



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, LAKHA & OWUOR JJ A)

CIVIL APPEAL NO 175 OF 1999

BETWEEN

NABRO PROPERTIES LTD.....APPELLANT

AND

SKY STRUCTURES LTD & 2 OTHERSRESPONDENTS

JUDGMENT

Lakha JA. This appeal, which has arisen in an action for specific performance of a contract for the sale of land from a decision of the Superior Court (Ole Keiwua J) given on 29 April 1999, has raised some points of no little difficulty. The actual question with which alone we must deal may, however, be shortly stated; it is whether in the circumstances which I shall state the defendant who was the purchaser under the contract, was entitled to an order of specific performance and, if not, to what reliefs, if any. It will be necessary to lay the foundation for what follows with some statement of the facts which must be detailed, at any rate as to part of them.

The contract itself is dated 19 December 1992. It was made between the appellant as the purchaser and the first respondent as the vendor and is hereinafter referred to as "the earlier agreement". It related to a piece or parcel of land, known as Land Reference 209/11875 (the suit property) along General Mathenge Drive, Nairobi admeasuring approximately 2.6 acres or thereabouts.

The defendant was desirous of developing the suit property as a residential project and with a view to protecting its interest as the purchaser registered a caveat against the title on 31 May 1994. Chronologically, the next document relevant to these proceedings was an Assignment. It was undated but emanated from the defendant who had executed it. It was, however, not executed by the plaintiff. The price in the Assignment is given as Kshs.650, 000/= whilst that in the earlier agreement it was Kshs. 5,700,000/ =.

As the defendant failed to complete the transaction by the completion date of 31 March 1993 the plaintiff instituted proceedings to have the caveat removed. Having successfully removed the caveat the plaintiff transferred the suit property to the Second Added Party which was registered on 19 October 1994 when the property was unencumbered.

The purchaser asked for the cancellation of the transfer to the Second Added Party but did not in its pleading base any such claim on the ground of fraud which was not canvassed before the trial judge.

In these circumstances, the learned judge dismissed the purchaser's claim. He concluded by holding:-

“The defendant on May 10 1994 did not have a registered interest when the caveat was registered against the property. Therefore the transfer to the 2nd Added party was valid as it was registered on October 10 1994 when the property was unencumbered

It is against that decision that this appeal has been brought by the purchaser. Mr. Oraro who did not appear before the superior court argued the appellant's case with considerable force and persuasion. So did Mr. Muchiru for the first and second respondents, and Mr. Nowrojee for the third respondent, who had also appeared in the court below. I propose to deal with this appeal by considering separately the various documents in the case and their ultimate effect in the aggregate and overall assessment in the outcome. Let me, therefore, now turn to consider the four events that make up this case.

First, the agreement for sale between the appellant and the first respondent, the original plaintiff and the defendant respectively, who were the purchaser and vendor. It is dated 19 December 1992 with the purchase price of Kshs.5,700,000/=. The completion date was 31 March 1993. It is not in dispute that the plaintiff's Memorandum and Articles of Association required execution by two directors whereas the Agreement of Sale in breach of the requirement is executed by one director only. It also renders the Agreement incapable of being enforced. Further the defendant had not paid the full purchase price and had not applied for any extension to complete the transaction. The learned judge also held likewise and, with respect, I agree. Finally, no approval to develop the property as a residential project or at all had been obtained as the property had never been transferred to the defendant.

Secondly, instead, there was a fresh assignment submitted to the plaintiff after the completion date of the earlier agreement without any extension to complete having been sought or obtained. It was executed by the defendant though undated. It clearly rescinded or superseded the earlier agreement. The learned judge held that:-

"It is, however, clear that the defendant did not sue in the new agreement. It has sued on the December 19, 1992 agreement which in my judgment no longer vests any cause of action on the defendant. In June, 1994 the defendant by the said assignment had manifested a clear intention to create a new contractual obligation."

I respectfully agree.

Thirdly, the caveat. At the time the caveat was registered the defendant had no registrable interest in the land. The acceptance of such caveat did not in law create any such interest. As at 31 May 1994 there was no Agreement of Sale in fact and the appellant had taken no steps to be in a position to perform. The affidavit accompanying caveat was not sworn before a Commissioner of Oaths. It is also bad as it was based on the earlier agreement which had lapsed.

Fourthly and finally, there was the Agreement for Sale of the 5 October 1994 between the plaintiff and the 2nd Added Party. This property was advertised in June 1994. The purchase price on the document was Kshs.2 million and a sum of Kshs.4.9 million to wipe out a debt of that amount. The transfer was registered on 19 October, 1994.

Having set out and considered the four main pillars or planks of the purchaser's case, let me now turn to the result arising from each of them to see if at the end of it all the purchaser could found a case entitling it to an order of specific performance of the earlier agreement. It seems clear to me that the earlier agreement is invalid for want of proper execution as it is also incapable of enforcement. The fresh assignment of June 1994 manifested a clear intention to create a new contractual obligation. It rescinded the earlier agreement or, to say the least, varied it. The caveat did not create any registrable interest in the land in favour of the purchaser, and finally, the transfer of the land to the 2nd Added Party made the earlier agreement impossible of performance.

In these circumstances, I am satisfied that none of these documents can sustain a claim on behalf of the purchaser for specific performance of the earlier agreement. If I am wrong in so holding, then in my judgment, the purchaser disentitled itself to the remedy of specific performance. As the learned judge

held:

"I also see that the defendant has delayed in its quest for specific performance of the December 19, 1992 agreement. The claim came to be made on April 20, 1995. The delay is inordinate and has disqualified the defendant from the remedy of specific performance."

Furthermore, the purchaser is unable to show that reciprocity is possible. If the plaintiff sued for the balance of the purchase price under the earlier agreement, the defendant would retort that it had signed a new assignment with new arrangements agreed. This makes reciprocity no longer possible on the part of the purchaser.

As to a claim for damages, this is not available to the purchaser either. It did not show it had funds to effect the proposed project. Equally, the purchaser had no approved plans nor could it, on the available material before the court, raise funds on unexpired term of ten years. There was in fact no evidence of damages in the absence of approval for developments as intended by the purchaser. Talking of obtaining any approval made no sense as the property had never been transferred to the purchaser. Accordingly, it appears to me that the purchaser had not suffered any loss in that respect.

That leaves me with the question of whether transfer by the vendor of the property to the 2nd Added Party was in the circumstances fraudulent. Fraud had not been pleaded specifically. It is contended that that being so, no reliance can be placed upon it. But whilst it was not a part of the purchaser's pleading, it is contended that allegations of fraud are made elsewhere. Assuming (without deciding) that such allegations are available to the purchaser, I find nothing of substance in the fraud. The fact that the 2nd Added Party had a business relationship with the vendor did not constitute any evidence of fraud. The purchase price of two million is quite clearly less than that agreed upon in the earlier agreement. But there was evidence that another 4.9 million was to be used in writing off bad debts. But a reduced purchase price, if any, by itself is no evidence of any fraud. The purchase price at any time depends upon prevailing market conditions although the issue of fraud was properly not available as it was not canvassed. Speaking for myself, I find on the material before the Court, that the evidence of fraud was not of any substance and I so find. As the learned judge concluded in his judgment:-

"Accordingly, the defendant has no right to disturb, the title to the 2nd Added Party gained on October 19, 1994 *bona fide* and for value and without notice of any defect in the plaintiff's title. As to rescission, I think this case is quite different and on its own. This is because long after the expiry of the original agreement for sale, the defendant entered into a totally different and new contract for the sale of the same property. The defendant on May 10, 1994 did not have a registrable interest when the caveat was registered against the property. Therefore the transfer to the 2nd Added party was valid as it was registered on October 19, 1994 when the property was unencumbered."

Having carefully considered all the material before the Court and bearing in mind the conclusions, I find no difficulty in being able to find for the vendor. Accordingly, I would dismiss the purchaser's appeal with no order as to costs both here and in the court below.

Owuor JA. This is an appeal by Nabro Properties Limited, the appellant herein, who was the defendant in HCCC No 2994 of 1994 (OS). The appellant is dissatisfied with the judgment of the superior court (Ole Keiwua, J as he then was) by which he dismissed its counterclaim upon finding that Southfork Investment Ltd, 3rd respondent herein, (who was the 2nd added party) was a bona fide purchaser for value without notice of any defect in the title of Sky Structures Ltd., 1st respondent (the original plaintiff) to the property known as LR No. 1870/11/121/R. The learned judge went on to hold that the transfer to the 3rd respondent was valid and the appellant had no right to disturb its title to the property.

The facts giving rise to the litigation were fairly straightforward. On 19/ 12/1992 the appellant and the 1st respondent entered into an agreement for sale of the property known as LR 1870/11/121/R Nairobi measuring approximately 2.6 acres. The interest sold was described in the agreement for sale as a leasehold by way of a sub-lease of the residue of the Nairobi City Commission term of 99 years from

1985, less the last three days. The agreed purchase price was Ksh.5,700,000/= of which a deposit of Ksh.570,000/= was deposited with M/s Farouk Adam & Co, Advocates who was acting for both the parties as stakeholders. The sale was expressed to be subject to the Law Society Conditions of Sale and also to the conditions and covenants stipulated in a Letter of Allotment from the Nairobi City Commission dated 23/10/1992. Other special conditions were inter alia:- that the sale was subject to the Vendor (1st respondent) procuring a valid assignment from the allottees and finally that the sale would be completed on or before 31st day of March, 1993.

By 31st March, 1993 the 1st respondent had not obtained the assignment of the property from the Nairobi City Commission. The matter was not placed before the meeting of the Commission until a week after the expiry of the completion date on 6/4/1993. Fees for conveyance was paid on 27/ 5/1993 and assignment from the Commission given on the same day in favour of the 1st respondent. However, and despite having obtained the assignment, the 1st respondent did not transfer the land to the appellant and nothing seems to have happened in the matter until sometime on 15/ 9/1993 when another payment of Ksh.300,000/= was demanded and given to the 2nd respondent, Z R Shah (the 1st added party in the superior court) for purpose of 'quickenning the transaction'.

Sometime in May, 1994 the appellant noticed an advertisement in the newspapers for the sale of the property. To protect its interest in the property it placed a caveat against its title, claiming a purchaser's interest pursuant to the sale agreement of 19/12/1992. Thereafter in June, 1994 an assignment was brought to the appellant by the 2nd respondent for execution. This assignment showed a consideration of the sum of Ksh.650,000/=. The appellant executed it and returned it to the 1st respondent. However, various efforts to have the matter concluded between the appellant and the 1st respondent did not bear fruits even after various letters were written to the 1st respondent including a completion notice dated 19/9/1994.

In the meantime, the 1st respondent commenced proceedings in the superior court on 18/8/1994 by way of an originating summons under certificate of urgency seeking removal of the caveat that had been registered by the appellant against title of the property. The summons was supported by an affidavit sworn by the 2nd respondent in which he alleged that the appellant had failed to complete the sale agreement despite various requests and that the 1st respondent required an unencumbered title to the property to enable it obtain a facility from its bank.

The matter was placed before Bosire J (as he then was) who certified the same as urgent and ordered to be served for inter parties hearing on 20.8.1994. On 20/8/1994 the matter proceeded ex-parte as the defendant who was apparently served, did not appear and the order for removal of the caveat was granted.

Thereafter the 1st respondent executed an assignment of the property dated 5/10/1994 in favour of the 3rd respondent for a consideration of Ksh.2,000,000/= and the same was registered on 6/10/1994.

In the meantime, the appellant continued to pursue the 1st respondent for conclusion of the sale without any success. Instead, on 6/1/1995 a letter was received by Farouk Adam & Co., Advocates from Onyancha Bw'omote & Co. Advocates (acting for the 1st respondent) in respect of transfer of shares in the 1st respondent's company and gave the impression that the appellant had been purchasing shares in the 1st respondent. Enclosed in the letter was a cheque for the sum of Ksh.706,000/= purportedly being deposit for purchase price for the said shares. This cheque was rejected by Faruok Adam & Co., Advocates. Nothing else transpired in the matter until 20/4/1995 when the appellant filed an application by way of chamber summons upon discovering that the suit premises had been sold to the 2nd added party and that there had been other proceedings before the court whose file could not be traced.

The orders it sought were basically that a file in respect of the originating summons culminating in the ex-parte order for removal of the caveat be reconstructed. Secondly, that one Zaverchand R. Shah and Southfork Investment Ltd. be added as parties to the proceedings. Thirdly, that any further dealings in the suit premises be stopped and that the purported transfer of the suit land to Southfork Investment Ltd be set aside. Finally that the respondent/plaintiff's company do transfer the suit premises to the respondent/applicant pursuant to the agreement of sale dated 19th December, 1992. In the alternative, the

court do determine damages to be paid to the appellant.

The two added parties were accordingly served and after filing their replying affidavit, they applied and an order was made by Ole Keiwua J. (as he then was) on 27th June 1996 converting the originating summons into a suit, the appellant's application dated 20th April, 1995 was deemed as the defence and counterclaim. Thereafter, the matter proceeded to hearing before the learned judge. 1st added party, Z.R. Shah gave evidence on his own behalf and that of the 1st respondent. While the appellant adduced evidence from their mutual advocate M.F. Adam and one Mr. Pindoria, a director of the appellant.

On 29th April, 1999 the learned judge delivered a judgment subject matter of this appeal in which he found that the agreement for sale dated 19th December, 1992 lapsed on 31st March, 1993 since no extension was sought or obtained. The same agreement was improperly executed by the appellant since it had been signed by only one director. Further that the appellant did not tender the balance of the purchase price nor had it demonstrated that it indeed had the balance. Further that the execution of another assignment in June, 1994 superseded the sale agreement of 19th December, 1992, if at all the same was still valid, and that by that assignment, the appellant had manifested an intention to create a new contractual relationship and thereby rescinding the sale agreement of 19th December, 1992. He further found that the caveat was not only defective but also improperly based. Upon finding that the appellant had not established a case for specific performance and that it was not entitled to damages, he dismissed the counterclaim and held that the 3rd respondent was a bona fide purchaser for value without notice of the defect in the 1st respondent's title.

In his submission before us, Mr. Oraro, counsel for the appellant divided the twelve grounds of complaint into three groups and which in my view raise three important issues:

- a. Whether the agreement for sale dated 19th December, 1992 was alive and capable of being performed at the time the appellant went to court.
- b. If the answer to (a) is in the affirmative, whether the 1st respondent breached the same and whether the appellant is entitled to an order for specific performance.
- c. Whether the 3rd respondent is a bona fide purchaser for value without notice.

Mr Oraro's argument on the first issue was that the learned judge's finding that the contract had lapsed was wrong and cannot be supported by the evidence on record. His contention was that there was no provision in the sale agreement making time of essence. Under the 'special conditions', the sale was subject to the 1st respondent procuring a perfect assignment from the City Commission. This was not done before the completion date. Therefore at the stipulated time, the 1st respondent did not have a property to assign nor was it in a position to complete the sale. Yet and even after that date, the 2nd respondent collected a sum of Ksh.300,000/= in September, 1993 for the same purpose. Therefore the 1st & 2nd respondent conducted themselves in a manner to indicate that time was at large and not of essence.

Further, no notice of rescission was given by the 1st respondent to the appellants therefore the contract was still open at the time the court action was commenced. Mr Oraro relied on the case of *J J Kinyanjui versus Rachel Wahito Thande and another* CA NO. 284 of 1997.

It was not in issue that the sale agreement between the parties was dated 19th December, 1992. The interest sought to be sold being a lease hold of 99 years from 1985. The purchase price was Ksh.5.7 million of which a deposit of Ksh.570,000/= was paid at the execution to Faruok Adam & Co. Advocates acting for both parties. There was also the special condition in the agreement that the 1st respondent was to obtain a perfect assignment from the City Commission to facilitate the sale. By "a perfect assignment" of the sub-lease I take it, it was meant one that accorded with the terms of the agreement.

Completion of the sale was clearly set for 31st March, 1993. I wholly agree with Mr Oraro that there was no provision anywhere in the agreement which made time of essence. The 1st respondent did not avail the "perfect conveyance" on or before the completion date. Indeed, the issue of the conveyance was

deliberated upon at the meeting of the Commission held on 6th April, 1993 as contained in the minutes of that date. It is at this meeting that a resolution was passed allowing the council to execute the conveyance in favour of the 1st respondent. The conveyance that was granted on 27th May, 1993 was not for 99 years from 1985. It was for 99 years from 1st June, 1904. Notwithstanding the expiry of the completion period, the appellant did not do anything to extend the agreement period.

In my view, the 1st respondent having failed to obtain a conveyance for the period of 99 years from 1985 from the City Council, it could not have been able to perform the agreement and in particular special condition 4 thereto which was fundamental to the transaction. It is clear to me that the agreement was made impossible to performance by failure to obtain the "perfect assignment" on this score, I am in agreement with the learned Judge that the agreement of 19th December, 1992 was impossible to perform.

However, I do not agree with him that the reason for the impossibility was because the agreement was not properly executed.

Section 34 of the Companies Act Cap 486 Laws of Kenya provides how contracts by a company should be executed. They need not be under seal. In any event it is an elementary tenet of company law that a person dealing with a company is not bound to make enquiries and the appellant was entitled to take it that the agreement was properly executed.

Secondly, there is the issue of the assignment that was executed by the appellant around June, 1994. The purchase price in the assignment was stated as Ksh.650,000/=.

The term granted is a leasehold period from 1904 for 99 years. Mr Oraro initially dismissed it as an inconsequential document which according to him was part of the grander scheme to defraud the appellant. On the other hand, Mr Muchiru and Mr Nowrojee, counsel for the respondents submitted that it was an important document that rescinded the agreement for sale. According to them the interest sold therein was different from the one contained in the agreement for sale. The price of Ksh.650,000/= was lower than the original price of Ksh.5.7 million. With the result, this created a new arrangement. To this, Mr Oraro replied that the document was part of the agreement that was contemplated under special condition 1 of the agreement in that the 1st respondent in availing the same and the appellant in executing the same the two were acting pursuant to the sale agreement. The only difference here being that the appellant had accepted a lesser title or interest than the one covenanted in the agreement for sale.

My view of the matter is that the document could not have been part of a collusive scheme to defraud the appellant and at the same time, the "perfect conveyance" envisaged under special condition 1 of the agreement to be obtained by the 1st respondent. It offered what it obtained which the appellant readily accepted and executed. This was a transaction where both parties were represented by counsel and must have sought and obtained the necessary legal advice. Obviously, the arrangement sought to be created by the assignment was different from the one sought to be created by the sale agreement. Going by the observation of the learned author *Chitty on contract*, 27th Edition Vol. 1 par. 022-023, the appellant herein chose to be bound by the new assignment thereby executing the same. This in my view amounted to a rescission of the old contract as this fundamental term was entirely inconsistent with the terms of the old agreement. Furthermore, it matters not whether it was performed or not. Indeed, it need not amount to an enforceable contract as was the case herein when it was not executed by the 1st respondent. Its effect therefore was to rescind the earlier agreement and therefore a rescission notice was not necessary. In the circumstances, I find, on the first issue that the agreement for sale dated 19th December, 1992 was not only impossible to perform but that it was also had been rescinded by the execution of the new assignment. It follows from the foregoing that the learned judge's finding that the caveat was improperly based was correct since the same was predicated on the old sale agreement. It also follows that by the time the caveat was placed on the title, the appellant did not have a cause of action based on that sale agreement. In view of this finding, I do not find it necessary to consider the issue of whether or not the 1st respondent breached the contract.

I will now briefly consider the issue of specific performance. As stated above and since I have found that the sale agreement was impossible to perform, it could not have formed a cause of action for specific

performance. That notwithstanding, it is clear to me that the appellant was guilty of laches in that he had executed the agreement on 19th December, 1992. He did not come to court until April, 1994 to seek the equitable relief of specific performance, especially when they had come to know that the 2nd respondent was not playing a straight game. I further agree with Mr. Nowrojee that the appellant was not able to show that on its part it was ready, willing and able to perform its part of the bargain.

A party seeking specific performance must show and satisfy the court that it can comply i.e. it must be ready, willing and able to do so. In this case, there was only a mere statement that the appellant was ready to pay. That evidence could not sufficiently discharge the burden cast on the appellant. This being the case, the reliance on *Thomas Joseph Openda v Peter Martin Ahn* (1982-88) I KAR 294 case did not advance the appellant's case in any way.

On this issue, I also find that the appellant was not entitled to an order for specific performance. Nor would it have been entitled to damages since the leasehold in question was very short and it was admitted that no lender would give money on the security of such a short lease. More important however is the fact that the claim for damages was not proved by evidence. The appellant merely placed some figures before the Court and made no effort to help the court in ascertaining what, if any, would be damages due.

That now leaves me with the third issue whether or not the 3rd respondent was a bona fide purchasers for value without notice. The learned Judge found for the 3rd respondent and rejected the appellant's claim for cancellation of the 3rd respondent's title. As pointed out earlier in this judgment, the appellant's case was that the 3rd respondent was a collusive partner in a scheme to defraud the appellant. In support of this claim it was contended on behalf of the appellant that the caveat which was lodged by the appellant on 31st May, 1994 was removed in September, 1994. The 3rd respondent commenced negotiation for sale of the property in June, 1994 after seeing an advertisement in the newspaper, therefore it would have searched the property in which case it would have seen the caveat and agreement which quoted the price of Ksh 5,700,000/=. It was therefore put on notice by that caveat. Further the sale price to the 3rd respondent was so low compared to the price the appellant was ready to pay that there must have been collusion between the parties. To cap it all the two were in business together, and therefore more likely or not relatives. Do these three incidents demonstrate in any conclusive manner that the 3rd respondent knew and was part of the 1st or 2nd respondent plans if any to defraud the appellant?

First and foremost, the requirement under Order VI rule 8 of the Civil Procedure Rules, that a party who intends to rely on any fraudulent acts of another the same must be pleaded and particularize so as to put the other party in full knowledge and be able to defend itself. There was no pleading based on fraud in this case. Indeed, the only allegations of fraud made were mainly directed at the 2nd respondent and in counsel's submission. They were in my view not proved to the required standard. To my mind, if the appellant was serious in its allegation that the directors of both the 1st and 3rd respondents were relatives and therefore must have colluded in order to defraud it, the appellant needed to do more than make mere allegations. It cannot merely rely on the fact that the sale to the 3rd respondent was for Ksh 2 million only while it, had executed an assignment for 650,000/= for a property that it had previously contracted to buy for Ksh 5.7 million. On the evidence availed to the learned trial Judge, he cannot be faulted in coming to the conclusion that he did, in that the 3rd respondent was a bona fide purchaser for value without notice and thereby rejecting the appellant's request that its title to the suit property be cancelled. In the result, I would dismiss this appeal with no order as to costs both here and in the court below.

Gicheru JA. According to *Brooms Legal Maxims* at page 191:

"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest....., we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law."

It "has been applied to promote justice, in various and dissimilar circumstances.....and applies also with peculiar force to that extensive class of cases in which fraud has been committed

by one party to a transaction, and is relied upon as a defence by the other.we may state the principle upon which (the court of equity) invariably acted, namely - that the author of wrong who has to put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong."

By an Agreement made on 19th December, 1992 between the 1st respondent and the appellant herein, hereinafter called the Agreement, the 1st respondent agreed to sell and the appellant agreed to buy all that undeveloped piece of land known as LR 1870/11/121/R situate in Nairobi and measuring approximately 2.6 acres or thereabout. The interest to be sold was a leasehold by way of a sub-lease of the residue of the Nairobi City Commission term of 99 years from 1985 less the last three days thereof. The purchase price was Kshs.5,700,000/- of which Kshs.570,000/- was deposited with Farouk Adam & Company, Advocates as stakeholders. The sale was subject to the Law Society Conditions of Sale in so far as they were not inconsistent with the conditions of the Agreement. The completion date was on or before the 31st day of March, 1993. The Advocates for the parties to the Agreement were Farouk Adam & Company, Advocates. The property sold was subject to the conditions and covenants stipulated/implicit or contained in the Nairobi City Commission letter of allotment dated 23rd October, 1992 reference number CV.1183/sq/1/6/JKM/jwq and to all payments stipulated therein save and except for the Stand Premium of Kshs 400,000/- and land rent and rates which were payable by the 1st respondent otherwise the property was sold free of encumbrances, changes and/or claim.

The special conditions to the Agreement were as follows:

1. That the sale was subject to the 1st respondent procuring a valid and perfect assignment of the sublease from the existing allottee to the appellant and/or their nominee (if so directed by them in writing at any time prior to the execution of the assignment) and the 1st respondent was to ensure that due and proper resolution of minutes and formalities in respect of the assignment from the City Commission were duly complied with and procure the same.
2. That all rates and outgoings were to be apportioned as at the completion date and the 1st respondent was to procure a clearance certificate from the City Commission and Land Rent Certificate valid until the completion date at his own cost and expense.
3. Each party to the Agreement was to bear and pay their respective legal expenses with cost of Stamp Duty, registration fees and other disbursements payable on registration of the assignment including fees due to the Nairobi City Commission being borne by the appellant while the 1st respondent was at its own cost discharge any existing encumbrance.

It would seem therefore that the completion of the Agreement was predicated on the fulfilment of these special conditions.

From the minutes of the Ordinary Meeting of the City Commission dated 5th April, 1993, a resolution of the assignment between the Nairobi City Commission and the 1st respondent in respect of the original LR 1870/ 11/121 now LR 209/11875, hereinafter called the suit property, was made and on 27th May, 1993, an assignment of the suit property was executed between the Nairobi City Commission and the 1st respondent. That assignment whose interest was the residue of the unexpired leasehold of 99 years from 1st of June, 1904 was registered at the Nairobi Lands Office on 28th May, 1993. It will be observed that the resolution of the assignment of the suit property to the 1st respondent by the City Commission and the subsequent registration of the assignment were made after 31st March, 1993 - the completion date of the Agreement. The fulfilment of this part of the special conditions of the Agreement was the responsibility of the 1st respondent. Its fulfilment after the completion date made the latter but a mirage. If therefore the appellant was desirous of pursuing the Agreement, the completion date was no longer relevant. Indeed, on or about 15th September, 1993 and in furtherance of the Agreement, the 2nd respondent, who was one of the two directors of the 1st respondent and who was the signatory to the Agreement for and on behalf of the 1st respondent, requested the appellant to pay Kshs 300,000/- as he needed the money "to pay someone for the plot" - the suit property. That money was to be accounted for towards the purchase of the suit property. According to the appellant, the 2nd respondent had given the assurance that once this

money was paid, the transfer of the suit property to the appellant would be completed immediately. In consultation with the joint lawyers of the parties to the Agreement, Messrs. Farouk Adam & Company, Advocates whose advice was that if this payment would speed up the completion of the Agreement so be it, a cheque dated 15th September, 1993 drawn in favour of the 2nd respondent for the sum of Kshs.300,000/- was issued by the appellant. It was encashed by the 2nd respondent on the same day. Thereafter and until towards the end of May, 1994 nothing happened towards the completion of the Agreement save that during that month the suit property was advertised for sale in the local daily newspapers. This alarmed the appellant who in order to protect its interest in the suit property registered a caveat against the title to the said property on 31st May, 1994. During the month of June, 1994 the 2nd respondent asked the appellant to sign an assignment document prepared by a lawyer of the Nairobi City Commission with a view to speeding up the process of the transaction relating to the Agreement and that the 2nd respondent was to pay the legal charges of the Nairobi City Commission's lawyer. The joint Advocates of the parties to the Agreement, Messrs. Farouk Adam & Company approved this procedure provided that the registration would be effected at the Lands Office by them. The appellant being desirous of the completion of the Agreement was duped to sign the undated purported assignment of the suit property the consideration whereof was now Kshs.650,000/- instead of the original contract price of Kshs.5,700,000/- out of which the appellant had paid to the 1st respondent in the aggregate a sum of Kshs.870,000/-. This document which was not signed by the 1st respondent and is at pages 138 to 140 of the record of appeal was the basis of the submission of counsel for the respondents both in the court below and in this Court that the appellant had rescinded the Agreement. On the appellant signing the purported and undated assignment of the suit property, the 2nd respondent requested him and indeed insisted that the appellant should sign the withdrawal form of the caveat registered by the appellant against the title to the suit property. The appellant refused and pointed out that the caveat would be removed on presentation of documents for the registration of the aforementioned assignment at the Lands Office, Nairobi.

Despite persistent requests by the appellant to complete the Agreement, the 1st respondent took no action in that regard and by a letter dated 6th January, 1995 the 1st respondent sent back to the appellant by a Banker's Cheque the sum of Kshs.706,000/- being the deposit it had made pursuant to the Agreement. The appellant had no stomach for this turn of events and therefore returned to the 1st respondent the Banker's Cheque aforementioned. A subsequent search of the title to the suit property in the Nairobi Lands Office revealed that an *ex-parte* order of the superior court dated 20th September, 1994 removed the appellant's caveat against the title to the suit property and that the assignment to the said property had been executed on 5th October, 1994 in favour of the 3rd respondent by the 1st respondent for a consideration of Kshs.2,000,000/-. This triggered the Chamber Summons dated 19th April, 1995 and taken out by the appellant under Orders 1 rules 3 and 10, IXA rule 10, XXXVI rules 3 and 3B and XXXIX rules 1, 2 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. Principally, this Chamber Summons sought orders for the reconstruction of the now lost superior court file in Civil Case NO. 2994 of 1994 (O.S.) in which the 1st respondent had sought the removal of the caveat registered against the title to the suit property by the appellant with counsel then acting for the 1st respondent being required to supply to the superior court a complete set of all documents filed by them in that court leading to the *ex-parte* order issued by the said court on 20th September, 1994 and vacating the same forthwith; adding the 2nd and 3rd respondents as parties to the Originating Summons; prohibiting all dealings with the suit property; setting aside the purported transfer of the suit property to the 3rd respondent; and that the 1st respondent do transfer the suit property to the appellant pursuant to the Agreement or in the alternative the superior court do determine the amount of compensation to be paid to the appellant by the 1st respondent for breach of contract and any other subsequent losses and damages; and costs of the Chamber Summons. By consent of parties, the Originating Summons referred to above was converted into a suit under Order XXXVI rule 10 of the Civil Procedure Rules with the application filed by the 1st respondent on 18th May, 1994 being converted into a plaint and the appellant's application dated 19th April, 1995 being converted into a defence and counterclaim with the 2nd and 3rd respondents being respectively deemed to be 2nd and 3rd defendants to the appellant's counterclaim against the 1st respondent. All the parties thereto were at liberty to file any and/or further affidavits if necessary and the pleadings and summons subsequent thereto were to be converted into a full hearing.

Hearing of the now converted Originating Summons commenced on 7th October, 1997. At that hearing, it

transpired that the 1st respondent had sold the suit property to the 3rd respondent for a sum of Kshs.2,00,000/- with a balance of Kshs.4,900,000/- to wipe out a debt of that amount. The 3rd respondent was a sister company of the 1st respondent in clothing business. Indeed, according to the 1st respondent, the removal of a caveat registered against the title to the suit property by the appellant was with a view to facilitating the sale of the suit property to the 3rd respondent. According to the joint counsel for the appellant and the 1st respondent, Mr. Mohamed Farouk Adam, the appellant was able and willing to complete the Agreement but the 1st respondent was always prevaricating in this regard. Consequently and after a long delay, on 19th September, 1994 he served the 1st respondent with a formal notice of completion on the instructions of the appellant failing which a suit for specific performance was to be filed. Although the appellant was concerned about the delay in completing the Agreement, the 1st respondent though elusive in this regard never called off the sale of the suit property. As on 19th September, 1994 therefore, the Agreement was still valid notwithstanding the absence of a formal extension of the completion date.

The appellant was a Building Contractor and Property Developer and had been in the latter business for over 20 years. The purchase of the suit property was intended for building 22 maisonettes at a total cost of Kshs.96,700,000/- each of which could easily sell at a minimum price of Kshs.6,500,000/- and realising a total revenue of Kshs.143,000,000/-. The anticipated minimum profit would have been Kshs.46,300,000/-. The appellant was at any time able and willing to pay the purchase price of the suit property but was never told when the balance would be paid. Subsequent removal of the caveat against the title to the suit property and the transfer of the same to the 3rd respondent was according to the appellant fraudulent. Hence the appellant's claim for specific performance of the Agreement or in the alternative damages for its breach by the 1st respondent together with costs of the proceedings in the superior court.

The 1st respondent was by the expiry of the date of completion unable to complete the Agreement because of absence of the necessary documents for that purpose while the 3rd respondent came into the matter when it purchased the suit property from the 1st respondent.

In his judgment dated and delivered at Nairobi on the 29th day of April, 1999, the learned trial judge observed that while the completion date of the Agreement was 31st March, 1993 the 1st respondent had not become the owner of the suit property until 27th May, 1993 when it acquired the assignment in respect thereof so that by the date of completion the 1st respondent was not capable of transferring any interest in the suit property to the appellant. Yet the learned judge held that by the time the 1st respondent obtained title to the suit property the appellant had neither paid the balance of the purchase price nor applied for extension of time to complete the Agreement. Instead, the appellant had submitted to the 1st respondent a fresh assignment which was completely different from the subject-matter of the Agreement. To the learned judge therefore, this amounted to a rescission of the Agreement. Yet the circumstances of the new assignment as are explained earlier in this judgment were perhaps meant to entice the appellant to agree to have the caveat he had registered against the title to the suit property removed. The learned trial judge nevertheless held that the appellant was neither entitled to specific performance of the Agreement nor to damages for breach of the Agreement. He also dismissed the appellant's counterclaim against the 2nd and 3rd respondents the upshot of his holding being that the suit against the appellant succeeded with costs to the 1st respondent and the appellant's counterclaim was dismissed with costs to the 2nd and 3rd respondents.

Against the decision of the Superior Court the appellant appeals to this Court putting forward 12 grounds of appeal all of which are dependent on whether or not the Agreement came to an end on 31st March, 1993.

As indicated earlier in this judgment, as on the date of completion, the 1st respondent had not complied with the first special conditions set out towards the beginning of this judgment so that as at that date the 1st respondent could not pass any interest in the suit property to the appellant. It seems illogical to me to hold that the appellant would have been expected to fulfil his part of the Agreement while the 1st respondent was not or was not capable of doing so as at the date of completion. Subsequent conduct of the parties to the Agreement as is indicated in this judgment shows that after the date of completion, time

was no longer of the essence. According to their joint counsel, Mr. Mohamed Farouk Adam, the appellant was always ready and willing to fulfil its part of the bargain while the 1st respondent was playing truant to the Agreement. Indeed, from the circumstances obtaining in relation to the appellant's signing the undated copy of the new assignment as are outlined in this judgment, the subsequent removal of the caveat registered against the title to the suit property by the appellant and transfer of the same to the 3rd respondent - a sister business company of the 1st respondent - smacks of bad faith and determination by the 1st respondent to dishonour the Agreement and stinks of fraud. The 1st respondent cannot be permitted to benefit from its own wrong. I would in the circumstances allow this appeal, set aside the judgment of the superior court in favour of the 1st respondent and in place thereof enter judgment in favour of the appellant for specific performance of the Agreement together with costs. I would also set aside the dismissal of the appellant's counterclaim against the 2nd and 3rd respondents and in place thereof enter judgment for the appellant in the counterclaim together with costs. I would also award the costs of this appeal to the appellant. But as Lakha and Owuor, JJ A disagree there will be a majority judgment of this Court that the appellant's appeal is dismissed with no order as to costs both here and in the Court below.

Dated and delivered at Nairobi this 26th day of April, 2002

J.E GICHERU

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL