REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 15 of 2005

SOUTHERN SHIELD HOLDINGS LIMITED ..…….. APPELLANT

AND

ESTATE BUILDING SOCIETY ……..……..…...……..…… RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ombija, J) dated 17th October 2003

in

H.C.C.C. NO. 1851 OF 2001)
****

JUDGMENT OF THE COURT

By a plaint dated and filed in the High Court of Kenya at Mombasa on 27th June 1989 in HCCC No. 374 of 1989, Kenya Coastal Holdings Limited sued the current respondent, Estate Building Society, for beach of agreement of sale of property. By an order dated 21st October, 1993, the suit was transferred from Mombasa to the High Court of Kenya Central Registry, Nairobi where it became Civil Case No. 209 of 1995 before a further transfer to Milimani Commercial Courts where it ended up as High Court Civil Case No. 1851 of 2001.

During the pendency of the litigation, the plaintiff changed its name from Kenya Holdings Ltd. to Southern Shield Holdings Ltd and by a consent order dated 27th June, 2002 the necessary substitution was effected in the suit.

The plaint itself was amended on 28th November, 2001, further amended on 27th June, 2002 ending with a second further amended plaint dated 20th December 2002.

The substance of the plaintiff's claim was that by a written agreement of sale dated 21st December 1988, the respondent agreed to sell and the appellant agreed to purchase Plot No 398 Section XXI Mombasa Island, ("the suit property") together with all the buildings and improvements thereon for Kshs 7,000,000.00. A sum of Kshs 700,000 was paid to the respondent's advocates as stakeholders. The completion date was 31st January, 1989 and the parties further agreed that the suit property would be handed over to the appellant with complete vacant possession of the buildings thereon and conveyed free from all encumbrances, charges and liens.

In the event the respondent was unable to hand over the suit property with complete vacant possession as of the date of completion, the appellant was given three options, namely (a) not to proceed with the sale, (b) to extend the period within which the respondent was to obtain complete vacant possession to 31st March, 1989, or to another date mutually agreed by the parties, or (c) complete the sale notwithstanding lack of vacant possession.

The appellant pleaded that the respondent was unable to give complete vacant possession by 31st January, 1989 and at the respondent's request the completion date was extended to 28th February, 1989. The respondent was still not able to complete by the new completion date forcing the appellant on 11th March, 1989 and in accordance with the provisions of the agreement for sale, to serve upon the respondent a notice to complete the transaction by 31st March, 1989. In response, the respondent cancelled the transaction unilaterally through a letter dated 12th April, 1989 which the appellant contended was unlawful and in breach of the contract. As a result, the appellant pleaded that it suffered loss and damage and prayed for the following reliefs:

i) Specific performance of the agreement for sale;

ii) An order that the respondent within a time to be specified by the court execute a transfer in favour of the appellant free of all pledges, mortgages and other adverse interests;

iii) Further or in the alternative damages for loss of bargain to purchase the property valued at Kshs 30,000,000 as at 18th April, 1997 and or for delay in completion of the transaction;

iv) Further or in the alternative to i) and ii) the sum of Kshs 700,000 paid to the respondent as deposit;

v) An injunction to restrain the respondents by itself, its agents, servants or otherwise from parting with or disposing off the suit premises otherwise than to the appellant;

vi) Further or other relief and costs.

From the record the respondent filed its defence on 22nd August, 1989 and amended the same on 18th December, 2001. The main point in the defence was that the respondent cancelled the agreement for sale because consent to transfer the suit premises was not granted by the Commissioner of lands and such consent was a vital prerequisite for the transfer of the suit premises. Consequently the refusal of consent to transfer frustrated the contract. The respondent denied that the plaintiff had suffered loss and damage for loss of bargain and denied the stated value of Shs. 30,000,000 for the suit property as at 18th April, 1997 terming it unreasonably inflated.

The appellant filed a reply to defence on 29th August, 1989 and amended the reply to defence on 15th January, 2002. The amended reply to defence pleaded that the refusal by the Commissioner of Lands of consent to transfer was occasioned by the respondent's refusal to comply with its own internal procedures and that the respondent had never disclosed to the appellant that it had been denied consent to transfer. Hence the appellant denied that the agreement for sale had been frustrated.

Subsequently the parties framed the issues for determination and agreed on bundles of documents. On 1st October 2002, a consent order was recorded by which the parties agreed that the suit be determined in terms of the provisions of ***Order XIV Rule 6 and 7*** as regards liability. The parties agreed to make submissions on liability and depending on the outcome, to agree on quantum of damages.

The suit was heard by Ombija, J who on 17th October, 2003 made the following key findings, as far as this appeal is concerned:

a) the cancellation of the contract of sale by the respondent was not due to lack of consent to transfer from the Commissioner of Lands, but because the respondent had failed or neglected to forward its

resolution requested by the Commissioner of Lands and without the resolution the Commissioner could not give consent to transfer the suit premises. Consequently the Commissioner of Land's refusal to grant consent to transfer did not frustrate the contract of sale and that the frustration of the contract of sale was self-induced;

b) under S. 48 of the Registered Land Act, Cap 300 Laws of Kenya, the contract of sale was voidable;

c) the respondent did not inform the appellant of the Commissioner of Land's refusal of consent to transfer;

d) *The respondent's act of cancelling the sale was unlawful and in breach of contract*.

The learned judge concluded that since ultimately no consent was obtained from the Commissioner, no general or special damages could be recovered under the transaction. He ordered the deposit of Kshs 700,000 which had been placed in a fixed deposit account together with interest released to the appellant. He also awarded costs at higher scale.

Aggrieved by the judgment and decree, the appellant lodged this appeal against that part of the judgment that held that the appellant was not entitled to general or special damages for breach of contract. Nine prolix grounds of appeal were set out, which for the avoidance of verbosity and repetition can be compressed into four grounds as follows:

1. Having found that the respondent was in willful breach of contract, the learned judge erred in failing to hold the respondent liable in damages;

2. The learned judge erred in using the analogy of the provisions of the Land Control Board Act and the decision of ***Kariuki vs. Kariuki;***

3. The learned judge erred in holding that no special or general damages were recoverable against the respondent; and

4. Having found that the respondent failed to obtain consent by its own willful neglect and default, the learned judge erred by allowing the respondent to rely on lack of consent from the commissioner of lands to avoid performance of the contract.

In finding that the respondent was in willful breach of the contract, the learned judge delivered himself thus:

On page 11 of the judgment:

"Given the foregoing facts I take the view that the contract of sale was not cancelled by the defendant because of lack of Commissioner's consent to transfer. Indeed the Commissioner by the letter of 22nd May, 1989 reproduced herein sought resolution of the vendor-Estate Building Society- sanctioning sale as a matter of urgency. On the available evidence M/s Gakuru & Co. Advocates did not forward the much sought for resolution. Without that resolution the Commissioner would not give consent. On the premises the contract of sale, in my view was cancelled because the defendant failed to forward the resolution without which the Commissioner would not give consent" (emphasis added).

On Page 13:

"As to whether the Commissioner's refusal of the consent to transfer was a result of neglect by the defendant to comply with its internal procedures I answer in the affirmative. As said earlier the defendant readily provided consent to charge. However when the Commissioner sought consent to transfer (sic) by a letter dated 22nd May, 1989 the defendant drew cold feet. The agreement on the face of it was signed by directors of the vendor and purchaser. Equally the common seal of both parties were affixed. The only thing lacking was consent. It was the duty of the vendor to provide the same and in my view the vendor

intentionally failed to do so."(emphasis added).

On Page 14:

"In any event as earlier said the Commissioner never refused consent to transfer (emphasis added). Rather it was the defendant that refused to avail the resolution of the defendant company authorizing transfer as enjoined by section 23 of the Building Societies Act, cap 489 Laws of Kenya."

On page 15:

"As to whether the Commissioner's refusal to grant consent to transfer frustrated the sale I answer in the negative. It was the duty of the defendant to obtain the consent as per the contract. The duty entailed compliance with all internal regulations and procedures of the defendant in terms of the provisions of the Building Societies Act (Cap 489) Laws of Kenya. The defendant grew a cold feet (sic) and hence the frustration of the contract was self-induced. The defendant created a further ground for refusal to obtain consent and cannot in law use it as a shield when the same was self inflicted." *(emphasis added).*

On page 16:

"In any event consent was not refused (emphasis added). There is no such indication from the Commissioner. The Commissioner merely sought resolution of the company which was not provided."

Whilst Mr. Luis Onguto, learned counsel for the appellant, supported these findings but only criticized the manner in which the learned judge proceeded in light of his findings, Mr. Gitonga Murugara, learned counsel for the respondent, contended that on the basis of the evidence before the learned judge, he could not have validly come to the above conclusions.

To arrive at the above findings, the learned judge was heavily influenced by a letter from the Commissioner of Lands dated 22nd May, 1989 and addressed to the then advocates for the respondent, M/s Gakuru and Company Advocates. The relevant part of the letter read as follows:

"*Thank you for your letter Ref. No. E/16 of 5.5.89.*

It is noted that you have applied for consent to transfer the above property which is owned by Estate Building Society. We have had representation by other interested parties who have indicated that the Society has only given consent for the property to be charged but not to be transferred. It would, therefore, be appreciated if you could forward to us the Society's resolution in form of the agreed minutes to the effect that this property is to be transferred as implied by you. Your earliest reply will be highly appreciated so that this matter can be disposed of as early as possible."

From the extract we have quoted from page 11 of the judgment, the learned judge concluded that the respondent did not forward the information requested by the Commissioner and that without that information the Commissioner would not give consent. In fact in the extracts from page 14 and 16 of the judgment, the learned judge held that the Commissioner never refused consent to transfer; it was the respondent who refused to avail the resolution authorizing transfer.

Having reconsidered the evidence and evaluated it as we are bound to do (See ***SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123, 126*** and ***SEASCAPES LTD VS. DEVELOPMENT FINANCE COMPANY OF KENYA LTD (2009) KLR, 384, 396***)and further taking note of the fact that there were no witnesses who testified before the learned judge,we agree with Mr. Murugara that the evidence before the Court did not support the conclusions the learned judge came to. The learned judge totally ignored several letters that were admitted in evidence relating to the respondent's application to the Commissioner of Lands for consent to transfer.

The first is a letter dated 5th January, 1989 from the respondent's advocates addressed to the Commissioner of Lands. By that letter, the respondent applied for consent to transfer the suit premises

and forwarded KShs.100/- consent fee. The second is dated 5th May, 1989. Again it was the respondent's advocates writing to the Commissioner about the consent to transfer. The letter stated as follows:

Thank you for your letter of 4th May, 1989.

You state that your records show our letters were received on 28th April 1989 and that none of our staff ever saw you on the subject. This is not the true positions (sic). Our original letter was returned to our staff twice, the first time with payment intended for the consent for undisclosed reasons. After that the writer came personally to determine the cause of the delay just to be informed that there was a problem being looked into whereafter we wrote our second letter of 16th March 1989 calling for confirmation of the position.

The property is owned by Estate Building Society.

The clearance certificate is attached as requested. The rates certificate will be obtained from the Municipal Council."

t was in reply to the above letter that the Commissioner wrote on 22nd May, 1989 asking for the respondent's resolution.

The third and perhaps the most important letter was from the Commissioner of Lands dated 31st May, 1989 addressed to the respondent's advocates. That letter, short and to the point was in the agreed list and bundle of documents filed in court on 8th July, 2002. It was No. 32 in the list and read as follows:

"RE: MOMBASA/BLOCK XXI/398

Thank you for your letter ref. No. E/16 dated 30th May, 1989.

The Government has rejected the proposed transfer of the above property."

Thus the finding by the learned judge that the respondent did not provide the information that the Commissioner sought (page 11), that the respondent intentionally failed to obtain consent (page 13) and that the commissioner did not refuse consent (pages 14 and 16) is not borne out by the evidence which was before him. The respondent did write to the Commissioner of Lands on 30th May, 1989 presumably responding to the letter of the Commissioner dated 22nd May, 1989. It was after receipt of the letter of the respondent dated 30th May, 1989 that the Commissioner of Lands, by a letter dated 31st May, 1989 definitively refused consent to transfer the suit property.

We accordingly find on the evidence that the Commissioner of Lands refused consent to transfer the suit premises.

The next issue for consideration is what was the effect of the Commissioner of Land's refusal of consent to transfer the suit property? Contrary to the appellant's assertion, the learned judge did not find, or even suggest that the suit premises was agricultural land subject to the Land Control Act, Cap 302 laws of Kenya. All that the learned judge said was that the case before him was analogous to one where there is failure to obtain consent of the Land Control Board. Using that analogy, he relied on the case of ***KARIUKI VS. KARIUKI (1983) KLR, 225*** where this Court held that a party to a transaction that is declared void by statute for lack of consent cannot be guilty of fraud for contending that the transaction is void and that no special and general damages can be awarded on the basis of such a transaction.

The consent in issue in the present case was required under ***S. 48 of the Registered Land Act, Cap 300 Laws of Kenya***, now repealed. That provision provided as follows:

"*Upon registration of a lease containing an agreement, express or implied, by the lessee that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written*

consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with section 110, has been produced to the Registrar."

There is a proviso to the provision which is not relevant to these proceedings.

In addition to ***KARIUKI VS. KARIUKI***, Mr. Murugara relied on several authorities to support the view that lack of the kind of consent contemplated by ***section 48*** renders the transaction void. The first was ***MLAY VS. PHONEAS (1968) EA), 563*** which involved construction of ***s. 19 of the Freehold Titles (Conversion)*** and ***Government Leases Act*** (Tanzania). The section provided that *"a disposition of a Government lease shall not be operative without the consent of the Commissioner"*. The High Court of Tanzania held the meaning of 'inoperative' is not voidable but that in so far as the agreement in question concerns disposition of Government leasehold property, it is *'void'*; but may still be of some effect as far as a collateral agreements are concerned. The second case was ***ALEXANDER GRAY PATTERSON & OTHERS VS. BADRUDIN MOHAMED SALEH KANJI (1956) 23 EACA 106*** a decision of the former Court of Appeal for Eastern Africa on the interpretation of ***regulation 3 of the Land Regulations, 1948 (Tanganyika)*** which prohibited the holder of a right of occupancy from letting a house without the consent of the Governor. The Court held that a claim founded on a transaction that was declared by law to be inoperative for lack of approval could not be sustained.

The third authority ***FAZAL KASSAM (MILLS) VS. ABDUL NAGJI KASSAM (1960) EA 1042*** involved the same Land Regulations, 1948 and was to the same effect. The last authority was ***MOTIBAI MANJI VS. KHURSID BEGUM, (1957) EA 101***, another decision of the former Court of Appeal for Eastern Africa. The case involved interpretation of ***s. 2 of the Land Transfer Ordinance (Uganda)*** which prohibited transfer of *mailo* land without the written consent of the Governor. In a transaction where no such consent had been obtained, the Court held that the agreement was prohibited by law and was void *ab initio* and that nothing subsequently done could convert it into an enforceable contract.

For his part, Mr. Onguto relied on the case of ***AZIZ VS. BHATIA BROTHERS LTD (2000) 1 EA 10***, a decision of a full bench of five justices of the Court of Appeal of Tanzania. The issue that was referred to the full bench was the legal effect of lack of consent to a sale of registered land because there were conflicting decisions by the Court. The full bench reviewed a long line of decisions on the issue, which included ***MLAY VS. PHONEAS (1968) EA), 563, MOTIBAI MANJI VS. KHURSID BEGUM, (1957) EA 101, FAZAL KASSAM (MILLS) VS. ABDUL NAGJI KASSAM (1960) EA*** and ***ALEXANDER GRAY PATTERSON & OTHERS VS. BADRUDIN MOHAMED SALEH KANJI (1956) 23 EACA 106.*** The court concluded that the words *"shall not be operative"* as used in ***regulation 3 of the Land Regulations, 1948 and 1960***, did not mean void.

We have carefully considered the decision of the full bench of the Court of Appeal of Tanzania and find that the court arrived at that conclusion based on the specific provisions of the law of Tanzania. The court found that in Tanzania, transactions that do not have consent are saved by the provisions of ***Section 2 (2) of the Law of Contract Ordinance Cap 433 Revised Laws of Tanzania***, which provides as follows:

"Notwithstanding the provisions of paragraph (g) or (j) of subsection (1) of this section, where any written law in force in Tanganyika on the date when this ordinance comes into operation provides that an agreement (howsoever described), of the kind specified therein, shall not be enforceable by action unless or until certain requirements specified therein are complied with, or certain consents are obtained, no such agreement shall be void by reason only that it is not enforceable by action under the provisions of that law for want of compliance with any such requirement or the obtaining of any such consent." The Court concluded as follows:

"…We are satisfied that the expression "shall not be operative" *as used under regulation 3 of the land Regulations 1948 and 1960 does not mean "void" or another meaning to the same effect. We are satisfied that this must be the correct interpretation in view of the provisions of subsection (2) of section (2) of the Law of Contract Ordinance. We note that the decisions of cases made before the enactment of the law of Contract Ordinance and which held to the effect that non-compliance with the statutory*

requirement of consent or writing rendered a contract void, were correct according to law applicable then, but ceased to be precedents on the matter after 1960."

There is therefore no doubt that this decision was specific to Tanzania on account of the provisions of her law, the equivalent of which we do not find in the ***Law of Contract Act, Cap 23 Laws of Kenya***. We would also like to echo the words of the Court in ***JIVRAJ VS. DEVRAJ (1908) EA 263*** that:

"There is a principle of law, however, that where a court has interpreted the law in a certain manner particularly an interpretation which affects property rights, and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustice."

In the premises we find that the decisions relied upon by the respondent are good law in Kenya.

Mr. Onguto also relied on the cases of ***DAY VS. SINGLETON (1899) 2 Ch. 320*** and ***MALHOTRA VS. CHOUDHURY (1979) 1 ALL ER, 186***. The former was relied upon for the proposition that a purchaser is entitled to damages (beyond return of deposit) for loss of bargain if the seller fails to do his best to procure consent to transfer where it is required. In that particular case, the Court specifically found that the seller had successfully endeavoured to induce the refusal of consent so that they could sell the property in question on more advantageous terms. In the latter case, the court found that there was absolutely no effort on the part of the defendant to persuade his wife, who was required to give consent for sale, to do so.

From the evaluation of the evidence in this case, especially the correspondence between the appellant's advocates and the Commissioner of Lands (including reference to a visit to the Commissioner's office by the respondent's advocates to pursue the issue of consent), it appears that the Commissioner was from the very beginning reluctant to give consent and definitively refused to so by the letter of 30th May, 1989. The respondent does not fall within the purview of ***Day Vs. Singleton*** and ***Malhotra Vs. Choudhury [supra]***.

In light of our findings above, issue number 3 and issue number 4 in this appeal must fail.

We accordingly uphold the judgment and decree of the superior court but on the grounds that the Commissioner of Lands declined to give consent for the transfer of the suit property. The appeal is otherwise dismissed with costs.

Dated and delivered at Nairobi this 12th day of April, 2013.

ALNASHIR VISRAM

JUDGE OF APPEAL

P. KIHARA KARIUKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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