REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 152 of 2006

SAVINGS AND LOAN KENYA LIMITED ....………..………. APPELLANT

AND

MAYFAIR HOLDINGS LIMITED ……………….………… RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kisumu (Wambiliyangah, J) dated 10th May, 2000

in

H. C. C. C. No. 312 of 1996 (O.S)
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JUDGMENT OF VISRAM, J.

This appeal raises only one important issue: who, between the purchaser and the seller (selling under a statutory power of sale), is liable to pay the land rent and rates up to the time of the sale of the immovable property.

The facts giving rise to this appeal are simple and not in dispute. There are two immovable properties that are at the centre of the dispute herein – Kisumu Municipality Block 9/961 and 962 (the suit property) which were formerly owned by Kisumu County Council, and charged to Savings and Loan Kenya Limited, the appellant herein. When Kisumu County Council defaulted in its mortgage obligations, the appellant sought to exercise its statutory power of sale, and asked its auctioneers, Jogi Auctioneers, to sell the property by way of public auction. The respondent, Mayfair Holding Limited, was declared the highest bidder at the auction on 19th August, 1996, and its bid of Kshs.24,800,000/= was accepted. It promptly paid the required deposit of Kshs.6,200,000/=. Subsequently, the respondent attempted to pay the balance of the purchase price, Kshs.18,600.000/= less the land rent and rates of Kshs.1,286,049.05/= which had accrued and had remained unpaid until and as of the date of the auction. The respondent refused to accept that payment and demanded the full purchase price of Kshs.18,600,000/= insisting that the land rent and rates were payable by the respondent purchaser. In order not to delay the transaction, the respondent went ahead and paid the extra Kshs.1,286,049.05/= on a without prejudice basis. The transfer documents were thereafter released; the transfer effected; and the respondent assumed ownership of the property.

The respondent then demanded refund of Kshs.1,286,049.05/=, being the land rent and rates it said it had paid on behalf of the appellant. Upon the appellant's refusal to pay the same, the respondent filed an Originating Summons under ***Order 36*** of the Civil Procedure Rules in the High Court of Kenya at Kisumu seeking the determination of whether pursuant to the construction of Clause 13 of the Conditions of Sale (the Agreement), entered into between the parties, it was entitled to a refund of the amount it paid

for land rent and rates from the appellant.

In a Judgment delivered on 10th May, 2000, Wambiliyangah, J found for the respondent, and entered judgment for it for Kshs.1,286,049.05/= with interest and costs.

Aggrieved by that decision, the appellant filed this appeal citing the following five grounds of appeal:

"1. The learned judge erred in law and in fact in failing to recognize and find that the defendant did not hold the position of a vendor of the charged property in relation to the material transaction.

2. The learned judge erred in law in failing and refusing to recognise that the application of the principles of construction required an appreciation of the circumstances of the plaintiff and of the defendant in regard to the material transaction.

3. The learned judge misdirected himself by equating the balance of the successful bid made the plaintiff in the sum of Kshs.24,800,000.00 to be the balance of the purchase price on the completion date.

4. The learned judge erred in law in entering judgment for the plaintiff against the defendant in the sum of Kshs.1,286,049.05 together with interest thereon from the date of the originating summons on an originating summons seeking the determination of a question.

5. The learned judge erred in failing to give any consideration or weight to arguments and submissions of both counsels and to case law cited on the law relating to the construction of deeds."

Essentially, the determination of this appeal revolves around the meaning and interpretation of Clause 13 of the Agreement, which both parties agree is the relevant part of the contract in contention.

Clause 13 of the Agreement states as follows:

''The purchaser shall be liable for payments of all land rent, rates and other outgoings and entitled to the receipt of all (if any) rent or other incomings as at and from the date of the auction and (subject as hereinafter provided) and the same shall be apportioned between the parties as at the date and the amount found so due by or as the case may be to the purchaser shall be paid with or deducted from the balance of the purchase price on the completion date PROVIDED THAT no claim may be made by the purchaser against the vendor which relate to the period after the auction."

In his submissions before us, Mr. I. E. N. Okero, learned counsel for the appellant argued that the learned Judge of the High Court erred "in equating a seller selling under a statutory instrument with a normal seller", and holding erroneously that the appellant was liable to pay the outstanding land rent and rates.

Mr. Kasamani, learned counsel for the respondent, on the other hand, relies on the plain and ordinary meaning of Clause 13, arguing simply, that the seller was obliged to pay all the expenses, including land rent and rates, up to the time of the sale, and the purchaser thereafter.

The object of construction of terms of a written agreement is to establish therefrom the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract (See ***Investors Compensation Scheme Ltd. vs West Bromwich Building Society*** ***(1998) 1 W.L.R*** at 912).

The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. In***Ford vs Beech*** ***(1848) 11 QB 852 at 866:***

"***The common and universal principle ought to be applied: namely that (a contract) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent."***

In this case the Agreement was executed by the respondent and the appellant immediately after the auction sale. The agreement clearly sets out the circumstances of the transaction by indicating the auction sale was as a result of the appellant exercising its statutory power of sale under the Registered Land Act Chapter 300 Laws of Kenya (RLA). The agreement further sets out the conditions that apply to the sale. Therefore, the intention of the parties should be construed with reference to the object and the terms of the agreement.

If the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties. In ***Shore v Wilson******(1842) 9 CI & Fin 355, 565***Tindal C.J. held**:**

"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such a case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible...... The true interpretation, however of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated , that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can language of the instrument be made to speak the real mind of the party."

As we have stated, in his submissions before us, Mr. I. E. N. Okero, learned counsel for the appellant argued that the learned Judge of the High Court erred "in equating a seller selling under a statutory instrument with a normal seller", and holding erroneously that the appellant was liable to pay the outstanding land rent and rates. Mr. Okero did not provide us with any authority distinguishing between the two modes of selling, but submitted that the price of Kshs.24,800,000/= being the successful bid at the auction, was the "net" price, and was not subject to any deduction. If that was indeed the intention of the parties, nothing would have been simpler than to say so in the Agreement.

The literal interpretation of the first part of Clause 13 of the Agreement which reads; "***The purchaser shall be liable for payments of all land rent, rates and other outgoings and entitled to the receipt of all (if any) rent or other incomings as at and from the date of the auction...***" clearly establishes that the intention of the parties was to place an obligation on the appellant to pay the land rent and rates that had accrued before the date of the auction. Equally, the appellant was entitled to any rent or income from the party until the date of the auction.

The literal interpretation of the second part of the Clause 13 which reads, "...***and subject as hereinafter provided) and the same shall be apportioned between the parties as at the date and the amount found due by or as the case may be to the purchaser shall be paid with or deducted from the balance of the purchase price on the completion date*** ***<u>PROVIDED THAT</u>*** ***no claim may be made by the purchaser against the vendor which relate to a period after the date of the auction."*** establishes that the intention of the parties was that the obligation placed on the seller to pay land rates and its entitlement to incomings

was subject to apportionment between the appellant and the respondent as at the date of the auction. In other words the respondent was entitled to deduct the land rates it paid relating to the period before the auction sale and also was under an obligation to return the amount of any rent or income it received relating to the period before the auction sale from the balance of the purchase price. This intention is further fortified by the proviso in the clause which prohibits any claim by the respondent against the appellant which relates to the period after the date of the auction. Therefore from the construction of the clause it was clear that the parties intention was only to apportion the outgoings and incomings relating to the period before the auction date.

In this case the parole evidence rule applies in respect of interpretation of Clause 13 of the Agreement because the clause is not ambiguous and its interpretation in its ordinary sense does not result in absurdity, create some inconsistency with the rest of the agreement or lead to an unreasonable result.

The appellant argued that sale by public auction in exercise of statutory power of sale is different from a normal sale in that in the former case the chargee is not a vendor and the obligations of a vendor in normal sale do not apply to it as the title is in the chargor's name. It was therefore the appellant's contention that it was not under a legal obligation to meet the outgoings that had accrued prior to the auction date as it was not the vendor in the ordinary sense.

With respect, we disagree with that contention. The appellant in this transaction assumed the role of a vendor though not in the ordinary sense by virtue of ***section 77 (1)*** and ***(3)*** of the RLA which empowered it to sell and transfer the charged property despite the title being still vested in the Chargor. Generally in land transactions the purchaser is not obligated to pay any outgoings that have accrued prior to the sale since interest in the property only passes to the purchaser after the sale. Therefore in this case the question of when property passed to the respondent is intertwined with the question of when the Chargor lost its right of redemption over the charged property.

The charged property in this case was registered under the RLA. ***Section 72 (1)*** of the RLA is categorical that a Chargor's right of redemption over the charged property is extinguished when the property is sold by the Chargee in exercise of its statutory power of sale. Under the same provision property is deemed to have been sold at public auction once a bid has been accepted. This position is further reflected in common law and the doctrines of equity which are applicable in this case by virtue of ***section 163*** of the RLA. In ***<u>MbuthiavsJimba Credit Finance Corporation &Another</u> Civil Appeal No. 111 of 1986***the Court of Appeal held that by virtue of the security being registered under the RLA the equity of redemption was lost at the fall of the hammer at auction sale. This is because at the fall of the hammer the highest bidder is declared the purchaser and a binding contract of sale is concluded.

In this case the equitable and beneficial interest in the charged property passed to the respondent on the 19th August, 1996 when it was declared a purchaser at the auction and a valid contract concluded. The respondent was therefore only obligated to meet outgoings relating to the period after the sale.

The appellant's interpretation of Clause 13 that the respondent was not entitled to a refund of rates it paid in respect of the period before the auction date is unreasonable. This is because under the ***section 69 (1) (b)*** and ***(1) (j)*** of the RLA there are implied terms that are imposed on all charges under the Act which entitle the Chargee to recover any land rent/outgoings it pays over the security as a result of the Chargor's default as part of the principal amount due to it. In this case the term is expressly provided under Clause 6 (1) and 8 of the charge dated 16th January, 1990 between the appellant and the Chargor. It would therefore be unreasonable for the appellant to insist that the respondent meets land rates relating to a period before the auction sale while the appellant has a legal right under the charge to recover the same from the proceeds of the sale.

It is clear from the Agreement and the circumstances of the sale that it was the intention of the parties that the respondent was entitled to deduct Kshs.1,286,049.05/= being land rent and rates that had accrued prior to the auction sale from the balance of the purchase price.

The High Court in finding that the respondent was entitled to a refund of Kshs.1,286,049.05/= in respect

of the land rent and rates it paid gave effect to the true intention of the parties under the Agreement. If the trial court construed the intention otherwise it would have been rewriting the agreement contrary to the law. In ***National Bank of Kenya Ltd vsPipeplasticSamkolit (K) Ltd & Another*** ***(2001) KLR 112***the Court of Appeal at page 118 held: "*...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.*"

With regard to ground 4 of appeal, the power to award interest by a Court is discretionary under ***section 26*** of the Civil Procedure Act Chapter 21 Laws of Kenya. It is a settled principle that this discretion is quite wide and the same ought to be exercised judicially. In ***Salim& Another vsKikava*** ***(1989) KLR 534***the Court of Appeal held that although a Court had wide discretion in awarding interest under ***section 26*** of the Civil Procedure Act, the discretion should be exercised judicially. The court held that generally interest should be awarded on general damages from the date of the assessment which is the judgment date because it is the earliest date when the liability to pay arises. Further interest should only be awarded from date of filing the suit where the amount claimed had actually been expended/incurred at the dated of filing the suit.

The Court of Appeal can only interfere with the trial court's exercise of discretion where it is satisfied that the same was exercised on a wrong principle of law. In this case the respondent was claiming Kshs.1,286,049.05/= which it had paid in respect of land rent and rates at the date of filing the suit. The High Court in awarding interest from the date of the originating summons exercised it discretion judicially. Therefore this ground of appeal has no merit and should also fail.

All in all, for all the reasons outlined above, the appellant's appeal has no merit, and the same is dismissed with costs to the respondent. This judgment is written under ***Rule 32 (3)*** of this Court's Rules, and as Maraga, JA agrees, the orders of this Court shall be as stated herein.

Dated and delivered at Kisumu this 28th day of November, 2012.

ALNASHIR VISRAM

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JUDGE OF APPEAL

JUDGMENT OF MARAGA, J.A

I have read in draft the Judgment of Visram, JA and agree with him entirely. The orders shall be as proposed by Visram, JA.

Dated and delivered at Kisumu this 28th day of November, 2012.

D. K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR