



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 27 of 1999

THE GOVERNMENT OF THE UNITED STATES OF AMERICA.....APPELLANT

AND

JOSEPH MUIRURI GITHONGO.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Mbitio J) dated 1st September, 1998

in

H.C.C.C. NO. 1315 OF 1991

CONSOLIDATED WITH

H.C.C.C. NO. 2040 OF 1996)

JUDGEMENT OF OMOLO, J.A:

I had the advantage of reading in draft form the judgment of Akiwumi, J.A. and I entirely agree with his reasoning and conclusions. It is clear from a reading of the judgment of the superior court that the learned trial Judge wholly misapprehended the evidence which was placed before him by the parties. The lease-purchase agreements were placed before the trial Judge. None of them contained the stipulation contended for by the respondent that those agreements were conditional upon the respondent himself obtaining a loan or the appellant obtaining a loan on behalf of the respondent, from the Standard Chartered Bank, Ltd. True, the respondent was in need of money from that Bank, but the only thing the appellant ever offered to do in respect of that need of money by the respondent was that instead of paying directly to the respondent the sums due to him under the lease-purchase agreements, the appellant would instead remit the monies to Standard Chartered Bank Ltd. That is exactly what Ms Ann Dotherow told the Standard Chartered Bank Ltd in her letter dated 28th January, 1988 to Mr. Itela of that bank. In that letter, Ms Dotherow stated: "*The United States Agency for International Development has just concluded a Lease-Purchase Agreement with Mr. Joseph Githongo concerning four residential properties located in Spring Valley. Mr. Githongo has informed us that he is entering into an agreement with your bank whereby future payments under the terms of these agreements are to be made directly to you. We have no objection in doing so, but several items are required for us to process payments to your organization.*"

(a) We will require Mr. Githongo's approval in a letter to us to permit processing future payments directly to your bank;

(b) Account number to which future payments are to be deposited;

(c) *The terms of the agreement between yourself and Mr. Githongo specifying the amounts and number of years payment is to be made to your organization.*

Upon receipt of this information with certifications by Mr. Githongo, we will process future payments per his instructions, with a copy of this agreement to your bank. Please advise if you require any additional information.

Sincerely

B. Ann Dotherow

Executive Officer

cc: Mr. Joseph Githongo"

As is obvious from the letter itself, it was written after the lease-purchase agreements had been concluded and it was copied to the respondent. The respondent did not protest to anyone that no agreements had been concluded or that the agreements were conditional upon Standard Chartered Bank granting a loan to him. Instead, by his letter of 2nd February, he told Ms Dotherow:

"1. I acknowledge with thanks your copy of a letter to, Mr. Itela of the Standard Chartered Bank Kenya Ltd, Moi Avenue dated 28 January, 1988 on the above subject.

2. I am pleased to give my firm and irrevocable authority to the USAID Mission to pay all future rents directly to the Standard Chartered Bank Kenya Ltd as already agreed between all of us. This irrevocable authority to the USAID Mission remains in full force until the total sum advanced to me relating to the agreed purchase price is settled in full.

3. I most sincerely hope that this matter will now be concluded shortly and that I will be enabled to draw-down to settle some urgent matters which were the reasons for this particular sale.

Thank you,

Yours sincerely, J.M. GITHONGO."

I have said that the respondent was obviously in urgent need of money, and that was probably why he offered to sell his four properties to the appellant. But he equally knew that the appellant was not in a position to pay in a lump sum the agreed purchase price of some Shs.6 million. The inability of the appellant to pay in a lump sum the agreed purchase price was the reason for the lease-purchase agreements under which the appellant was to pay by installments.

At the same time, the appellant himself was arranging for a loan from Standard Chartered Bank. If his intention had been that the sale would only take place in the event that Standard Chartered Bank granted the loan to him, then nothing could have been easier than to put that understanding in the lease-purchase agreements. But if that was the respondent's intention and he kept it to himself, he cannot now be allowed to get out of the agreements due to his private intention kept away from the appellant. That cannot constitute a mutual mistake; nor can it constitute a frustration of the agreements. I agree with Akiwumi, J.A. that this appeal ought to be allowed with costs on the terms proposed by him.

As Tunoi, J.A. also agrees, the orders of the Court on this appeal shall be those proposed in the judgment of Akiwumi, J.A.

Dated and delivered at Nairobi this 14th day of July, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL