on 12th September, 1997 sent Netherland Guilders (NLG) 38,361.64 which was 5% of the down payment instead of the 10% indicted in the order confirmation.

The respondent acknowledged receipt of the money on 12th September 1997, but requested the appellant to transfer to them the 5% balance. From the correspondence produced before the High Court, it is clear that the respondent went ahead to prepare the said plants as it awaited the payment of the other 5% of the deposit. It can also be seen from the correspondence that the appellant was not ready to collect the plants as the farm where it intended to plant the flowers was not ready for planting.

On 4th March 1998, the respondent wrote to the appellant asking if it could sell the plants meant for the appellant to another farm and instead prepare "*Dormant eyes*" for them for planting by July/August. In the said letter, the respondent reminded the appellant to transfer the remaining 5% of the deposit amounting to 38,438 NLG to its account.

The money was not paid and another reminder dated 21st January, 1999 was sent to the appellant. In that letter the issue of the costs of maintaining the ordered plants was first raised. According to the respondent, it was costing two (2) Dutch Cents per plant per month in sprays, fertilizers, labour etc to maintain each of the plants. The respondent also confirmed having sold one and half hectares worth of plants as suggested earlier apparently to mitigate any anticipated loss as the flowers would overgrow if not collected within the anticipated time.

The first demand for payment for the plants and not just the 5% deposit was made in this letter. Five months later, no payments were forthcoming and the plants had not yet been collected. The respondent re-calculated the amount of money owed in respect of the plants planted and tended for the appellant but not sold to other parties or collected by the appellant. The amount owing after the said sale had been reduced from 768,000 to 209,080 NLG. After deducting the 38,361 NLG which had been paid as 5% deposit, the balance was 170,719 NGL which amount the respondent was claiming from the appellant.

In a letter dated 2nd December, 1999 which was a reply to the letter of 13th May 1999 which tabulated the amount owed, the appellant stated in the last sentence that it's Managing Director Mr. H. Da Gama Rose:-

> ***"Is in agreement to the amount, you are charging Casa Rosa which is NGL 170, 719.00."***

The learned Judge placed heavy reliance on this statement in arriving at his determination. He interpreted it to mean an admission of the debt by the appellant. We shall revert to this issue later in this judgment. This is the amount claimed by the respondent in its pleadings before the High Court.

What was the appellant's defence?

The appellant denied liability to the respondent in the sum claimed in its defence and counterclaim dated 20th September, 2001. According to the respondent, there was an agreement to grow certain varieties of Rose plants and to supply the same by delivering them to Case Rosa Estate in Thika for replanting. It was the appellant's case however, that the contract between them and the respondent was a mere agreement to sell, and that the same was subject to and conditional upon the permission to the parties of the Breeders of the said varieties of Roses and plants to grow or replant the same.

The appellant admitted having paid the NLG 38,361.64 with the balance of the purchase price to be paid by installments partly against delivery and thereafter six and twelve months after delivery. It claimed that amount from the respondent in its counterclaim. We may however point out here that from the order confirmations we have referred to, and which are admitted by both parties, the transaction did not progress to the stage of delivery and the question as to when the installments would fall due and payable was in the circumstances precipitate. The transaction stagnated at the stage where the 5% deposit which was half of the deposit supposed to be paid had been paid, plants prepared and preserved but not collected. The reason given for the non-collection was that the appellant's farm was not yet ready for planting.

In his evidence in court, Mr. Keith Njuguna Munene, the respondent's accountant amplified the contents of the plaint. He told the court that they had a contract to supply the appellant with the rose plants in question. He referred to the order confirmations we referred to earlier. He stated that upon receipt of the 5% deposit, they started preparing the order but since the appellant's farm was not ready, they had to keep the plants under refrigerated conditions (animated suspension) in order to slow down the growth. His evidence was that the said process could only be sustained for 3 – 4 months after which the natural process of growth could not be suspended and so the plants overgrew into bushes. Some of the plants as stated earlier were sold and the amount realized was set off from the amount claimed from the appellant.

The amount claimed by the respondent from the appellant was the cost of keeping the said plaints in animated suspension under refrigeration for several months. The cost included electricity bills, sprays, fertilizers and labour as tabulated earlier on.

On its part, the appellant through Horatius Da Gama Rose, its Managing Director testified that he had discussions with the respondent on the purchase of flower plants for planting in a new Rose farm they wanted to start in Thika. He said that their discussions centered on the price, delivery, quality of the plating material and payment terms.

His testimony was that the document referred to as an order confirmation was not an order confirmation but only an offer from the respondent to sell to them.

According to this witness, the appellant only paid the 5% as a "*show of good faith*" at the request of the respondent as it was in danger of losing its licence with the breeder. They were therefore, just paying as a favour to the respondent to save its licence with the breeder. He contended that it was not the intention of the parties to perform the contract.

The witness could not however explain the statement in the letter dated 2nd December, 1999 referred to earlier but he acknowledged that *"on the face of it, the last paragraph in the letter…. admits the plaintiffs claim."*

He said that the letter was a counter offer on future purchases and not an admission of the debt. He denied that the respondent ever prepared any flower plants for them and so they had no obligation to pay the amount claimed. They instead claimed the 5% down payment made for an order that was never delivered.

After considering this evidence along with the written submissions of both counsel, the learned Judge made the following findings *inter-alia* :-

> ***"That the appellant placed an order for the supply of various plants as per the order confirmation dated 6th February, 1997 which was signed by both parties; that the parties re-negotiated the order later and concluded the order confirmation dated 13th June, 1997 – also signed by both parties but which was later substituted with the one signed on 5th September 1997 but backdated to 13th June 1997."***

It was upon signing this 3rd renegotiated order confirmation that the 5% deposit was paid. The finding of the learned Judge was that 5% deposit was in part-performance of the contract and "*not as a show of mere good faith without the intention of performing any contract as claimed by the appellant*".

According to the Judge, although no delivery was ever made, the respondent had partly performed the contract by preparing the plants at great expense but the appellant had failed to complete its part of the contract. He went on to conclude that the respondent was entitled to the sum claimed as the appellant had in fact admitted the sum in writing. He held that the loss suffered by the respondent was in the nature of special damages and since the parties had already agreed on the same, there was no need to particularise the same in the pleadings.

The respondent's counterclaim was dismissed, firstly on the ground that it had been applied legitimately for its intended purpose and secondly, because it was the appellant who had caused the contract to be frustrated and hence the loss claimed to be incurred – so the same was not refundable.

Judgment was consequently awarded to the appellant for the equivalent of NLG 170,719 in Kenya Shillings at the rate of conversion being that obtaining at the time of filing the suit – the latter because presumably, the amount awarded was in the nature of special damages and not general damages.

Aggrieved by the said judgment, the appellant moved to this Court by way of this appeal in which it has proffered nine grounds. The learned Judge is faulted for ordering that conversion rate of the guilders awarded to the respondent be as at the time of filing the plaint saying that such rate was not capable of being determined; that the Judge erred in holding that the 5% was a binding contract between the parties notwithstanding the fact that the 10% deposit had not been paid; that there was no admission of the NLG 170,719 as the appellant had sought reduction of the same; that the appellants offer to pay could not deprive it of a legal defence; that the Judge had erred in finding that the claim was in the nature of specific damages; and finally that the appellants counterclaim ought not to have been dismissed.

It urged this Court to allow this appeal with costs and allow the appellant's counterclaim as against the respondent to the tune of Ksh1, 259,232/= with interest until payment in full. At the hearing of this appeal, Mr. Ngatia, learned counsel for the appellant took us through the record and reiterated the issues we have summarised above. His emphasis was principally that there was no binding contract between the parties as they were negotiating and renegotiating the terms up to the very end. There were no determinate terms in the contract and it was therefore incomplete and unenforceable. He submitted further that since the 10% deposit stipulated in the contract had not been paid, then the contract was not concluded. Furthermore, in his view, the respondent had no business starting to prepare the plants before the 10% deposit was paid in full.

He cited to us the House of Lords case **Hyde vs Wench (1840) 49 ER 132**. While we must commend Mr. Ngatia for his or his research assistant's remarkable aptitude for research which enables them smell out cases that are several centuries old, we are certain that equally relevant, more recent cases would not have been hard to find. The case in question was about offer and counter offer where the seller offered to sell a property for £1000, but the vendor offered £950 and thereby rejected the earlier offer. The court found that there was no binding contract between them as the earlier offer had been rejected and the counter offer had not been accepted.

Furthermore, counsel submitted, even on the 170,179 NLG which is said to have been agreed on, the appellant had still asked for a further rebate of 169,080 and this would therefore mean that the terms of the contract were still not definite to the end.

The other important issue raised by the appellant (not to say that the others are less important) was that the Judge erred in giving an award of special damages while the same had not been pleaded or proved by way of production of receipts or other evidence as required in law. Mr. Ngatia availed to us several authorities on that issue which we have taken time to read and whose contents we have noted.

Mr. Kaburu, learned counsel for the respondent was of a different view. According to him, the terms of contract were clear. The parties both signed the confirmed order dated 13th June, 1997, and the respondent had acted and started preparing the flower plants once the 5% deposit was paid. According to Mr. Kaburu, the respondent had acted on a gentleman's agreement as it never thought that the appellant would renege on its word.

We have carefully considered these very able submissions of both counsel, the grounds of appeal and the entire record before us. In our view, this appeal hinges or turns on those two issues, which once determined will seal the fate of this appeal. We have re-evaluated the evidence as contained in the entire record as we are as a first appellate court commanded to do by Rule 29(1) of the Rules of this Court.

This Rule finds concurrence in many decisions of this Court among them **Selle vs Associated Motor Boat Company Limited [1968] E.A. 123** and **PIL Kenya Limited vs Oppong [2009] KLR 442,** which this Court has remained loyal to over the years.

The gist of these cases is that as a 1st appellate court, it behoves us to re-appraise, critically re-analyse and re-evaluate the evidence adduced before the trial court and arrive at our own independent decision. Having done so, we start by asking ourselves whether there was a binding contract between the parties herein. There was definitely an offer in the name of the confirmation order dated 13th June 1997. The same was accepted by the appellant when it signed it. It was returned to the respondent vide the letter dated 16th June, 1997 in which the appellant stated:-

> ***"Arrangements are being made to remit immediately 10% to your company's bank account."***

This order was nonetheless revised and replaced with another order that was signed by the appellant on 5th September, 1997. This revised order was however backdated to 13th June 1997 as it was replacing the earlier one. This subsequent order was followed up with the payment of the 5% down payment amounting to NLG 38,361.64 on 12th September, 1997.

We hold the view that the payment was part payment of the consideration. It was a pointer or indicator to show that the appellant was serious and was committing to the performance of the contract. There was no turning back on the purchase of the ordered plants. The understanding of both parties as at that moment was that the respondent could proceed to prepare the plants as per the confirmed order.

There was a meeting of minds here. If the appellant had changed its mind, it would not have paid that money. If it changed its mind later, there was nothing easier than rescinding the contract in writing and asking for a refund of its deposit. The respondent knew and understood very well that the appellant could not take delivery of its plants because the farm where it intended to plant the flowers was not ready. It was on this understanding that the respondent decided to keep the plants in suspended animation in order to slow their growth in order to give the appellant time to get the farm ready.

In all the correspondence produced as Exhibit before the High Court, there was never any demand for a refund of the 5% down payment. There was also no mention that the payment of the NLG 38,361.64 was meant to assist the respondent not to lose its licence as claimed by PW1 in his evidence before the High court. Were this to be the truth, then the letter dated 3rd October, 1997 would have elicited an explicit reply denying the facts contained therein.

The letter was confirming receipt of the order confirmation on 5th September, 1997, and the receipt of the NLG 38,361.64. The same indicated the balance of NLG 38,438.36 was still awaited and requested the

appellant to transfer the same to the respondent.

The letter of 4th March 1998 was also clear that the respondent had prepared some plants for the appellant and was asking if it could sell some to another farm but immediately prepare Dormant eyes for the appellant whose farm was still not ready for planting. Paragraph three of that letter stated:-

> ***"All the terms of the contract remain the same, and we will supply you with the 4 ha of varieties that you initially ordered."***

This letter clearly referred to terms of a contract. There was no reply in rebuttal to that letter to the effect that no contract existed between the parties.

The follow up to this letter was the one dated 21st February, 1999 in which the respondent informed the appellant that they had incurred costs in maintaining the plants which they were yet to collect. The respondent explained that each plant was costing them two Dutch cents to maintain. The respondent asked for payments to be made but also disclosed that in order to mitigate their loss, it had sold roughly one and half hectares worth of the plants.

The plants sold were tabulated later in the letter dated 13th May, 1999 and the amount realised from the sale was deducted from the initial order. The 5% deposit was also deducted from that amount and that is how the demanded figure of 170,179 NGL was arrived at. In that letter, the respondent in the usual accommodating tone offered to rebate any future sales by 100,000 NGL if the appellant were to buy "*further four hectares – within one year"*.

It is clear from this letter that the rebate of 100,000 NLG would only apply to future purchases and had nothing to do with the existing contract. This letter was replied to seven (7) months later, with an apology for the delay. In that letter dated 2nd December 1999, the writer indicated that the Managing Director of the appellant "*was in agreement to the amount you are charging Casa Rosa which is NGL 170,719.00"*.

We shall revert to this issue later on. As far as the issue of the existence of a binding contract between the parties is concerned, we are satisfied that there was an offer, acceptance, consensus ad idem, consideration and part performance by the parties. The appellant paid the 5% down payment and the respondent proceeded to prepare the plants as ordered. This contract was enforceable in law.

Ground 3 & 5 in the memorandum of appeal therefore fail.

On ground 4, it is true that there was no express provision in the contract providing for the maintenance of the plants in animated suspension. In our view however, that was necessary in order to preserve the plants for collection by the appellant. It was the rational, prudent, and most reasonable thing to do. Had the appellant prepared its land and collected the plants in good time, the preservation would not have become necessary, and the cost involved could therefore have been avoided.

We hasten to note also as pointed out earlier that the respondent did write to the appellant and informed it of the cost it was incurring in preserving the plants. The appellant raised no objection whatsoever, and nor it is challenge the amount of 2 Dutch cents per plant per month. It is evident therefore that both parties had an understanding that the respondent was incurring costs on preserving the plants, that such cost was not provided for in their contract, but which cost would definitely be shouldered by one or both of them. When the respondent indicated that this cost was on the shoulders of the appellant, there was no protest or query raised. The presumption therefore was that the respondent had accepted that responsibility.

We now advert to ground six and seven on the issue of the NGL 170,719. It is common ground that this is the amount incurred in maintaining the plants which were not sold (lost as bushes) in animated suspension less the 5% paid as down payment. We have already found that the amount was justifiably expended as the plants had to be preserved. We have also found that this amount was expressly admitted by the appellant's Managing Director as indicated in the letter dated 2nd December, 1999 and 3rd

December 1999. Learned counsel for the appellant submitted that his admission was not unequivocal. On our part however, we do not see any equivocation in the statements in the two letters in question. In the letter of 2nd December, 1999, the appellant through Mike Norris its CEO referring to the Managing Director of the appellant stated:-

> ***"He is in agreement to the amount you are charging Casa Rosa which is NGL 170,719.00."***

In his reply to that letter, Mark Luckhurst on behalf of the respondent wrote:-

> "***This is notwithstanding the correct debt of NGL 170,719.00***
>
> ***(which Da Gama Rose agrees is correct) must be paid."***

There was no denial from the appellant that the said amount was owed. The computation was not even questioned by the appellant. We agree with the learned Judge that the computed loss was in the nature of special damages. We also agree with Mr. Ngatia, learned counsel for the appellant and our holdings in the several cases in the appellant's list of authorities that special damages must be specifically pleaded and also strictly proved.

In this case however, the claim was for a sum already admitted by the appellant. It was not in our view necessary for the respondent to particularise this claim as in how much of it went to electricity, labour, sprays etc. That information had already been given to the appellant before the suit was filed and it had been admitted unequivocally. Ground seven must therefore fail.

As to whether the learned Judge erred in entering judgment in guilders at a rate of conversion obtaining "*at the time of filing suit*", we do not find any fault in that. As admitted by both counsel, when the suit was filed, the guilder was still valid currency. By the time the judgment was delivered, the currency had been replaced by the Euro. The exchange rate would have been easily ascertained from the Central Bank of Kenya. The learned Judge gave the order that was reasonable and logical in the circumstances. This was meant to forestall or obviate a situation where the court would have ordered payment in a currency that was no longer in circulation and thus rendering the court's judgment ineffectual.

Ground one also fails.

On the counterclaim, we hold that the same could not succeed as the amount claimed was subsumed in the NLG170, 719 which we have found was properly owed. It was not a question of forfeiture of the deposit as submitted by learned counsel for the appellant but rather, a set off on the money already used to grow and preserve the plants which the appellant ordered but never collected.

We agree with the learned Judge of the High Court that it was the appellant's fault that the contract was frustrated. The counterclaim was therefore properly dismissed.

We have said enough to show that this appeal lacks merit. We dismiss the same with costs to the respondent.

Dated and delivered at Nairobi this 6th day of February, 2015.

W. KARANJA

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

K. M’INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR