



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMOLO, O'KUBASU & GITHINJI, J.J.A.)

CIVIL APPEAL NO. 197 OF 2001

BETWEEN

ALFRED M. O. MICHIRA..... APPELLANT

AND

M/S GESIMA POWER MILLS LIMITED..... RESPONDENT

**(Appeal from the judgment and decree of the High Court of
Kenya at Kisii (Justice Mbaluto) dated 17th May, 2001**

**in
H.C.C.C. NO. 71 OF 1997)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Mbaluto J) by which the superior court dismissed the appellant's claim for damages for breach of contract for the sale of land with no order as to costs.

By an agreement for sale dated 21st August, 1996 the respondent in this appeal agreed to sell land reference No. 209/4194/16 situated in the City of Nairobi to the appellant at a price of Shs.10,000,000/=. The relevant clauses of the agreement are set out below in extenso:

“3. THAT the agreed purchase price shall be paid to the vendor as follows:

(i) Kshs.1,000,000/= (ONE MILLION SHILLINGS ONLY) being (10%) percent of the purchase price shall be paid by the purchaser upon the vendor executing this agreement by cheque No. 196780 KCB Kisii dated 21 st August, 1996.

(ii) Part of the balance of the purchase price namely Kshs.2,000,000/= (REA D KSHS. TWO MILLION SHILLINGS ONLY) shall be paid to the vendor within seven (7) days of the vendor delivering the parcel of land in vacant possession to the purchaser.

4. THAT the purchaser undertakes to pay stamp duty required by the commissioner of lands and/or district registry or any other government department to secure the registration of the plot in the purchaser's name.

5. THAT further to contents of the paragraph 4 above the vendor undertakes to obtain all required consents from all relevant Government offices to facilitate the Transfer and due registration of the parcel of land in the purchaser's name free of all encumbrances and extends the lease to 99 years.

6. THAT the vendor undertakes to accomplish and deliver certificate of title in the purchaser's name to the purchaser free of any encumbrances excepting the existing occupation within NINETY (90) days from the date of the execution of this agreement and further that this condition is of essence to this contract.

7. Kshs.7,000,000/= (READ SEVEN MILLION SHILLINGS ONLY) shall be paid upon the vendor complying with condition No. 6 herein.

8. THAT should any party default any of the conditions stated above the party at breach shall be liable to the innocent party the money of equivalent forty percent (40%) of the purchase price herein ...”.

That agreement which was apparently drawn by the parties themselves was signed before an advocate. According to the abstract of title produced in the superior court the respondents acquired the suit land on 4th October, 1973. It is a leasehold property registered under the Registration of Titles Act for an initial term of 51 years from 1st January, 1953 which term was varied to 66 years on 5th March, 1974.

The appellant filed the present suit on 18th February, 1997. He averred in paragraph 4 of the plaint that the respondent was in breach of clause 3 of the agreement by failing to obtain the agreed consents and delivering vacant possession to the appellant. He further averred in paragraph 5 of the plaint that the respondent was also in breach of clause 6 of the agreement by failing to deliver the certificate of title to the appellant within the stipulated 90 days from the date of execution of the agreement.

He pleaded that he had suffered damages as a result of the breach and claimed:

“(a) Damages as per clause 8 of the sale agreement – Kshs. 4 million.

(b) Refund of part consideration paid to the defendant Kshs. 1,000,000/=.

(c) Special damages totaling Shs.90,000/=.”

The respondent in the defence and counter-claim denied any breach of the agreement and averred that the sale agreement “was conditional in delivering vacant possession as there were seven tenants occupying the premises ...” and claimed damages by way of counter-claim for breach of same agreement by the respondent. On 9th June, 1997 the appellant's claim was partially compromised when an order was recorded in the following terms:

“By consent judgment for plaintiff against the defendant for Shs.1,000,000/= with costs and interest.

2. By consent issue of general damages for breach of contract to proceed to trial”.

The evidence of the appellant at the trial was brief. He testified that he paid a down payment of Shs. 1 million; that the balance was to be paid upon execution of the transfer; that the plot had tenants and that he was to obtain vacant possession on completion of the purchase price; that completion was not done within 90 days; that defendant (respondent) told him to wait but did not give him a reason for delay; that after respondent failed to complete, he instructed his lawyer to write a letter notifying him of the default

and that he made a search in the lands office after respondent failed to transfer the property and discovered that respondent had on 13th March, 1997 sold the same property to one General Misiani Timothy Orwenya for Shs.10,000,000/=.

The evidence of Stanley Mayieko – a director of the respondent was similarly brief. It was part of his evidence that the appellant did not pay the balance of Shs. 9 million within the 90 days; that appellant kept on saying that he would pay and that he was looking for a bank loan; that the respondent could only have given the appellant vacant possession upon payment of the balance of purchase price; that no transfer was prepared and that after the expiry of the 90 days on 21st August, 1996 the respondent sold the property to another person on 13th March, 1997 for Shs.10,000,000/=.

Upon consideration of the evidence the learned Judge concluded:

“My view of this matter based on the evidence as briefly summarized above is that neither of the two parties to the agreement was at any time in a position to perform its part of the agreement. Accordingly given the vague, uncertain and contradictory nature of the agreement it is clear that there was no meeting of the minds of the contracting parties. The agreement between them is clearly void and incapable of enforcement. Consequently, the clause providing for the payment of Shs. 4 million by either of the parties who breached the contract upon which this suit is founded is not enforceable against either party. Furthermore, there is in my view no adequate or satisfactory evidence that either party, was in breach of the agreement”.

Nonetheless, the learned Judge ordered the respondent to pay interest on deposit of Shs. 1 million (which had been refunded at the date of judgment) “at commercial rates” in order to return the parties to respective positions they were in prior to the payment.

There are 13 grounds of appeal but in our view grounds No. 3, 4, 5 are the principal grounds which substantially express the appellant’s grievances to this Court:

“3. The learned trial judge erred in law and in fact in failing to make a finding that it is the defendant who breached the Agreement therefore was liable to pay Kshs.4,000,000/= in terms of clause 8.

4. The learned trial Judge’s interpretation of the Agreement its terms thereof is wrong.

5. The learned trial Judge erred in law and in fact in making a finding that the agreement was vague, uncertain, contradictory void and unenforceable”

This being a first appeal the appreciation of the evidence and the construction of the agreement for the sale of land by the learned Judge of the superior court is obviously not binding on this Court. This Court is free to come to different findings of fact or different construction of the agreement for sale of land from that of the trial Judge, of course bearing in mind that we neither saw nor heard the witnesses who testified before the Judge – see ***Selle v. Associated Motor Boat*** [1968] EA 123.

This appeal mainly concerns the construction of the agreement for the sale of land entered into by the parties on 21st August, 1996. The learned trial Judge observed that the agreement appears to have been “home-made” and that it contains several contradictory clauses framed in unusual terms. That fact does not give room to this Court to tamper with the agreement. As Apoloo, J.A. said in ***SHAH V. SHAH*** [1988] KLR 289 at page 292 paragraph 35, in respect of an agreement drawn by laymen:

“One must bear in mind that this agreement was drawn up by laymen. They did not use any legal language and the court can only interpret the sense of their agreement and not interpolate it with any technical legal concept ...”.

If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties.

Mr. Ouma, learned counsel for the appellant contended, among other things, that the respondent did not raise the issue of ambiguity of the agreement in its defence; that the issue of appellant paying money or depositing money with the lawyer before transfer was not in the agreement and that there was no evidence that appellant was not in a position to perform his obligations under the contract.

Mr. Siganga for the respondent, on the other hand, supported the findings of the learned Judge that the contract was uncertain and contradictory and illustrated this by reference to certain clauses of the agreement.

The learned Judge examined the material clauses of the agreement themselves to find out their meaning and also contrasted them with the oral testimony of the parties. He then came to the conclusion that clauses 3(ii) and clause 6 as read with clause 7 were contradictory in that while clause 3(ii) provided that respondent had to deliver vacant possession before part payment of Shs. 2 million clause 6 as read with clause 7 provided that the property would be delivered subject to existing tenancies. The learned Judge also found from the oral testimony of the witnesses that the parties were not in agreement on how the purchase price would be raised; when the balance of the purchase price was to be paid and when the respondent was to give vacant possession.

Although Mr. Ouma disputes that the agreement was ambiguous he conceded that the agreement provided for two alternative periods when the respondent could give vacant possession, namely, either at any time during the life of the contract as condition for payment of Shs. 2 million by the appellant or on the date of completion.

We have considered the agreement and the submissions of the respective counsel. There was no evidence that since the agreement was made on 21st August, 1996 any of the parties endeavoured to perform its part of the agreement.

Indeed, there was complete inactivity during the 90 days duration of the contract. The transfer which according to the respondent was to be prepared by the appellant's advocate was not prepared. The appellant's demand letter dated 22nd January, 1997 was written nearly 2 months after the expiry of the contractual date of completion.

It is surprising that even in that letter the appellant did not offer to complete the agreement or insist on the performance of the agreement by the respondent. Instead he demanded payment of Shs. 4 million pursuant to clause 8 of the agreement for the alleged breach of the agreement by the respondent.

It is evident that by 22nd January, 1997 when the demand letter was written the land the subject matter of the agreement was still subsisting for the respondent transferred it to another person on 13th March, 1997, over three months after the contractual date of completion. Admittedly, the respondent sold the land at the same price that he had contracted to sell to the appellant.

All those circumstances show that the respondent was in a position to complete the agreement by the time the appellant claimed damages for breach of contract. So what prevented the parties from completing the contract?

We believe that the answer must be because, as the learned Judge correctly found, there was no meeting of the minds of the contracting parties thereby making the contract incapable of performance. It is strange that in the suit that the appellant filed on or about 18th February, 1997 he did not seek the equitable relief of specific performance although the land had not been sold to another person. It is therefore also probable that the appellant could not raise the balance of the purchase price.

In addition to factors which made the learned Judge conclude that the agreement was void, there is also the uncertainty about the payment of the purchase price. Clause 7 as read with clause 6 of the agreement envisages that the land would be transferred to the appellant before he pays the balance of the purchase price which in this case is Shs. 9 million.

Indeed, that is how the appellant has construed the agreement which prompted Mr. Stanley Mayieka, a director of the respondent to state that the respondent did not mean to give property to the appellant before payment. That is, indeed, an unusual clause for it is a condition precedent to specific performance of an agreement for sale of land that the purchaser must pay or tender the purchase price at the time and place of completing the sale – see *Openda v Ahn* [1984] KLR 208 at page 218 paragraphs 10 to 15. That clause would mean that the contract would be executed first before the balance of purchase price becomes due and payable. The agreement did not even provide for the time within which the balance of purchase price would be payable or secure the payment. The fact that the agreement is uncertain on the fundamental term on the payment of the purchase price makes the entire agreement void for uncertainty.

Lastly, the fact that the agreement is capable of being construed as providing for two different dates for giving vacant possession by the respondent is itself evidence of uncertainty.

In the final analysis, we are satisfied, like the learned Judge, that the entire agreement is void for uncertainty and that neither party can be held to be in breach of the agreement or be entitled to any damages from the abortive agreement.

Alternatively, since neither party actively endeavoured to perform his obligations in order to bring the contract to fruition, it can be inferred from that inactivity that the parties had mutually rescinded the agreement by abandoning it thereby discharging each party from the performance of the agreement.

Those being our views, it is not necessary to investigate whether or not the Shs. 4 million claimed is a penalty or liquidated damages or whether it is recoverable in addition to refund of the deposit.

For those reasons, we are satisfied that the learned Judge reached the correct decision and that this appeal has no merit. We accordingly, dismiss the appeal with costs to the respondent.

Dated and delivered at Kisumu this 9th day of July, 2004.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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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