



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 330 of 2003

HUSAMUDDIN GULAMHUSSEIN POTHIWALLA ADMINISTRATOR,  
TRUSTEE AND EXECUTOR OF THE ESTATE OF GULAMHUSSEIN  
EBRAHIMJI POTHIWALLA.....APPELLANT

AND

KIDOGO BASI HOUSING CORPORATIVE  
SOCIETY LIMITED AND 31 OTHERS ..... RESPONDENTS

*(An appeal from the judgment and decree of the High Court of Kenya*

*at Mombasa (Ang'awa, J) dated 8<sup>th</sup> December, 1997*

In

H.C.C.C. No. 112 of 1995)

\*\*\*\*\*

JUDGMENT OF THE COURT

This appeal has a long and somewhat unhappy history. At one point during the hearing of the appeal it was suggested to the advocates that perhaps the dispute could be amicably settled out of Court. For that reason on 17<sup>th</sup> January, 2008 this Court made the following order:-

*“This appeal was called to hearing this morning. It had been heard for some minutes when it emerged that some issues in the appeal ought to be negotiated in the best interest of justice. In the circumstances, a negotiated settlement or an agreement on some contentious issues was suggested to the counsel for the parties and they signified their willingness to negotiate. However, they asked for more time to contact and seek instructions from the parties to the appeal. In the result, this appeal is taken out of today’s list to enable parties to discuss a settlement out of court.*

*The appeal shall be mentioned on 24<sup>th</sup> January, 2008. In the event that no settlement is reached, the appeal which is part-heard shall be assigned a hearing date on a priority basis.”*

On the 24<sup>th</sup> January, 2008 the Court was informed that there was no possibility of a settlement. Hence, the court made the following order:-

***“The Court is informed that the parties are unlikely to reach a settlement out of Court. It follows therefore that this appeal will be re-fixed for hearing to its finality. The parties may obtain a hearing date in Nairobi.”***

The appeal was accordingly re-fixed for hearing in Nairobi on 13<sup>th</sup> October, 2008 when the submissions from both counsel appearing for the parties were concluded and judgment reserved.

This is an appeal from the judgment of the superior court (Ang’awa, J) delivered and dated 8<sup>th</sup> December, 1997 in which the learned Judge dismissed the appellant’s suit with costs and gave judgment in favour of the respondents, as prayed in the counter-claim.

This being a first appeal it is our duty to re-evaluate the evidence, assess it and make our own conclusions and as we do so we must remember that we have neither seen nor heard the witnesses. In SELLE AND ANOTHER V. ASSOCIATED MOTOR BOAT COMPANY LTD AND OTHERS [1968] E.A. 123 at p. 126 Sir Clement De Lestang V. P. said:-

***“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally “Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270.”***

The above has been adopted by this Court in numerous decisions e.g. WILLIAMSON DIAMONDS LTD V. BROWN [1970] E.A.1 and ARROW CAR LIMITED V. BIMOMO & 2 OTHERS [2004] 2 KLR 101.

The dispute between the parties herein can be traced back to a plaint filed in the superior court at Mombasa on 17<sup>th</sup> February, 1995, in which the appellant herein (as the plaintiff in the superior court) sued the respondents (as the defendants) seeking the following reliefs:-

- “(a) payment of all outstanding unpaid rent plus interest of the plots now occupied by the Defendants;***
- (b) It can be declared that no sale agreement exists between the Plaintiff and the Defendants regarding the Plot Number 1015 Section XVII Mombasa Island.***
- (c) An injunction be issued restraining the Defendants and each of them their servants and others from encroaching on the Plaintiff’s said land Plot No. 1015/XVII.***
- (d) An injunction be issued against the Defendants and each of them their servants agents and others from trespassing on the Plaintiff’s land on the said Plot No. 1015/XVII Mombasa.***
- (e) An injunction be issued against the Defendants and each of them their servants agents and others from harassing intimidating and molesting the Plaintiff by using Government influence in connection with the dispute on this land.***
- (f) That costs of this suit be paid by the Defendants.”***

In order to appreciate the nature of this dispute we set out in full the contents of the plaint filed in the superior court which stated as follows:-

- “1. The plaintiff is an adult male residing and carrying on business in Mombasa. His address for service for the purposes of this suit is care of KHAMINWA & KHAMINWA ADVOCATES, AMBALAL HOUSE, 4<sup>TH</sup> FLOOR, P.O. BOX 89447, MOMBASA.**
- 2. The Plaintiff is the sole surviving Trustee, Executor and Administrator of the Estate of Gulamhussein Pothiwalla pursuant and by virtue of the Mombasa High Court Probate and Administration Cause No. 25 of 1960 and the subsequent confirmation of the grant of probate thereof.**
- 3. The 1<sup>st</sup> Defendant is a Co-operative Society duly incorporated in accordance with the provisions of the Co-operative Society Act Cap (490) Registered on 10<sup>th</sup> September, 1986 No. 4712. Service of summons upon the 1<sup>st</sup> Defendant shall be effected through the Plaintiff’s Advocates Office.**
- 4. All other defendants numbered 2-32 inclusive are adults residing and carrying on various businesses in Mombasa Town. Summons to be served through the Plaintiff’s Advocates’ Office.**
- 5. At all material times and now the Plaintiff was and is the owner administrator of Plot of land known as L.R. NO. Mombasa/Block/XVII/1130 (Original 1015).**
- 6. The Plaintiff states that prior to 1980 the Defendants numbered 2-32 inclusive were tenant occupiers of temporary structures without land at a monthly rent of Kshs.500/- each.**
- 7. The Plaintiff states that todate the said Defendants (2-32) are still occupying the said land but that since 1986 they have refused failed and or neglected to pay the said rents and are therefore in breach of tenancy agreement.**
- 8. Further the Plaintiff stated that in September 1986 the Defendants numbered 2-32 inclusive arranged for the incorporation of a co-operative society the 1<sup>st</sup> Defendant of which they purport to members for the sole purposes of acquiring the Plaintiff’s land.**
- 9. Since 1986 the Defendants have sought undue influence, coercion, fraud, misrepresentation and falsehood to force the Plaintiff and his predecessors into transferring to them the said piece of land reference Mombasa/Block XVII/1130 (original 1015) namely by involving the Government Administration Machinery through Chief Tononoka, District officer Island Division District Commissioners Office.**
- 10. The Defendants falsely misrepresented to the said Government Officers that they the Defendants, were squatters while infact they were occupying the land under licenses from the proprietors of the land in dispute.**
- 11. Consequently the Government Officers unlawfully encouraged the Defendants to breach their tenancy obligations and no rents have been paid since 1986 as aforesaid.**
- 12. Furthermore the Government Officers pressurized the Plaintiff and his Predecessors in order to procure the sale of the said land to the Defendants. For this purposes the Plaintiff has been subjected to threats and great pressure. He has been summoned to at least 58 meetings at the Government Officers’ office purportedly to try to resolve the “matter” once and for all.**
- 13. The Plaintiff states that no written agreement exists as the terms and conditions of sale of any of the Plaintiff’s land to the Defendants.**
- 14. Further the Plaintiff will show that any purported agreement which is denied as to the sale of the Plaintiff’s plot aforesaid to the Defendants is null and void the same having been obtained by**

*undue influence and coercion as stated above.*

**15. The Defendants have without authority from the Plaintiff engaged a surveyor to carry out alleged survey of the Plaintiff's plot afore said which is trespass upon the land.**

**16. The Defendants have also using the Government's influence brought another persons to occupy the land of the Plaintiff without the consent of the Plaintiff which is trespass to the Plaintiff's land.**

**17. The Defendants continued to harass the Plaintiff with threats of arrest and the forms of intimidation all aimed at forcing the Plaintiff to surrender his title interest and rights in the said land to the Defendants.**

**18. The Defendants have made several payments to the Plaintiff purportedly by way of the purchase price but infact the said payments have been towards the rents payable under the tenancy agreements as aforesaid.**

**19. Furthermore the Defendants numbered 2-32 are only entitled to occupy the portion of land upon which their temporary structures are situated i.e. a space of 36' x 52 1/2', but contrary to the agreement the Defendants and each of them have taken over the excess land thus encroaching on the Plaintiff's land are therefore trespassing thereon.**

**20. The Defendants unlawfully and without right or the authority of the Plaintiff have subdivided the said land into several plots and have obtained deed plans for the same the whole of the Plaintiff's land and they intend to see those subdivisions to the persons (sic).**

**21. The Plaintiff therefore seeks court assistance by way of injunction declarations and orders to protect the Plaintiff's interest in the said land against the Defendants.**

**22. The cause of action arose under the jurisdiction of this court."**

In response to the foregoing the respondents filed a defence and a counter-claim which stated as follows:-

**"1. The Defendants admit the contents of paragraphs 1, 2, 3 and 4 of the plaint save that their address for service for the purposes of this suit is care of SWALEH & COMPANY, ADVOCATES, SOCIAL SECURITY HOUSE, NKRUMAH ROAD, P.O. BOX 87988, MOMBASA.**

**2. The Defendants deny paragraph 5 of the plaint and state that the plaintiff is only an Administrator of the estate of GULAMHUSSEIN POTHIWALLA and not the owner as alleged.**

**3. The Defendants deny paragraph 6 of the plaint and state that the Defendants are owners of houses on plot No. 1130 (original No. 1015) and were paying only kshs.900 a year and not Khs.500/- a month as alleged.**

**4. The Defendants deny paragraphs 7 and 8 of the plaint and state that the issue of payment of rent is irrelevant since the administrator of the estate of Gulamhussein Plothiwalla offered the Defendants to purchase the plots on which their hoses stand and the Defendants agreed to do so.**

**5. The Defendants deny paragraphs 9 and 10 of the plaint and state that the plaintiff is not truthful and that the plots were and offered to them for sale, fulfilled part of their contract by paying the purchase price, paid for all other disbursements and that it is the plaintiff who has refused to fulfill their part of the agreement.**

**6. The Defendants deny paragraphs 11 and 12 of the plaint and state that if it was true the plaintiff has been forced by the Government (which is denied) then the plaintiff should have sued the Government.**

7. *The Defendants deny paragraph 13 of the plaint and state that the last agreement made between the plaintiff and the Defendants was done at the plaintiff's instance on 12<sup>th</sup> day of August, 1994 and drafted by his own lawyer Mr. H.A.T. ANJARWALLA and received the money on that particular day and the defendant shall cleave for leave to produce the said agreement.*
8. *The Defendants deny paragraph 14 of the plaint and state that the said agreement was prepared by the plaintiff's lawyer who was acting on his behalf and the plaintiff willingly signed the said agreement.*
9. *The Defendants deny paragraphs 15 and 16 of the plaint and state that the surveyor was engaged by the plaintiff and the other administrator jointly and the plans produced by the surveyor were duly approved by the Administrators but the plaintiff refused to pay the surveyor after he completed his work.*
10. *The Defendants deny paragraph 16 of the plaint and put the plaintiff to strict proof thereof.*
11. *The Defendants deny paragraph 17 of the plaint and put the plaintiff to strict proof thereof.*
12. *The Defendants deny paragraph 18 of the plaint and state that the money paid by the Defendants in lump sum was towards purchase of the said plots as agreed in writing between the parties and were not for rent as alleged.*
13. *The Defendants deny paragraph 19 and 20 of the plaint and put the plaintiff to strict proof thereof.*

#### **COUNTERCLAIM**

14. *The Defendants counterclaim from the plaintiff for an Order for specific performance of the agreement made on 12<sup>th</sup> day of August, 1994 between the plaintiff and the Defendants which agreement was meant to seal all the other agreements done between the parties.*
15. *That the said agreement for sale between the plaintiff and the Defendants to sell to the Defendants 42 sub-divisions of plot No. MSA/BLOCK XVII/1130 (Original No. 1015) for Kshs.1,155,000/-.*
16. *That in the said agreement time was of essence to the contract and that the Defendants completed their part of the contract but the plaintiff continued to neglect and or refuse to transfer the said plots to the Defendants as agreed.*
17. *The Defendants have therefore suffered a great deal as a result of the plaintiff's refusal to transfer the said plots.*

**REASONS WHEREFORE the Defendants pray to this honourable courts:-**

- (a) *To dismiss the plaintiff's suit with costs.*
- (b) *To make an order for specific performance as stated above.*
- (c) *General damages*
- (d) *Costs."*

The hearing of the suit in the superior court commenced on the 29<sup>th</sup> August, 1995 before Oguk, J (as he then was) when Hussamuddin Galamhussein Pothiwalla gave evidence as a trustee and executor of the estate of his late father Gulamhussein Ebrahim Pothiwalla. This witness gave the history of the dispute.

It would appear that there were negotiations for the sale of the land in dispute to the respondents. It was the appellant's case that although they had agreed to sell the land in dispute to the respondents there was dispute over the price which dispute was resolved by the District Officer who forced the sale on the appellant. In the course of his evidence this witness stated:-

***“The position is that we had agreed to sell the plots to the people of Kidogo Basi but we had differed at the price for the various plots.”***

Then later in his evidence the witness stated:-

***“It is now my case that I would like to sell to these people the various plots at the price based on the value of 25<sup>th</sup> May, 1995 (MF1-11)”.***

Finally this witness said:-

***“After I refused to sign the transfer I was called by letter dated 8<sup>th</sup> February, 1995 (letter No. 1 in the bundle) to appear before the D.C. with my lawyer. I did not go there and so was my counsel. The Defendants were asking the Provincial Administration to force me to transfer the land. I therefore decided to take the case in court.”***

After this witness had concluded his testimony the hearing was adjourned and by the time the matter came up for hearing again on 27<sup>th</sup> February, 1997 it was Ang'awa, J. who took over the hearing of the case when Abubakar Amady (PW2) a Town Planning Officer with Mombasa Municipal Council gave evidence. He testified that the plot in dispute was subdivided and that it was for residential purposes.

The record shows that Hussein Husamuddin Pothiwalla (PW3) gave evidence almost similar to that of PW1. The next witness was Maina Chege (PW4) a valuer who carried out valuation of the land in dispute and presented his report. After the evidence of Maina Chege the appellant closed his case and it was then the respondents' turn to present their case.

The first witness on behalf of the respondents was Bwanatumu Sombwana Bonatumu (DW1) who described himself as a planer working with Kenya Posts Telecommunication. He was the chairman of Kidogo Basi Co-operative Society (1<sup>st</sup> respondent). The gist of his evidence was that there was a sale agreement between the administrators of the estate of the late Pothiwalla who was the owner of the land in dispute and the respondents. In the course of his evidence in chief Banatumu stated:-

***“I agreed on the purchase price with the administrators of this property. After he accepted price of 18,500/-. We paid the purchase price by installments. I paid the money by cheque. I paid the money to the other administrator Ibrahim . I paid by cheques.”***

The second witness on behalf of the respondents was Rosemary Muthoni Muchangi (DW2) who was the secretary of the 1<sup>st</sup> respondent. Her evidence was in support of her chairman (DW1) to the effect that there was a genuine sale agreement between the appellants and the respondents for the purchase of the plots.

Josphat Otieno Kogera (DW3) was the private surveyor who carried out the subdivision of the land in dispute.

David John Forster (DW4) was a surveyor and a valuer who was approached by the 1<sup>st</sup> respondent and he prepared his report which was produced in evidence. It was his evidence that he carried out the assessment of ground rent.

After the fourth witness for the respondents the advocates for the parties made submissions and the learned Judge reserved her judgment.

In her judgment dated 8<sup>th</sup> December, 1997 the learned Judge considered all that had been urged before her and concluded her judgment thus:-

***“The advocate for the Plaintiff prayed that the rents be paid.***

***I find that there was a contract that was entered into by the deceased and the Defendants 1 – 31. That on the death of the deceased the estate should have completed the agreement. Instead for a decade the parties have been unable to complete the agreement due to the Plaintiff declining to do so. His main concern is wishing to have the purchase price increased. The Defendants despite this, agreed to do so, namely increase the purchase price but only by a significant amount.***

***It is this that kept the Plaintiff from agreeing to sell stating that he never received the said purchase price from his brother.***

***I find that the Plaintiff thereafter did enter into an agreement in 1994. He is bound by it. I see no reasons why this agreement cannot be enforced.***

***The Plaintiff has caused anguish to the Defendants. Although he is entitled to the rents from 1986 I would not order the Defendants to pay this on the grounds that the Defendants are entitled to general damages. I would compute any rents payable to the Plaintiff be treated as general damages and as such off set the sum for his prayer.***

***I hereby dismiss the case against the Defendants with costs. I enter judgment on the counter-claim for the Defendants as prayed on specific performance with costs.”***

It is that finding that provoked this appeal which led the appellant, through his advocates to file this appeal citing the following twenty (20) grounds of appeal:-

- “1. The learned Trial Judge erred in holding that, on the material before her, that there was any appearance within the meaning of Order IX Rule 5 of the Civil Procedure Act by the Respondents No. 2 to 32 inclusive.***
- 2. The learned Trial Judge erred in holding that, on the material before her, there was any defence and counterclaim within the meaning of Order XIII of the Civil Procedure Act filed by the Respondents No. 2 to 32 inclusive.***
- 3. The Learned Trial Judge erred in the law and facts in failing to appreciate that, the memorandum of appearance, defence and counterclaim dated 24<sup>th</sup> day of February, 1995 and 18<sup>th</sup> March, 1995 respectively was filed by the first Respondent within the meaning of the Civil Procedure Act.***
- 4. The Learned Trial Judge erred in law and in facts for failing to appreciate that the Appellant was the sole serving Administrator and Trustee of the Estate of GULAMHUSSEIN EBRAHIMJI POTHIWALLA his late father and not his elder brother.***
- 5. The Learned Trial Judge erred in law and facts in failing to consider fully the comprehensive documentary evidence and there was a miscarriage of justice.***
- 6. The Learned Trial Judge erred in law and facts in failing to appreciate that the (Appellant) HUSSAMUDDIN GULAMHUSSEIN POTHIWALLA and his late elder brother EBRAHIMJI GULAMHUSSEIN POTHIWALLA were the Trustee and administrators of the Estate in terms of Mombasa High Court Probate and Administrator cause No. 25 of 1960.***
- 7. The Learned Trial Judge erred in holding that on the material before her, it was proved that there were payments made to the late GULAMHUSSEIN EBRAHIMJI POTHIWALLA a (trustee) by the defendants.***

8. *The Learned Trial Judge erred in holding that the Appellant made an offer asking to be paid Kshs.50,000/- by the 1<sup>st</sup> Respondent while no such evidence was adduced.*
9. *The Learned Trial Judge erred in failing to consider that the offer that was made by the late administrator and the trustee of the Estate in exhibit (MFI 22) was withdrawn through MFI 22 and was made to the first Respondent.*
10. *That the learned Trial Judge erred in law and facts for failing to appreciate that the judgment does not comply with the mandatory provisions of Order XX Rule 3.*
11. *That the Trial Judge erred in law and facts in failing to appreciate that the subsequent Decree is defective.*
12. *That the Learned Trial Judge misdirected herself in law and facts in failing to appreciate that MFI 4 was not an offer to Defendants 1 to 32.*
13. *That the Learned Trial Judge misdirected herself in law and facts for having made a finding of facts that the Government Administration had interfered and concerned themselves with the civil matter and proceeded further to declare the purported Sale Agreement lawful under the relevant laws.*
14. *The Learned Trial Judge erred in law and facts in awarding special and general damages without mitigations or proof of such an ascertained momentary consideration and not having been addressed on the point by the defendants to such issues or damages.*
15. *The Learned Trial Judge erred in law and facts in failing to uphold the Appellant's legal submissions in her judgment.*
16. *The Learned Trial Judge erred in law and facts and misdirecting herself as to who among the deceased entered into a contract with the defendants No. 1 – 32.*
17. *The Learned Trial Judge misdirected herself in law and facts in failing to appreciate that she could not award costs to the Respondents on a specific performance claim.*
18. *The Learned Trial Judge erred in law and facts in failing to appreciate that there were (32) defendants and not (31), a failure fatal to the conclusiveness of the suit.*
19. *The Learned Trial Judge erred in law and facts for having appreciated that, the rent was due and again proceeded to compute it as general damages without giving the actual figures or any other legal considerations of it.*
20. *The Learned Trial Judge erred in law and facts in entering judgment on the counterclaim in complete disregard of Order VIII of the Civil Procedure Act.”*

That is the appeal that came up for hearing before us in Mombasa on 17<sup>th</sup> January, 2008 when Ms Kethi D. Kilonzo appeared for the appellant while Mr. H. Jiwaji appeared for the respondents.

In her submissions Ms Kilonzo stated that the learned Judge misunderstood the nature of the dispute and that the findings of the learned Judge were not supported by the evidence. She reminded us that the appellant had prayed for the agreement to be voided as it had not been stamped which was in breach of **section 19** of the Stamp Duty Act. She further submitted that the learned Judge ought to have rejected the counter-claim for specific performance.

Ms Kilonzo then dealt with grounds 5, 8, 9, 13 and 15 of the Memorandum of Appeal by pointing out that there were two agreements and that these agreements were vitiated by duress and interference from the Provincial Administration who fixed the purchase price.

It was further submitted that the respondents who had been in occupation for the last 50 years were tenants and not squatters hence even if they occupied the suit land for 300 years they could not acquire title as the appellant would still be entitled to the rent. As regards the issue of agreement for sale, Ms Kilonzo submitted that the appellant offered to sell but the offer was withdrawn when the respondents refused to agree on the purchase price. For that reason the respondents were unable to meet the conditions of the agreement. It was further submitted that specific performance was an equitable remedy which could only be granted where there was no alternative remedy.

Ms Kilonzo then dealt with the issue of the two agreements and it was her contention that the both agreements had been vitiated by undue influence from the Provincial Administration.

To buttress the foregoing submissions Ms Kilonzo relied on her list of authorities.

On his part Mr. Jiwaji started his submissions by stating that the trial court relied on the evidence of the witnesses that testified before it and that the learned Judge had the opportunity to hear and see these witnesses hence assess their credibility. Mr. Jiwaji referred us to the sale agreement and the payment schedule. He contended that all the payments were made but the appellant refused to collect the cheques. Mr. Jiwaji sought to rely on the second agreement and went on to submit that it cannot be disputed that there was a sale agreement involving a willing seller and willing buyer. It was Mr. Jiwaji's submission that there was no duress and that the learned Judge made a correct finding.

Finally, Mr. Jiwaji asked us to dismiss the appeal with costs but conceded that as the respondents had enjoyed occupancy of the suit land they should pay the land rent.

We hope that what we have set out above gives a picture of what is before us in this appeal. From the pleadings, the evidence and submissions made in the superior court it would appear that certain facts are not in dispute. We shall start from there. For example it is not in dispute that the respondents were in occupation of the suit land for a long time and that they were actually tenants paying an annual rent of Kshs.900/- each. The land belonged to the father of the appellant. It was the appellant's contention that although there had been an agreement to sell the land (comprising of various plots occupied by the respondents) that agreement was vitiated by interference of the Provincial Administration who more or less forced the appellant to sell the plots to the respondents. It should be remembered that it was the appellant who filed the suit in the superior court seeking payment of unpaid rent from the respondents and their eviction from the suit land. In our view this was the main bone of contention in this dispute. There were two agreements produced in evidence. The first agreement was the one dated 24<sup>th</sup> September, 1988 and was between the appellant and the surveyor (Josphat O. Kogera). The main issues agreed upon in this agreement were as follows:-

**“NOW IT IS HEREBY MUTUALLY AGREED**

- 1. The surveyor shall first prepare a proposed sub-division plan giving each existing structure a sub plot and access road as per council regulation and this plan to be submitted to the Mombasa Municipality for approval.***
- 2. The surveyor undertakes to complete the work within three (3) months from the date the approval plan is received from the council.***
- 3. The agreed fees is Kshs.1,000/- (Shilling One Thousand Only) per sub-plot. There are 40 sub-plots. Total amount Kshs.40,000/-.***
- 4. The charges excludes disbursements especially Government fees, e.g. Municipal Council Submission fees and rates, Government charges for title deeds etc.***
- 5. The payment will be as follows:-***

***On signing of Agreement ..... Kshs.2,500/-***

*On submission of sub-division plan to council ..... Kshs.2,500/-*

**6. In case of any queries or legal difficulties that arises, it will be binding for you to support and give co-operation to us to settle the matter amicably.”**

The second agreement was made on 12<sup>th</sup> August 1994. In our view this was the most important document governing the relationship between the parties herein. That agreement was as follows:-

**“REPUBLIC OF KENYA**

**AGREEMENT OF SALE**

**VENDOR:- Husamuddin G. Pothiwalla, as the administrator of the estate of Gulamhussein Pothiwalla.**

**BUYER:- Kidogo-Basi Housing Co-op. Soc. Ltd.,**

**P.O. Box 85459**

**MOMBASA**

**PROPERTY:- Forty-two (42) subdivisions as described in the schedule hereto being subdivisions of original Plot No. Mombasa/Block XVII/1130 (Orig. 1015).**

**PRICE:- Shs.1,155,000/- (Shillings One Million One Hundred and Fifty-Five Thousand only).**

**PAYMENT:- Buyer has already paid:--**

- (a) Sh.527,800/- to Ebrahim G. PLIOTHIWALLA.**
- (b) Shs.157,500/- paid to Surveyor Mr. Josephat Kogera as per his receipt attached.**
- (c) Sh.147,200/- is to be paid by bankers cheque on the signing of this agreement.**
- (d) Sh.322/500/- to be paid on or before the 15<sup>th</sup> October, 1994.**

**CONDITIONS:- The property is sold subject to the occupation thereof by various members of the Buyer.**

**TIME:- Time is hereby made of the essence of the contract and on the failure of the buyer to complete payment as aforesaid the agreement will stand cancelled.**

**TRANSFER:- Buyer to prepare and complete the transfer to the Society at its own expense.**

**DATED THIS 12<sup>TH</sup> DAY OF AUGUST 1994.”**

It is significant to note that the agreed purchase price according to this agreement was Kshs.1,155,000/-. That agreement stated that Kshs.527,800/- had already been paid to Ibrahim G. Pothiwalla. There was also Kshs.157,500/- already paid to the surveyor Josephat Kogera. At page 626 of the record of appeal appears payment schedule. At p. 641 is a copy of a cheque for Kshs. 147,200/- in favour of the appellant. It is for the foregoing reason that Mr. Jiwaji submitted that all the payments were made as per the agreement but the appellant refused to collect the payments.

We have gone over the evidence adduced in the superior court and the submissions by counsel appearing for the parties and we are satisfied that there was indeed a genuine agreement between the

parties in which it was agreed that the respondents were to purchase their respective plots. We have looked at the written agreement between the parties and it cannot be denied that there was an agreement between a willing seller and a willing buyer. It would appear that there was an attempted change of mind on the part of the seller but we are of the view that the law will not allow a party to wriggle out of an agreement freely entered into. There was complaint that the Provincial Administration interfered but in our view the Provincial Administration was merely trying to reconcile the parties and bring order in the entire process. That did not amount to duress. In **NATIONAL BANK OF KENYA LTD. V. PIPEPLASTIC SAMKOLIT & ANOTHER [2001] KLR 112** at p. 118, the Court said:-

***“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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of Fina Bank Limited vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported):***

***“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”***

Having carefully considered what was before the superior court and what has been urged before us we are satisfied that there was a concluded contract of sale between the parties. We find no evidence of any intervening circumstances that would have vitiated the sale agreement. This is a case in which the learned Judge considered the evidence of the four witnesses from each side and in the end concluded that there was an agreement which had to be enforced by the court. These were all findings of facts and on our part we decipher no error on the part of the learned Judge.

In **EPHANTUS MWANGI & ANOTHER V. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278** at p. 292 Hancox, J.A (as he then was) said:-

***“A Court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence of the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”***

The first holding in that case is also relevant namely that :-

***“The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.”***

Taking into account all the circumstances of this case we are satisfied that the learned Judge cannot be faulted in his findings and conclusions. On our own re-evaluation of the evidence and perusal of the relevant documents produced in the superior court we have come to the same conclusion as the learned Judge that there was a valid written agreement of sale between the parties. We therefore find no merit in this appeal and order that the same be and is hereby dismissed with costs to the respondents. These shall be the orders of this Court.

Dated and delivered at Mombasa this 30<sup>th</sup> day of January, 2009.

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**