IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 158 OF 2001

BETWEEN

CHARLES MWIRIGI MIRITI …….…… APPELLANT

AND

THANANGA TEA GROWERS SACCO LTD ……...…… 1ST RESPONDENT

MICHIIMIKURU TEA GROWERS SACCO LTD …….. 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Tuiyot, J.)dated 23rd April, 2001

in

H.C.C.C No. 85 of 2000)

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JUDGEMENT OF THE COURT

[1] This is a first appeal against the decision of the High Court (Tuiyot, J.) dated 23rd April, 2001. This Court is required to analyze and re-assess the evidence on record and reach its own conclusion in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123***, thus:

> "***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

[2] The brief background of this appeal is that the appellant instituted a suit against the respondents before the High Court in Meru seeking *inter alia* an order of specific performance of an agreement dated 3rd July, 2000, and in the alternative damages for breach of contract. The appellant is at all material times the registered owner of Plot No. 21 situated within Maua Municipality *(suit property);* the appellant had

charged the suit property to the 2nd respondent as security for a loan facility which he had obtained from the bank prior to the sale agreement complained about.

[3] It was the appellant's case that vide a written agreement dated 3rd July, 2000, the 1st respondent agreed to purchase the suit property for a consideration of Kshs. 8,000,000/=. It was a term of the agreement that the 1st respondent would pay Kshs. 4,766,135.65/= directly to the 2nd respondent on or before the 30th March, 2001; the said sum would offset the outstanding loan and it was also to be considered as part of the purchase price. The balance of the purchase price was to be paid to the appellant on or before 3rd December, 2001. It was a further term of the agreement that the suit property would be transferred to the 1st respondent upon payment of the outstanding loan as well as the balance of the purchase price. However, the 1st respondent repudiated the contract before the effective date of performance. Thereafter, the 2nd respondent issued a statutory notice of intention to sell the suit property. According to the appellant, the 1st respondent was in breach of the aforementioned agreement. The appellant also contended that he would be prejudiced if the 2nd respondent sold the suit property to recover the loan.

[4] In its defence, the 1st respondent averred that the agreement dated 3rd July, 2000 was made in connivance with some of its former office bearers without the consent of its members which was a necessary prerequisite for a valid trasaction. Consequently, the agreement was not enforceable. The 1st respondent also argued that the agreement was not valid because of lack of consideration. By a resolution made on 30th August, 2000, the 1st respondent's members resolved not to purchase the suit property; the repudiation was communicated to the appellant before the effective date of performance of the agreement. The 1st respondent contends that it did not breach the aforementioned agreement.

[5] On the other hand, the 2nd respondent averred that it was not privy to the agreement between the appellant and the 1st respondent. According to the 2nd respondent, there was no cause of action against it.

[6] When the matter which was filed by way of an originating summons came up for hearing, the parties agreed that the matter be determined on the basis of written submissions. The learned trial Judge, (Tuiyot, J.) considered the submissions and the material that was before the Court and by a judgment dated 23rd April, 2001, he dismissed the appellant's suit with costs. It is that decision that has provoked this appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact in arriving at a decision not supported by the evidence on record.***
- ***The learned Judge erred in law and in fact in failing to find that there was no frustration of contract and that the 1st respondent was in breach of contract.***
- ***The learned Judge erred in law and in fact in failing to find that the appellant was entitled to orders of specific performance and/or damages for breach of contract.***
- ***The learned Judge never apprehended the issues of law and facts in the matter hence arriving at an erroneous decision.***
- ***The learned Judge ought to have assessed the damage he would have awarded the appellant if he found in his favour.***
- ***The entire judgment was unfair to the appellant.***

[7] Mr. Kariuki, learned counsel for the appellant, relied on the appellant's written submissions and also made oral highlights. He submitted that the agreement dated 3rd July, 2000, was valid and enforceable. He argued that the appellant and the 1st respondent entered into an agreement whereby, the 1st respondent

agreed to purchase the suit property by paying the outstanding loan and the balance of the purchase price at future dates respectively. The appellant agreed to transfer the suit property once the 1st respondent paid the outstanding loan. He placed reliance on the text book; **Law *of Contract in East Africa by R.W. Hodgin,*** and emphasized that there was executory consideration on the part of the appellant. This is because the appellant was and still is ready and willing to transfer the suit property once the 1st respondent meets its part of the bargain. Mr. Kariuki maintained that the repudiation by the 1st respondent amounted to a breach of contract. The Court paused the question regarding the value of the suit premises in view of the prayers seeking specific performance of the contract. Mr. Kariuki nonetheless insisted that the appellant is only pursuing damages for breach of contract as he admitted the value of the property went up since the agreement.

[8] He submitted that the defence of frustration was neither available nor supported by the evidence on record. He argued that the allegations by the 1st respondent that its members refused to contribute towards the purchase price or lack of finances did not amount to frustration. According to Mr. Kariuki, it was self induced frustration which did not amount to a defence. Mr. Kariuki submitted that the 1st respondent had Kshs. 12,000,000/= in its account and therefore was capable of honouring the agreement. Further, the learned trial Judge failed to analyze the evidence and misapprehended the facts by holding that there was no consideration. He urged the Court to allow the appeal and issue orders of specific performance.

[9] Mr. Riungu in opposing the appeal submitted that the 1st respondent ceased to exist. He represented Michiimikuru Tea Growers Ltd which is not a party to the suit. He submitted that when the suit was filed by the appellant no money/consideration had passed from one party to another. There was an offer and a promise but the contract never crystallized. Mr. Riungu argued that the promise never created a duty which was enforceable in law. He emphasized that the appellant never gave out the suit property and the 1st respondent never gave out the money. According to him the contract was still-born. He urged the Court to dismiss the appeal.

[10] Mr. Kibet holding brief for Mr. Odhiambo, learned counsel for the 2nd respondent, pointed out that on 3rd February, 2005 a Notice withdrawing the appeal against the 2nd respondent was filed by the appellant, thus there was in essence no appeal against the 2nd respondent but he attended Court as he thought an order to that effect may not have been recorded.

[11] Upon considering the submissions by the respective counsel, the record of appeal and the authorities cited we are of the view that only these two issues fall for our determination:-

- ***Was the agreement dated 3rd July, 2000 valid and enforceable?***
- ***Was the appeal withdrawn as against the 2nd respondent?***

It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration. See ***Halsbury's Laws of England, Vol. 22, 5th Edition, paragraph 308.*** The trial court held that there was no consideration and that the agreement was one of an intention to sell and buy. ***Chitty on Contracts, Vol. 1, General Principles, 29th Edition*** at paragraph 3-004 defines consideration as follows:-

> ***"The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasized that these statements relate to the consideration for each promise looked at separately. For example the***

seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price."

See also ***Halsbury's Laws of England (supra), paragraph 309.***

[12] Consideration is further classified as either executed or executory. ***The Common Law Series on the Law of Contract by Robert Bradgate*** at paragraph 2:49 defines executed and executory consideration as follows:-

" A distinction is generally drawn between executed and executory consideration. Consideration for a promise is executed where it consists of an actual act or forbearance. Consideration is said to be executory when it consists of a promise of an act or forbearance. A simple example of a situation where consideration is wholly executory is provided by a contract for sale of goods to be delivered at a future date on credit terms. There is a fully binding, bilateral executory contract as soon as promises are exchanged, despite the fact that neither seller nor buyer has actually performed as yet. Each party's promise is consideration for that of the other. This example is typical of commercial contracts which often are bilateral executory contracts. When either party renders performance in accordance with his promise his consideration is executed."

Halsbury's Laws of England (supra), at paragraph 314 indicates that:-

"Consideration is said to be 'executory' when it consists of a promise to do or forbear from doing some act in the future; and it is said to be 'executed' when it consists some act or forbearance completed at the earliest when the promise becomes binding".

The learned author of ***Cheshire, Fifoot & Furmstone's Law of Contract, 14th Edition*** at page 83 in distinguishing executory and executed consideration stated,

"Consideration is called executory when the defendant's promise is made in return for a counter promise from the plaintiff, executed when it is made in return for the performance of an act. … At the time when the agreement is made, nothing has yet been done to fulfill the mutual promises of which the bargain is composed. The whole transaction remain in future".

[13] On one hand, the 1st respondent promised to pay part of the purchase price to the 2nd respondent to offset the outstanding loan on behalf of the appellant on or before 30th March, 2001, and to pay the balance of the purchase price to the appellant on or before 3rd December, 2001. On the other hand, the appellant promised to transfer the suit property to the 1st respondent once the outstanding loan was paid. These promises were in respect of acts to be done at future dates by both parties. Each promise consisted of something of value to be given and causally related to one another. In ***Cheshire, Fifoot & Furmstone's Law of Contract (supra),***

" But whether the plaintiff relies upon an executory or on an executed consideration, he must be able to prove that his promise remains or act, together with the defendant's promise or act constitute one single transaction and are causally related the one to the other."

See ***Wigan -vs- English and Scottish Law life Insurance Association (1909) I Ch 291.***

[14] The 1st respondent contends that the agreement was made without the consent of its members. Perusal of the record reveals that prior to the execution of the agreement, members of the 1st respondent vide a resolution made in a special general meeting held on 12th November, 1999 resolved to purchase the suit property. Further in the annual general meeting held on 26th May, 2009, the 1st respondent's members gave the management team authority to continue with the plan to purchase the suit property. This clearly shows that the 1st respondent's members had authorized the management team to enter into the aforesaid

agreement. ***Section 27 (1)*** of the ***Co-operative Societies Act, Chapter 490, laws of Kenya*** provides:-

> ***" The supreme authority of a co-operative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on matters."***

Therefore, the consideration in the agreement dated 3rd July, 2000 was executory. Consequently, the agreement was executory. ***Halsbury's Laws of England (supra), at paragraph 205*** defines an executory and executed contract as herein under:-

> ***" A contract is said to be executory so long as anything remains to be done under it by any party and executed when it has been wholly performed by all parties."***

[15] It is not disputed that the 1st respondent repudiated the agreement before the effective date of performance instigating the suit herein. The appellant sought enforcement/specific performance of the agreement. It was the 1st respondent's case that the agreement could not be enforced since consideration had not passed to either party. The agreement came to an end once the 1st respondent's members vide a resolution resolved not to proceed with the performance of the agreement and the repudiation was communicated to the appellant. On the other hand, the appellant maintained that the doctrine of frustration was not available to the 1st respondent since the circumstances that led to the repudiation were self induced. The trial court held that the performance of the agreement was subject to the availability of funds to the 1st respondent; the funds were to be obtained by way of a loan which was being negotiated by the 1st defendant from the 2nd defendant. Consequently, since the funds had not been obtained the agreement was not binding on any party.

[16] This now leads us to the issue of whether the agreement was genuinely frustrated.

In ***Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897***:-

> ***"As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."***

In the case of;- ***Davis Contractors LTD -vs- Farehum U.D.C, (1956) A.C 696, Lord Radcliffe*** at page. 729 held:

> ***"...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".***

[17] From the agreement dated 3rd July, 2000, it states:

> ***"It is agreed by the buyer that in the event it is able to raise the balance of the purchase price after paying the loan, the same shall be payable to the seller on or before 30th March, 2001, notwithstanding the provisions of Clause 5 of this agreement".***

There is an implied term that the performance of the 1st respondent's promise thereunder was dependent on the availability of funds. This term is also illustrated in the 1st respondent's minutes of the special general meeting held on 12th November, 1999 wherein it was resolved that members would contribute the purchase price by paying Kshs. 5,000/=; or in the event that members did not have cash they would obtain a loan of the equivalent amount from the 1st respondent. However, vide a resolution made at the special general meeting held on 30th August, 2000, it was resolved that the 1st respondent should not proceed with the agreement. The 1st respondent informed the appellant of the resolution and repudiated the agreement on the ground of lack of finances. According to the appellant, the 1st respondent was capable of meeting the agreement since it had Kshs. 12,000,000 in its account; the alleged frustration by the 1st respondent was self induced.

Chitty on Contracts, Vol. 1, General Principles, 28th Edition *at paragraph 24-059 in discussing self induced frustration provides:-*

> ***" The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. Thus a contracting party cannot rely on self induced frustration, that is, on frustration due to his own conduct or to the conduct of those for whom he is responsible. ..Thus frustration has been held to be self induced where the alleged frustrating event was caused by a breach or anticipatory breach of contract by the party claiming that the contract has been frustrated."***

Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 899, *the learned authors posited;-*

> ***" The defence of frustration can therefore be defeated by proof of fault, and the burden of proof of fault lies upon the party alleging it."***

See also ***Joseph Constantine Steamship Line Ltd. -vs- Imperial Smelting Corporation Ltd. (1942) AC 154.***

[18] From the minutes of the special general meeting held on 30th August 2000, it is clear that the 1st respondent was not capable of giving its members loan facilities to purchase the suit property. Further the letter that repudiated the agreement also clearly indicates that the 1st respondent was not capable of meeting its promise on account of lack finances due to drought and crop failure. The appellant did not prove the lack of finances was due to the 1st respondent's actions or omission. There was also no evidence at all adduced by the appellant to prove the claim for damages. In view of the foresaid we are in agreement with the Judge's findings that the defence that the agreement was frustrated as a result of lack of finances consequently discharging the appellant and the 1st respondent from meeting the promises which at the time of repudiation had not been performed was legally sound. See also ***Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 909*** *&* ***Chitty on Contracts, Vol. 1, General Principles, 28th Edition*** *paragraph 24-069.*

[19] Based on the foregoing, we find the agreement was not capable of being enforced through specific performance, and for that reason the claim for damages would have no basis, although no evidenced was adduced to support it. This is because specific performance is based on the existence of a valid and enforceable contract. As regards the appeal against the 2nd respondent, the record shows that a notice withdrawing the appeal against the 2nd respondent was filed by the appellant on 3rd February, 2005. This Court on 26th October, 2005 pursuant to the said notice marked the appeal against the 2nd

respondent as withdrawn with no orders as to costs, thus northing turns on the appeal against the 2nd respondent.

[19] In the upshot of the analysis of the entire appeal we find it lacking in merit and it is hereby ordered dismissed with costs to the 1st respondent.

Dated and delivered at Nyeri this 18th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR