



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, WARSAME & AZANGALALA, JJ.A)**

**CIVIL APPEAL NO. 178 OF 2008**

**BETWEEN**

**LYDIA WANJIKU WANYEE Suing as the administrator of the**

**Estate of the Late George Wanyee.....APPELLANT**

**AND**

**GEORGE NYANJA.....RESPONDENT**

**(Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Osiero, J)  
delivered**

**9<sup>th</sup> day of June, 2008 in**

**H.C.C.C. NO. 178 OF 2008**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The deceased, **George Wanyee** (hereinafter called “the vendor”) entered into an agreement of sale (hereinafter “the agreement”) with **George B. Nyanja**, the respondent (hereinafter “the purchaser”) whereby the former sold to the latter **L.R. No. 7583/23 Muitu Drive, Karen** (hereinafter “the suit property”) at the purchase price of Kshs.4,850,000/= on 9<sup>th</sup> February, 1990. The purchaser then deposited Kshs.500,000/= in terms of the agreement.

It was a term of the agreement that the purchaser would pay Kshs.2,000,000/= to Southern Credit Finance Limited on or before 25<sup>th</sup> February, 1990 and the balance was to be paid on completion which was stated to be 30<sup>th</sup> May, 1990. The purchaser however paid the Kshs.2,000,000/= between 12<sup>th</sup> February, 1990 and 8<sup>th</sup> August, 1990 leaving the balance sum of Kshs.2,850,000/= unpaid.

Notwithstanding the failure of the purchaser to pay the said balance of purchase price, the vendor, on 5<sup>th</sup> February, 1991 transferred the suit property to the purchaser. The default by the latter persisted and in his re-amended plaint dated 26<sup>th</sup> January, 2004 the vendor claimed the balance of purchase price plus interest thereon at 20% p.a. from 30<sup>th</sup> May, 1990 until payment in full and in the alternative an order revoking or annulling the transfer of the suit property to the purchaser. The vendor further claimed damages for

breach of contract and orders of injunction. During the pendency of the High Court suit, the purchaser, on 22<sup>nd</sup> March, 2004 paid the said balance of purchase price. In the interim, the vendor remained in possession and was paid rent from the suit property until the said balance of purchase price was paid.

What is the defence of the respondent and what transpired before the High Court – pleadings and evidence in brief is essential

**Osiemo J.**, who heard, the case dismissed the vendor's claim for interest on the delayed balance of purchase price on the ground that the vendor was not entitled to it as he was in possession of the suit land and received rent therefrom. The vendor was aggrieved and lodged the appeal before us premised upon some thirteen (13) grounds which were argued together by **Ms. Karanja**, learned counsel for the vendor. Her cardinal argument was that as there was no dispute that the purchaser delayed in paying balance of purchase price, interest on the same should have been awarded at 20% p.a. as claimed. In learned counsel's view, possession and receiving rent were none issues given the terms of the agreement and the conduct of the parties.

**Mr. Thangei**, Learned counsel for the purchaser, opposed the appeal and submitted that the vendor could not have both possession and rent in addition to interest. In learned counsel's view, breach of the agreement by the purchaser was irrelevant and so was previous correspondence exchanged between the parties.

Both counsel placed reliance upon submissions they made before the trial Judge and urged their client's respective positions.

We have considered the respective submissions of the counsel for the parties, together with the grounds of appeal, the pleadings and the material placed before the trial court.

There is only one principal issue in this appeal namely, whether the vendor was entitled to interest even though he received rent and retained possession until balance of purchase price was paid. There is no dispute that the purchaser did not pay the balance of Kshs.2,850,000/= until 22<sup>nd</sup> March, 2004 which was nearly fourteen (14) years after the completion date i.e. 30<sup>th</sup> May, 1990. There is also no dispute that the vendor remained in possession of the suit property until the said balance of purchase price was paid and received rent from the property. It is further agreed that long before payment of the said balance of purchase price, the vendor transferred the suit property to the purchaser i.e. on 5<sup>th</sup> February, 1991.

From those uncontested facts, we think the issue of who of the parties was in breach of the agreement cannot be in doubt. The agreement indicated the completion date as 30<sup>th</sup> May, 1990 when the balance of purchase price would have been paid. It was not paid until nearly 14 years later. The breach was in any event admitted in the submissions made on behalf of the purchaser by his advocates before the High Court. So the only issue for our decision is notwithstanding the purchaser's admitted default, could the vendor be denied interest on the balance of purchase price because he remained in possession and received rent thereof?

The learned Judge of the High Court in dismissing the vendor's claim stated:

***"It is trite law that when the purchaser pays the 10% deposit and the same is accepted by the vendor a constructive trust is created so that the vendor holds the property in trust for the purchaser. The equity looks at the purchaser as the owner of the property the subject matter of the contract and the vendor as the owner of the money. The vendor is supposed to retain the legal title to the property until full performance of the contract. But in the instant case it was not the case. The vendor did not retain the legal title to the property. It took the purchaser about 14 years to pay the balance of the purchase money which was Shs. 2,850,000/=.***

***The vendor transferred the suit property but retained possession and continued to receive rent from the tenants for 14 years when he received the balance of the purchase price and gave***

***vacant possession to the defendant. I do not think it would be fair for the plaintiff to receive the deposit, retain possession and continue receiving rent all along for 14 years and turn round to demand interest on the unpaid balance of the purchase price.”***

It is plain that the learned Judge, with all due respect to him, did not consider the agreement executed by the parties nor the correspondence exchanged between them. He also does not seem to have considered the authorities cited before him by learned counsel. He did not even allude to the issue of breach of the agreement at all.

The Judge with utmost respect did not consider the primary cause of the dispute and who is responsible for the protracted finalization of the agreement for sale.

The parties in this appeal incorporated the Law Society Conditions of Sale in their agreement. Clause 5 thereof reads:

***“5. Save as provided in Condition 6, the purchaser shall not be entitled to possession of the property until he has paid or (as the case may be) unconditionally authorized the release of the whole of the purchase money to the vendor.”***

Pursuant to this clause, it cannot be gainsaid that the vendor herein was in possession of the suit property lawfully as he could not give up possession until the purchase money was paid in full. So, up to 22<sup>nd</sup> March, 2004 when the purchaser paid the balance of purchase price, the vendor was entitled to remain in possession. We think it is also not in contention that the parties knew that retaining possession in reality meant receiving the rent from the suit premises. The vendor could not retain possession practically if he did not receive the rent from the suit premises.

The purchaser relied upon the decision of this Court in **Mwangi -v-Kiiru [1987] KLR 324** for the proposition that a vendor who retains possession is only entitled to balance of the purchase price without interest. With respect to the learned counsel for the purchaser that was not the ratio *decidendi* of that case. In any event, unlike in this appeal, the parties there, had not reduced the terms of their agreement such as the completion date into writing. Further, there, the vendor claimed retransfer of the property he had already transferred to the purchaser which is not the position here where the parties reduced the terms of agreement into writing and the vendor accepted balance of purchase price.

Reliance was also placed on the treatise, **Gibson’s Conveyancing 20<sup>th</sup> edition** which, at page 142, states:

***“As to possession. In the absence of stipulation, the purchaser is entitled to possession and to the rents and profits of the property from the time fixed for completion, on paying the purchase money.”***

And at page 143, the learned author continues:-

***“The conditions of sale usually provide that if the purchaser is authorized to take possession before actual completion, he shall keep the property in as good a state of repair as it was in when he took possession, pay all rents, rates, taxes, costs of repairs and insurances and other out goings, and interest on the purchase money, and be entitled to receive the rents and profits.”***

The same position also obtained in **Harvela Investments Ltd. -v- Royal Trust Company of Canada (C.I.) Ltd and Others [1986] ALL E.R. 221**.

Those authorities are however distinguishable from the present appeal. In all the circumstances discussed in those authorities, the vendors were blameworthy unlike the vendor herein. In **Harvela Investments**, it was acknowledged that each case must be judged on its merits. In this appeal, the completion date was given as 30<sup>th</sup> May, 1990. By that time the purchaser should have paid the purchase price in full. He did not do so until 22<sup>nd</sup> March, 2004. No fault can be attributed to the vendor for that willful default of the

agreement.

The parties engaged in correspondence over the issue of interest which correspondence was contained in the bundle of agreed documents put before the learned trial Judge. The parties further agreed not to call *viva voce* evidence. The correspondence was therefore not challenged before the trial Judge and is part of this record.

On 21<sup>st</sup> April, 1993 the vendor's advocates wrote to the purchaser's advocates, *inter alia*, demanding the following:-

***"2. Your client pays interest on the above sum at 20% p.a. from 30<sup>th</sup> May, 1990 until the date of payment. Presently this works out to Kshs.1,645,972.60."***

The said letter elicited a response from the purchaser's advocates in the form of their letter erroneously dated 4<sup>th</sup> April, 1993 but which was actually written on 4<sup>th</sup> May, 1993. Paragraphs (b) and (c) of that letter read:

***"(b) In your letter to our client dated 14<sup>th</sup> October, 1991, further copy whereof is herewith enclosed, you indicated to our client that the balance of the purchase price was Kshs.2,595,000/= and that the same attracted interest at 14% from 30<sup>th</sup> May, 1990. Kindly let us have your clarification as to whether the balance of the purchase price is Kshs.2,595,000/= or 2,850,000/= and further on the rate of interest being charged.***

***c) In your plaint filed in court the amount claimed is Kshs.2,850,000/= and the interest charged is at 20% p.a. with effect from 5<sup>th</sup> February, 1991. Kindly let us have your confirmation whether our client should proceed to calculate interest from 5<sup>th</sup> February, 1991 till payment in full."***

The vendor's advocates clarified, in their letter dated 6<sup>th</sup> May, 1993 that the balance of purchase price was Kshs.2,850,000/= and the rate of interest charged was 20% p.a. On 14<sup>th</sup> May, 1993 the purchaser's advocates indicated the purchaser's proposals in their letter of even date. Paragraph 2 read:-

***"2. Our client pays your interest amounting to Kshs.1,624,645/60 calculated as follows: (a) interest on Kshs.2,850,000/= at 20% p.a. from 30<sup>th</sup> May, 1990 to 13<sup>th</sup> September, 1990 amounting to Kshs.165,534/20 and (b) interest on Kshs.2,720,000/= at 20% p.a. from 14<sup>th</sup> September 1990 to 30<sup>th</sup> May, 1993 amounting to Kshs.1,459,111/40."***

The purchaser himself joined the correspondence and wrote to his advocates on 6<sup>th</sup> July, 1993 stating, at paragraphs 2 and 3, as follows:

***"Mr. Joseph Njuguna through his lawyers (Att: Mr. Ngethe) is supposed to pay you all the monies claimed by Messrs K. Mwaura & Co. Advocates together with your fees of Kshs.150,000.00. It is Mr. Njuguna's strongest view that it is a waste of time and money arguing with Wanyee's advocates over Seven hundred thousand Kenya shillings. I do agree with him.***

***Mr. Njuguna will pay me Kshs.3.0 million which is my initial deposit of Kshs.2.0 million (sic) together with an interest amount of Kshs.1.0 million. But [that] does not in any way form the bone of contention at the moment. All we want is to get rid of Mr. Wanyee and his lawyers, and the best way to do it is to pay them whatever they are demanding, period.***

From the above correspondence, it is clear beyond peradventure that the parties understood between themselves that interest at 20% p.a. was payable on the delayed purchase price. The purchaser had the use of the said money for the entire period the same remained unpaid. It would be inequitable for him to have delayed with the vendor's money and now claim that he cannot pay interest because the vendor was in

possession and received rent.

It is uncommon in the normal cause of events that money would appreciate over a period of time. It is the exact opposite with respect to landed property particularly in a fast growing city such as Nairobi. There is no doubt that the suit property currently has a far much higher value than it had at the time of the sale to the purchaser. That higher value will enure for the benefit of the purchaser.

We also observe that clause 8(3) of the Law Society Conditions of sale buttresses the vendor's claim to interest. The clause is in the following terms:

**"8.....**

***(3) Where the completion is for any reason whatsoever other than the default of the vendor or his mortgagee delayed beyond the completion date, the purchaser shall, subject as is hereinafter otherwise provided pay to the vendor on completion interest on the balance of the purchase money computed from the completion date until the date of payment of the purchase money in full (both dates inclusive)....."***

The learned Judge, in his judgment did not, with all due respect to him, consider the correspondence we have considered above nor did he even mention the said provisions of the Law Society Conditions of Sale. He also failed to appreciate the consequence of the purchaser's breach of the agreement of sale.

We are not unfair or uncharitable to say that the learned trial Judge did not place reliance on the bundles of documents produced before him on the issue of the interest and for what period. Had he done so, his analysis of the facts and final determination or decision would have been different. He did not attach much premium to the genuine cry of the appellant for justice and in the end committed a grave error or miscarriage of justice. In the result, we think the learned Judge was in error when he declined to award the interest the vendor sought. This appeal must therefore succeed. The same is allowed with the result that the judgment of the High Court dated 9<sup>th</sup> June, 2008 is set aside. We substitute therefor judgment for the appellant for interest on Kshs.2,850,000/= at the rate of 20% p.a. from 30<sup>th</sup> May, 1990 to 22<sup>nd</sup> March, 2004.

The appellant shall have the costs of this appeal and also of the High Court.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>th</sup> DAY OF DECEMBER, 2015.**

**H.M. OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**