**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, MWILU & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 146 of 2009**

**BETWEEN**

**DANIEL MIGWI NJAI.....….....APPELLANT**

**AND**

**HIGH VIEW FARM LIMITED 1st RESPONDENT**

**GEORGE NDUNGU MWICIGI 2nd RESPONDENT**

***(An appeal from the Ruling of the High Court of Kenya at Nairobi (J.L.A. Osiemo, J.) dated 9th October 2008***

**in**

**H.C.C.C No. 4060 of 1985)**

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**JUDGMENT OF THE COURT**

1. By an agreement for sale dated 17th January 1985, the appellant agreed to sell to the 1st respondent a farm situate North East of Thika town at a price of Ksh 1,750,000/=. The farm is LR No. 11453/1 and is the suit property. The completion date was fixed as 15th April 1985 or thirty days after the relevant consent of the Land Control Board had been obtained. The 1st respondent paid a 10% deposit of Kshs.175, 000/= to the then common advocate of the parties Messrs Kamau Kuria, Kiraitu & Ringera Advocates.

2. On 11th February 1985, the Murang'a Land Control Board gave the necessary consent and on 19th February 1985 the 1st respondent in accordance with a verbal agreement took possession of the suit property with the right to manage, cultivate and to make further developments on the property. On the same day, the 1st respondent informed the common advocate that consent of the Land Control Board had been obtained and instruction was given for preparation of the necessary instruments of transfer which the advocates did.

3. Circumstances changed when the common advocate by letter dated 25th July 1985 informed the 1st respondent that the appellant no longer wished to complete the transaction. Due to this changed

state of affairs, the 1st respondent filed Civil Case No. 4060 of 1995 at the High Court against the appellant seeking an order for specific performance of the agreement of sale. The 2nd respondent was later enjoined in the suit. The respondent's case was that they have always been ready and able to perform their obligations under the agreement for sale and that an expense of Ksh. 845,000/= had been expended on developments on the property as well as legal costs for the transaction. The respondents averred that despite demand, the appellant had refused to complete the sale and execute the instruments of transfer.

4. The appellant in his defence at the High Court alleged that the sale agreement dated 17th January 1985 was void for non execution by the parties or because of lack of consideration from the respondents; that time was of essence and since completion did not take place in terms of the sale agreement, it became null and void after the completion date; that the agreement was further null and void because all parties were under a mutual mistake as to when the certificate of title in respect of the suit property would be issued to the appellant by the Registrar of Titles. The appellant did not deny that the common advocate had informed him that relevant Land Board Consent had been obtained.

The learned judge (Bhandari, J). upon hearing the parties delivered a judgment dated 11th February 1988 in favour of the respondents ordering specific performance of the contract and decreeing that the appellant do transfer to the respondents all that property known as LR 11453/1 Thika free from all encumbrances on the respondent tending the balance of the agreed price (emphasis ours).

6. Dissatisfied with the judgment, the appellant lodged an appeal to this Court being Civil Appeal No. 139 of 1989. This Court differently constituted dismissed the appeal on 14th August 1995. In dismissing the appeal, this Court observed that it had reviewed all the circumstances of the case and found that the learned judge did not err in exercising his discretion to order specific performance of the sale agreement.

7. Despite the appeal being dismissed, the appellant either refused and/or neglected to execute the instruments of transfer of the suit property to the respondents. This prompted the respondents to make an application to the High Court seeking orders that the Registrar of the Court do execute the transfer. On 22nd February 2006, an order was made allowing the Deputy Registrar to execute the transfer and on 10th April 2006, the 1st respondent was registered as proprietor of the suit property - LR No. 11453/1.

8. Two critical facts relevant to this appeal arise out of the registration of the 1st respondent as proprietor of the suit property. One is that the transfer and registration were made pursuant to the order and decree of specific performance but the respondents had not tendered the balance of the purchase price to the appellant and two; the respondents had all along been in possession of the suit property. The practical effect was that the respondents had possession of the property but had not paid the balance of the purchase price as at 10th April 2006 when the transfer was made. It is not in dispute that the balance of the purchase price was eventually paid on 30th October 2008. The appellant's alternative claim in this appeal is payment of interest at bank rates on the balance of the purchase price from date of possession of the suit property on 19th February 1985.

9. The appellant noting that transfer had been made and he had not received the balance of the purchase price moved the High Court by way of application for an order to cancel the transfer and title issued to the respondents. The grounds in support thereof were that the transfer was executed fraudulently; the respondents disobeyed the condition precedent to the transfer of the property and did not tender the balance of the purchase price and that the appellant was an unpaid vendor. The core of the appellant's application was that the respondents having failed to remit the full amount of the purchase price as ordered by the court, the transfer to the suit property was irregular and ought to be cancelled.

10. Upon hearing the parties, in a ruling delivered on 9th October 2008, the learned judge (Osiemo, J) dismissed the application to cancel the respondent's title to the suit property. The ruling is the subject of the present appeal. In dismissing the application, the judge expressed himself as follows:

> ***"The applicant having lost in the High Court and in the Court of Appeal this court has no jurisdiction to interfere with the decree so issued and therefore the application fails."***

11. Aggrieved by the ruling of 9th October 2008, the appellant has appealed to this Court citing, *inter alia,* the following grounds:

*"(i) That the learned judge erred in law in failing to find that transfer of LR No. 11453/1, Thika to the respondents was a complete nullity because it was made in contravention of the terms of the decree to which the transfer was made.*

ii. *That the transfer was made on 10th April 2006 before the balance of the purchase price was tendered.*

iii. *That the instrument of transfer was signed by the Deputy Registrar pursuant to an application made by the respondents and which application was not served upon the appellant or his advocate.*

iv. *That the learned judge erred in law when it was clear that the 1st respondent had taken possession of the suit property and caused it to be transferred to the 2nd respondent before payment of the purchase price."*

12. In the memorandum of appeal, the appellant urges this Court to cancel the transfer and restore the suit property to the appellant and in the alternative, that the 2nd respondent do pay the appellant interest at prevailing bank rates on Kshs.1,750,000/= from 19th February 1985 when the respondents took possession of the suit property..

13. At the hearing of this appeal, learned counsel Mr. P.M. Kiura appeared for the appellant while learned counsel Mr. J. W. Wanjohi appeared for the respondents.

14. Counsel for the appellant reiterated the grounds in support as itemized in the memorandum of appeal. It was submitted that the appellant was all along willing to execute the transfer instruments but the balance of the purchase price was never tendered as per the decree of specific performance; that the appellant was expecting the balance of the purchase price to enable him execute the instruments; that from 19th February 1985 when the 1st respondent took possession of the suit property, the balance of the purchase price was never paid until 30th October 2008. It was contended that the learned judge (Osiemo J.) erred in law in holding that he had no jurisdiction to hear and determine the matter on merit; that the issue before the learned judge was execution and enforcement of the decree of the High Court; that under ***Section 34 (1)*** of the **Civil Procedure Act**, all issues arising from execution of a decree of the court are to be determined by the court which issued the decree; that the judge erred in failing to appreciate that he had jurisdiction under ***Section 34 (1)*** of the **Civil Procedure Act** and the appellant's application ought to have been determined on merit; that the judge erred in failing to appreciate that the transfer was made before the purchase price had been paid. The appellant urged this court to award interest on the purchase price from 19th February 1985 at prevailing bank rates.

15. The respondents in opposing the appeal submitted that the transfer instrument was properly executed by the Deputy Registrar pursuant to a valid court order; that the delay in payment of the balance of the purchase price was occasioned by the appellant's recalcitrant refusal to execute the instruments of transfer from 1985; that transfer document was executed by the Deputy Registrar

upon application by the respondents; that the appellant is not entitled to any interest because he had refused to execute the transfer; that payment of the balance of the purchase price could not be made to the appellant without the transfer having been registered. It was submitted that after the transfer was made on 10th April 2006, the 2nd respondent suffered a stroke and he was unable to make payment of the balance of the purchase price until 30th October 2008. It was not denied that the respondents have been in possession of the suit property since 19th February 1985.

16. We have considered the grounds of appeal, the ruling by the learned judge and submissions by counsel and the authorities cited to us.

17. The reason for decision as stated by the learned judge is that he had no jurisdiction to hear and entertain the application to cancel the respondent's title because the Court of Appeal had already determined the matter in Civil Appeal No. 139 of 1989. We have considered this reason in light of the provisions of ***Section 34 (1)*** of the **Civil Procedure Act**. The Section provides as follows:

**"34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by**

a. **separate suit."**

18. Our examination of the record shows that there were two issues before the learned judge: first, an application for cancellation of the respondent's title and second, validity of the mode of execution of the decree for specific performance as ordered by the High Court and upheld by this Court.

19. It is our considered view that the learned judge erred in failing to distinguish and appreciate that there were two issues before him. On the issue relating to cancellation of the respondents' title, the learned judge did not err as he had no jurisdiction on the issue as the judgment and decree giving rise to specific performance was upheld by this Court in Civil Appeal No. 139 of 1989. The doctrine of precedence and *stare decisis* were applicable and the learned judge was bound by the decision of this Court.

20. On the issue of validity of the mode of execution of the decree, the learned judge erred as he had jurisdiction conferred by ***Section 34 (1)*** of the Civil Procedure Act to determine the same.

21. In the memorandum of appeal, the appellant has urged this Court to cancel the respondent's title. Save to very limited exceptions, we concur with the view expressed by this Court in **Rafiki Enterprises Limited -v- Kingsway Tyres & Automart Limited, Civil Application No. NAI 375 of 1996**, that this Court has no jurisdiction to recall, nullify, vary or rescind its own decision. In the instant appeal, this Court cannot sit on appeal against its own decision made in Civil Appeal No. 139 of 1989. As far as the decree for specific performance is concerned, the matter had already been heard and determined by this Court in Civil Appeal No. 139 of 1989 between the same parties hereto.

22. We have stated that the learned judge had jurisdiction to consider if the decree for specific performance was validly executed. The decree shows that the transfer of the suit property was subject to the respondents tendering the balance of the purchase price to the appellant. It is not disputed that the balance was paid on 30th October 2008 and transfer was made on 10th April 2006. Upon the transfer being made, it was incumbent upon the respondents to tender the balance of the purchase price to the appellant. This was not done until 30th October 2008. The explanation given is that the 2nd respondent suffered a stroke, but this *per se* is no excuse for non-payment taking into account that possession of the suit property was with the respondents from 1985. It is our considered view that interest on the balance of the purchase price is due to the appellant from the date of transfer of the suit property on 10th April 2006. Interest is not due from 1985 to the date of transfer because during this period, it was the appellant who declined to specifically perform the contract and execute the instruments of transfer. Further, interest is not payable before

10th April 2006 on the sum of Ksh. 1,575,000/= because the said sum being the balance of the purchase price was not due and payable until after suit property was transferred to the respondents.

23. From the foregoing, this appeal has some merit and is partially successful. We set aside in its entirety the ruling delivered by the learned judge on 9th October 2008 and substitute in its place an order that the respondents shall pay interest at court rates to the appellant on the sum of Kshs.1,575,000/= from 10th April 2006 till 30TH October, 2008. The respondents shall pay costs in the High Court and costs in this appeal, as well as further interest on the decretal amount from the date of filing suit until payment in full.

***Dated and delivered at Nairobi this2nd day of October, 2015.***

**H. M. OKWENGU**

**JUDGE OF APPEAL**

**P. M. MWILU**

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**