



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: TUNOI, AGANYANYA & ONYANGO OTIENO, JJA.)**  
**CIVIL APPEAL NO. 99 OF 2007**

**BETWEEN**  
**SHEM OBONDI.....APPELLANT**  
**AND**  
**SEEMFOD HOLDINGS LIMITED.....RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Osiero, J) dated 27<sup>th</sup> February, 2007*

in

**H.C.C.C. NO. 1163 OF 2003)**  
**\*\*\*\*\***  
**JUDGMENT OF THE COURT**

**Shem Obondi**, the appellant, was the unsuccessful plaintiff in the superior court. His claim for specific performance; an injunction; payment of current market value of a three bedroomed flat amongst those developed on **L.R. No. 209/12807, Nairobi** (the suit property); and mesne profits, was dismissed by the High Court of Kenya at Nairobi (Osiero, J.) on 27<sup>th</sup> February, 2007; and, hence this appeal.

The respondent on the other hand is **Seemfod Holdings Limited**, a limited liability company incorporated in Kenya under the *Companies Act Cap 486 Laws of Kenya*.

The appellant has preferred thirteen (13) grounds of appeal upon which the decision of the superior court is challenged. The appeal was disposed of by way of written submissions pursuant to the Court's order dated 4<sup>th</sup> February, 2010. Mr. Omotii, learned Counsel, acted for the appellant in the appeal, while Mr. Lubulellah, learned counsel, represented the respondent.

It is trite law that the appellant is entitled to expect from us that we will, on a first appeal as this one, subject the evidence on record to fresh evaluation and reach our own conclusions thereon. It was stated in **SELLE & ANOTHER VS. ASSOCIATION MOTORBOAT COMPANY LTD. & OTHERS [1968] EA 123**, that:-

***“An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow***

*the trial Judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.....”*

We reiterate that in the exercise of that jurisdiction however, we must, as the first appellate court, bear in mind the caution made in **PETERS VS. SUNDAY POST LTD. [1958] EA 424**, that is to say:-

*“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide... “*

The court must also be mindful of the further caution, and allow for it, that the trial court had the advantage of hearing and seeing the witnesses and is generally a better judge of their demeanour.

The main grounds of appeal as filed by the appellant are:-

**1. THAT the learned Judge erred in law and in fact in finding that the Sale Agreement between the Plaintiff and the Defendant was invalid for want of proper execution.**

2. ....

3. ....

**4. THAT the learned Judge misdirected himself in failing to find that an order of specific performance is incapable of enforcement on the basis of an agreement based on a future event.**

5. ....

6. ....

**7. THAT the learned Judge erred in law and in fact in failing to find that the defendant’s failure to transfer the suit flat to the plaintiff was a breach of contract.**

8. ....

9. ....

10. ....

11. ....

**12. THAT the learned Judge erred in law and in fact in failing to find that the powers of a Director of a company to bind the company is deemed to be free of any limitations under the Company’s Articles of Association as relates to a 3<sup>rd</sup> Party dealing with the company in good faith.”**

It is our task to examine these grounds presently together with the detailed submissions of learned counsel, but first, the facts as ascertained from the evidence tendered before the trial court.

The appellant is a retired civil servant. He used to reside in a Government house which was situate on the suit property which comprised approximately ¾ of an acre in the prestigious leafy up-market suburb of Kileleshwa, Nairobi. Just before he left the service, he applied for and was on 11<sup>th</sup> February, 1994 allotted the suit property subject to payment of a stand premium, rent, conveyance fees and other costs. Pursuant to the allotment, the appellant was issued with **Grant Number 69018** and registered on 26<sup>th</sup> April, 1996 for the suit property.

The record shows that before the pertinent grant was registered in his favour, the appellant sold and transferred his right title and interest in the suit property to the respondent at a consideration of **Shs.5,000,000/=**. This is the purchase price stated in Clause 3 of the Agreement of Sale made on 7<sup>th</sup> February, 1996 though the transfer dated 6<sup>th</sup> May, 1996 showed the consideration to have been **Shs.3,000,000/=**. The suit property was sold with vacant possession and the sale was subject to the Law Society Conditions of Sale.

Further, under the Agreement of Sale the appellant was entitled to one three – bedroomed flat on completion of the construction on the suit property.

It is not in dispute that soon after the acquisition of the suit property, the respondent constructed thereon a block of flats. This development started in or about May 1996 and would appear from the respondent's evidence to have been completed in March 1997, though the appellant stated that it was completed in 1999. The respondent had borrowed the sum of **K.Shs.10,000,000/=** from Savings and Loan Kenya Ltd. for this purpose and the same was secured by a first charge over the suit property. A total of 18 flats were built, some of which have been sold and transferred or let to third parties. At the time of the sale and transfer of the suit property to the respondent, the appellant dealt with a man known as **Dan Oyallo Songa** “(hereinafter referred to as “**Dan Songa**”) who at the material time was the Managing Director of the respondent Company. However, he died on 5<sup>th</sup> March, 2003 and it is worthy of note that the suit, the subject matter of this appeal, was filed on 13<sup>th</sup> November, 2003. It is an important aspect of this case that until a caveat was registered on 30<sup>th</sup> May, 2003 there is no evidence of any correspondence between the parties or acknowledgement of debt or liability between the appellant and the respondent as from 1996.

As stated earlier on in this judgment, the appellant on 13<sup>th</sup> November, 2003, some eight months after the death of Dan Songa, instituted suit against the respondent seeking, *inter alia*, specific performance of a term of the Agreement for Sale aforesaid by which the appellant claimed the respondent agreed to transfer to him one flat as part of the consideration of the sale of the suit property to the respondent. That term, contained in **Clause 3** of the said Agreement, reads as follows:-

**“3. The purchase price is K.Shs.5,000,000/= cash and an interest of 1 No. 3 – bedroomed flat on completion of the development of the above plot which Seemfod Holdings acknowledges the undertaking.”**

Apart from an order for specific performance, the appellant also sought an injunction restraining the respondent from transferring, alienating, charging, wasting or dealing with the suit property pending the hearing of the suit. In the alternative, the appellant claimed the market value of one of the flats built by the respondent on the suit property.

In a judgment dated 27<sup>th</sup> February, 2007 Osiemo, J. held that:-

**“The Sale Agreement was entered into on 7<sup>th</sup> February, 1996 and Mrs. Songa the other Director of the Defendant was kept in the dark until her husband Dan Songa passed away. The plaintiff has not given any explanation why the delay of about 7 years before he took action and why he waited until Dan Songa passed away and decided to take action. There was no attempt to make the other director (Mrs. Songa) aware of the transactions since the suit promises belonged to the company owned by the two as a family venture. It is impossible to imagine that Mr. Dan Songa could keep it to himself and that for a period of about 7 years the plaintiff did not even know Mrs. Songa until after the death of Mr. Songa.”**

And that:

**“The Memorandum and Articles of Association required execution by two directors. But the agreement was executed by one director only and without a Power of Attorney and was therefore invalid for want of proper execution as it also is incapable of enforcement. An invalid Sale Agreement cannot be a basis of entitling one to an order for specific performance.”**

Aggrieved by the said judgment the appellant has preferred this appeal which has been disposed of by way of written submissions.

It is Mr. Omotii's submission that there existed a conditional contract between the parties and which contract depended on the occurrence of a particular event at a future date. He contended that the period of limitation in conditional contracts based on the happening of a future event begins to run from when actual demand is made, and not from the date of agreement. Mr. Omotii averred, therefore, that due to the misrepresentation by the respondent as regards the time of the completion of the flats, time begun to run as from 13<sup>th</sup> May, 2003 when actual demand was made when the appellant's Counsel caused a demand letter to be written to the late Mr. Songa. He submitted that in that regard, the learned judge misdirected himself in not finding that the suit was lodged within the prescribed time.

Mr. Omotii further argued that the Sale Agreement was freely and voluntarily executed by both parties and had fully discharged their obligations and the respondent had, also, derived benefits under the contract. He contended that the Articles of Association did not prohibit one director of the company from negotiating and signing documents, contracts and/or agreements on its behalf. He submitted that the learned trial judge erred in holding otherwise.

On his part, Mr. Lubulellah submitted that the validity of the agreement is critically more important considering that the late Songa died on 5<sup>th</sup> March, 2003 a fact that is readily acknowledged by the appellant.

As dead men tell no tales, the Court should be convinced that the appellant was not merely trying to take advantage of the death of the late Songa. The appellant had stated that all his dealings were with the late Songa but his widow who was also a director of the respondent, confirmed that Dan Songa had handled the purchase exclusively with the appellant. She had never seen the agreement of sale until the appellant's advocate forwarded a copy to the respondent's Advocate. In fact she had never seen any other agreement of sale. She had only seen the transfer. In those circumstances, she was entitled to ignore the same.

Mr. Lububellah contended that the appellant had done nothing for a whole 7 years until when the late Songa had died. The period of inactivity was not explained. Further, the appellant was only entitled to **Shs.3,000,000/=** which sum was shown in the Transfer and nothing more. As this sum had been paid in full to him, the appellant was not entitled to anything more and his suit was misconceived.

On our part, we have keenly considered the submissions of both counsel including authorities cited by them. We will first consider the issue of the validity and the authenticity of the Agreement of Sale dated 7<sup>th</sup> February, 1996. It was signed by the appellant and by someone whom the appellant alleged was the late Songa on behalf of the respondent as the purchaser. The two signatures were witnessed by Richard Omwela, Advocate. The most glaring omission on the said Agreement, however, is that the respondent's common seal was not affixed on it.

**Mrs. Songa (DW1)** testified that there were two directors of the company. She was not aware of the existence of the Agreement of Sale and denied knowledge of its contents. All she knew was that the suit property was sold to the respondent at a price of **Shs.3,000,000/=** and there was nothing above it. The late Songa, her husband, never informed her of the flat to be given to the appellant. She only learnt of the appellant's demand in April, 2003, one month after the demise of her husband.

In a ruling pursuant to an application by the appellant for an interim injunction, Kihara Kariuki, J. in dismissing the application on the ground that the appellant had not established a ***prima case*** with a probability of success so as to entitle him to the relief sought held:-

***“The averment by Mrs. Songa puts into question the authenticity of the Agreement in these circumstances, and given that the only consideration stated in the Transfer dated the 6<sup>th</sup> May 1996 is K.Shs.3,000,000/=, it is not unreasonable to expect and presume that if negotiations of the nature alleged by the plaintiff had in fact taken place between him and Dan Songa, Violet Songa as a Director of the Defendant would have been involved in them or at the very least have been informed of them.”***

The learned Judge, therefore, was in agreement with Osiemo, J. in doubting the validity of the Agreement of Sale. We, too, would agree with the two learned judges. No one for sure knows who drew the Agreement of Sale. Though Mr. Omwela attested the execution thereof he stated candidly that he did not prepare it nor was he familiar with its contents. Further, he did not remember when it was signed.

Above all, it cannot be connected with the respondent in the absence of the common seal.

In the circumstances and in view of the death of Mr. Songa, who could obviously not testify, we hold that the appellant failed to establish that the Agreement of Sale produced in the trial Court as Exhibit No. 8 was actually the one signed by him and the late Mr. Songa.

Again, the appellant's testimony was contradictory to say the least; and indeed, unreliable. He told the trial court that the purchase price for the suit property was **Shs.10,000,000/=** i.e. **Shs.5,000,000/=** cash and one flat. But, the Transfer showed the consideration for the suit property was **Shs.3,000,000/=** and nothing else.

It is not in dispute that the construction of the flats was completed in *March, 1997* and their sale started soon thereafter. The appellant has not offered a satisfactory explanation why he never stated his claim until seven years after the construction of the flats; and in fact, only after the demise of the late Mr. Songa. In this regard there is no correspondence emanating from the appellant for over seven years and only until Mr Songa's death. He had never visited the construction site during that period nor even contacted the company during the lifetime of the late Mr Songa.

The delay in our view is inordinate. We would with respect agree with the two learned Judges in the court below that there ought to be a better reason than the one the appellant has advanced as to why he left matters in abeyance until after the death of Mr. Songa.

Moreover, logic and prudence dictate that if the appellant had a genuine claim, he would have pressed it while the person he alleges to have dealt with was still alive or without undue delay. He has to pay dearly for his indolence.

In our view, as the Agreement of Sale-Exhibit No. 8-lacks authenticity, we have no hesitation in holding it as invalid and is in the circumstances incapable of enforcement. We do not, therefore, hold the respondent in breach of the alleged contract which is on the face of it invalid. In view of this holding, there is no need for us to consider the other grounds of appeal as this ground alone is sufficient to dispose of the entire appeal.

For the foregoing reasons, this appeal must fail and the same is accordingly dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of October, 2011.**

**P.K. TUNOI**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**