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 atNairobi (Justice Mbito) dated 1st September, 1998

In

H.C.C.C. NOS. 1315 OF 1991 AND 2040 OF 1996 CONSOLIDATED)

JUDGMENT OF AKIWUMI, J.A.

It is undisputed that the Appellant, the Government of the United States of America, having been approached by its landlord the Respondent, who was in financial difficulties, entered on 27th December, 1987, into four lease purchase agreements with an option to purchase, with the Respondent in respect of four houses which the Appellant was then renting from the Respondent namely, house reference numbers L.R. No. 7158/281, L.R. No. 7158/232, L.R. No. 7185/283 and L.R. No. 7185/284 all on Spring Valley Road, Nairobi.

According to the said lease purchase agreements, the Appellant should exercise its option to purchase within seven years from the date of the lease purchase agreements and in any case not later than 30th September, 1994.

The appellant exercised its option to purchase L.R This is the exhibit marked affidavit reffered to in the annexed sworn before me on the7158/281 and L.R. No. 7158/283 by a letter in respect of each house dated 28th September, 1990 well within time. In respect of L.R. No. 7158/282 and L.R. No. 7158/284, the Appellant similarly, exercised its option to purchase them within time by letters to that effect dated 5th February, 1993. The Respondent having failed to honour his obligation to sell under the relevant lease purchase agreements, the Appellant brought two suits for specific performance against the Respondent to compel him to transfer the four houses to the Appellant. The first suit Civil Case No. 1315 of 1991 dated 25th February, 1991, which was in respect of L.R. No. 7158/281 and L.R. No. 7158/283, was consolidated with the second suit Civil Case No. 2040 of 1996 dated 14th August, 1996, which was in respect of the remaining houses, L.R. No. 7158/282 and L.R. No. 7158/284. In this respect it is important to draw attention to the applicable written law at the time that the lease purchase agreement were made. This is subsection (3) of section 3 of the Law of Contract Act which is as follows:

"No suit shall be brought upon a contract forthe disposition of an interest in land unlessthe agreement

upon which the suit is founded,or some memorandum or note thereof, is inwriting and is signed by the party to becharged or by some person authorized by him tosign it."

The Respondent's main defence to the Appellant's suit through his defences and counter-claims respectively dated 14th May, 1991, and amended four years later, and 12th September, 1996, was that even though the lease purchase agreements did not so specifically specify, the option to purchase was only to apply if the Respondent was able to obtain from the Standard Chartered Bank, by way of a loan, the agreed price of the houses upon the execution of the

lease purchase agreements, and that the Appellant was well aware of this. This was set out in the amended defence as follows:

"(a) Firstly, under a mistake of fact, namely thatthe transactions set out in the saidagreements would only be implemented and be ofeffect if the Defendant was granted a loan bythe Standard Chartered Bank of Kenya Limited.

(b) On the condition that the Defendant would begranted a loan by the said Standard CharteredBank of Kenya Limited.

(c) On the representation by the Plaintiff to theDefendant that it would obtain a loan for theDefendant from the Standard Chartered Bank ofKenya Limited which the Plaintiff would repayin full including interest; and

(d) On the mistake of fact of both parties thatthe sums payable under the said agreementswould be sufficient to repay not only thecapital sum hereby lent to the Defendant butall interest and costs in respect thereof.The sums were insufficient to repay the loanand interest."

Upon the loan having failed to materialize, the Respondent had purportedly rescinded the lease purchase agreements. The Respondent further counter-claimed for damages for trespass by the Appellant, and for a declaration that the lease purchase agreements were invalid and unenforceable. It is worth noting that the defence that the lease purchase agreements would only come into effect if, and only if, the Respondent obtained a loan, to be arranged by the Appellant, from the Standard Chartered Bank of Kenya was only introduced some four years after the defence and counter-claim to the first plaint was filed, by way of the amended defence and Counter-claim. The introduction of such an important factor in the defence after so many years, smacks suspiciously as anafterthought. By the time the second suit was filed, thisafterthought had already become solidified as a defence.

A number of letters which gave the background to the executionof the lease purchase agreements were produced. In his letterdated 18th August, 1987, the Respondent welcomed Mr. Liebner, anagent of the Appellant, back from holidays and asked for them tomeet to "progress the matter of USAID's intention to purchase" thenow famous Spring Valley properties. This letter was followed byseveral letters written by the Respondent between September, 1987, and February, 1988, to the Appellant confirming the lease purchaseagreements of the Respondent's four Spring Valley properties, between the Appellant and the Respondent. Although some of theseletters refer to the payment by the Appellant to Standard CharteredBank, of certain sums of money for the defrayment of the loan thatthe Respondent hoped to obtain from Standard Chartered Bank, theydo not contain anything to show that the lease purchase agreementswere dependent on the Appellant obtaining a loan from StandardChartered Bank for the benefit of the Respondent. Indeed, asappears in the Respondent's letter of 30th December, 1987, to theStandard Chartered Bank, it is the Respondent who had submitted anapplication to the Bank for a loan.

Subsequently, in his letter of 5th January, 1988, to Mr.Liebner, in which the Respondent referred to his loan applicationto the Standard Chartered Bank, the Respondent conveyed the following revealing message to Mr. Liebner, an agent of the Appellant, which fortifies the proposition that the arrangements between the Respondent and the Appellant were only those set out in the lease purchase agreements which did not require the Appellant to arrange any loan for the Respondent or for the Respondent to obtain a loan from Standard Chartered Bank or for the Appellant to pay in lump sum the purchase price of

the Spring Valley properties:

"They [Standard Chartered Bank] require fromyou, your undertaking to the StandardChartered Bank for direct payments of annualrents until the loan has been completelyliquidated. They will also want the firstannual rent paid direct to them. Please makearrangements so that the first cheque isreleased to them within this month. You willalso provide to them a copy of the leasepurchase agreement confirming to them thearrangements between the USAID and myself."

Then in his letter of 20th January, 1988, to Mr. Liebner, the Respondent having first thanked him "for copies of Memorandum of Agreement including the lease option to the Spring Valley properties", which he had already executed in the previous December, went on to state that:

"These leases appear in order exceptparagraphs 10, 11 and 12 which would have thenet effect of reducing the final agreed pricebetween you and me."

But these paragraphs do not relate to the failure of the Appellant to satisfy the alleged condition of the lease purchase agreements, namely, that the Appellant was to have paid the full purchase price or to have arranged for the Respondent to obtain a loan from Standard Chartered Bank or for the Respondent himself, to have obtained the loan, upon the execution of the lease purchaseagreements which had taken place the December before. Neither didthe Respondent then revoke the agreements. Indeed, on 9thFebruary, 1988, the Respondent had written to Mr. Itela of StandardChartered Bank a letter which if anything, confirmed the positionthat it was the Respondent who was applying for the loan from theBank and that the Appellant would only assist the Respondent inrepaying this loan by paying directly to the Bank, the annualrentals that were due to be paid to the Respondent under the leasepurchase agreements, as and when they became due and not in onelump sum:

"Dear Mr. Itela, Lease Purchase Agreement - Spring Valley Properties1. Thank you for a copy of your letter for Ms. Ann Dotherow in regard to the matter currentlyin progress. The amount of sale for theseproperties has been agreed at Kshs.6.5million. A sum of Kshs.1, 466,978.20 has beenreceived as the first annual payment by us.The balance therefore required from your Bankis Kshs.5, 033,021.80. The USAID will confirmthis position and give you the letter ofirrevocable undertaking to pay all sums ofrent in future direct to your Bank withoutfurther reference to myself. I have in factgiven to the USAID my letter of irrevocableundertaking so that they will be in a positionto pay all future rentals direct to theStandard Chartered Bank without any furtherreference to myself." (Underlining supplied).

Six days after the Respondent's letter to Mr. Itela, the latter on i5th February, 1988, wrote to the Respondent that his request, not that of the Appellant, for a loan, had been turned down. The pertinent part of this letter is as follows:

"Your request for a loan of Kshs.5.033 millionhas been given the necessary consideration but we regret to advise that we are unable toassist at the moment because of the currentcredit squeeze imposed on the commercial banksby the Central Bank of Kenya.".

As regards the assertion in the amended defence that the lease purchase agreement would only be implemented if the Respondent was granted a loan by the Standard Chartered Bank, I would say that, apart from the fact that in my view, this is not supported by evidence, such a crucial condition should have been included in the lease purchase agreements. But this was not done. It was only after the Standard Chartered Bank's inability to grant the Respondent the loan he had requested, that the Respondent for the first time, in his letter of 12th May, 1988, to the Appellant, introduced this crucial condition as an integral part of the lease purchase agreements. First, one would have thought that if this crucial condition was a genuine one, the Respondent would not have waited for some three months after he failed to obtain the loan, before purporting to rescind the lease purchase agreements.

Secondly, the very wording of this rescission to my mind, smacks of dishonesty. None of the correspondence produced at the trial support this uncandid assertion to the effect that the condition was an express provision of the lease purchase agreements, which is as follows:

"As you know it has proved to be impossible toraise the Bank credit which was an integralpart of the proposed lease purchase of theabove. Consequently the original leases of14th May, 1982, as amended by Amendments No. 1dated 9th and 10th May, 1987, therefore remainin force." (Underlining supplied).

When it is recalled that in his letter of 16th September, 1987, to Mr. Liebner, the Respondent had observed that:

"We agreed for the four houses at SpringValley a total purchase price of Kshs.6.5

Million. Although current market prices havebeen rising since last year when the aboveprice was agreed I still hold to the sameprice from the USAID for these properties. Ibelieve that our long-term continuedharmonious relationship is important and do, therefore, believe it is right for me to holdto the price already agreed previously."

That in his letter of 17th September, 1937, to Mr. Liebner, the Respondent had in respect of his Spring Valley properties stated that:

"As I indicated to you it has been confirmedto me that these properties could easily fetchKshs.7 million in the open market today.Despite this I however stick to the figurespreviously discussed with you."

That in his letter of 13th October, 1987, to Mr. Liebner, the

Respondent had said the following:

"I have been approached by others for theseproperties but I have clearly indicated tothese others that I would not deal withanybody unless the USAID was not willing toconclude the deal with me. The first offer istherefore to the USAID and until you indicateto me otherwise I will not entertain theseothers who are desirous of enteringnegotiations for a possible purchase."

and that in his letter of 30th December, 1987, to Mr. Itela, the Respondent had made the following assertion regarding the valuation of his Spring Valley properties:

"At the meeting with Mr. Warren we wererequested to send to you our formalapplication for this loan which we are pleasedto formally submit to you. We are alsopleased to send herewith valuation reports ofthese four properties at Spring Valley whichare valued in excess of Kshs.7.5 million.", it is not difficult for one to come to the conclusion that theRespondent untruthfully exploited the failure to obtain the loanfrom Standard Chartered Bank in order to break the lease purchaseagreements he had with the Appellant so that he could sell hisSpring Valley properties at a much higher purchase price and inlump sums than as provided for in the lease purchase agreements.

The foregoing analysis of the state of affairs as obtainable from the documentary evidence produced at the trial is in my view, consistent with the evidence of Mr. Liebner and Miss Dotherow both of them agents of the Appellant/ that the lease purchase agreements were not dependent upon the Respondent obtaining a loan from Standard Chartered Bank or upon these witnesses ensuring that the Respondent obtained the loan that he sought from the Bank or upon the Appellant paying the full purchase price upon the execution of the lease purchase agreements by the Appellant.

In his evidence, the Respondent quite brazenly stated with respect to the lease purchase agreements that:

"I still say that the agreement was a mere fiction for the purpose of obtaining a loan. I knew the documents were of no value to me until I got the loan. They were of value [to] USAID as they were important before the loan was released and for Washington to release the funds eventually. So far as I was concerned they were only to assist USAID to get processes done. I know that they were a fiction at the time I signed them. All I wanted was to get my funds ...."

The Respondent admits that by executing the lease purchase agreements, he took part in a deception

which he, I suppose, assumes is a good defence to the Appellant's equitable claim for the specific performance of his part of the bargain. I hold the contrary view. Furtheron in his evidence, if it is to be believed, which I do not, the Respondent changed his tune when he said as follows:

"A fiction can be changed. At that time Istill expected USAID to release the payment toStandard Chartered Bank in future. I hadclearly told Mr. Liebner that the lease wouldbe conditional on my ["being] granted a loan.However, Mr. Liebner told [me] that if thatcondition were put in the lease, Washingtonwould not accept it. In my earlier dealingsit was always a condition that payment wouldbe subject to US Congress voting money. Themoney was to be released by StandardChartered. This was not put in "the agreementbecause USAID only pay if US Congress votesmoney ...." (Underlining supplied).

This excerpt from the Respondent's evidence which incidentallytalks about things to be done in the future and which nowintroduces a new verbally conveyed condition, also raises a legalissue whether a written agreement can be dependent on verbalconditions. Assuming that the Respondent himself, had not admittedhis wrong doing, that the lease purchase agreements were anexercise in deception in which he had partaken, and which alone, inmy view, makes him undeserving of any judgment in his favour, couldthe validity of the lease purchase agreements be dependent on whatthe Respondent told Mr. Liebner? This Court in the case of Mbururi Matiri & Sons v Nithi Timber Co-operative Society Limited CivilAppeal No. 125 of 1987 (unreported), held in the unanimousjudgments of Platt, Gachuhi and Apaloo, JJA that a written contractcannot be amended by an implied stipulation unless it can be saidto be mutually intended and necessary to give efficiency to the contract. In that case the implied stipulation was not even one that arose out of a verbal condition, but one that was contained in the contract under the heading "Other Conditions". In his judgment, Apaloo JA as he then was, put the matter in his customary succinct manner, thus:

"The question for consideration in this partof the case, is whether as a matter of law, such stipulation should be implied. Therights and obligations of the parties werefounded on their written contract of the 10thNovember, 1984. And if my appreciation of thelaw on this aspect of the case is correct, nostipulation can be implied in a writtencontract unless it can be said to be mutuallyintended and necessary to give businessefficacy to the contract. It is clear to methat the appellant intended to have a refundof his deposit once he provided the BankGuarantee. The difficult question is on theevidence, can it be said that the societyshared that intention? Did it intend to giveup its cash security for a bank guarantee?That guarantee was subject to review on the30th June, 1986, just one year of its date andis liable to cancellation on thirty days'notice to the Society. As a form of security,it is less advantageous to the Society thanthe cash held. There is nothing in theevidence to which one can point as showing aclear and unambiguous intention on the part ofthe Society to give up its cash guarantee forwhat was, after all, a paper security. Sowhatever may have been the appellant'sintention, it is not shown that that wasequally the Society's. That being so, thereis no basis for holding that both partiesmutually intended the stipulation contendedfor on behalf of the appellant."

I would say that in the present appeal, there is nothing in the evidence which one can point to as showing a clear and unambiguous intention and there is nothing in the lease purchase agreements also to imply this, on the part of the Appellant, that the lease purchase agreements were a sham and that they were not to become effective unless the Appellant obtained for the Respondent or the Respondent himself, obtained, the loan from the Standard Chartered Bank or unless the Appellant paid the full purchase price. Why should the Appellant burden itself, with paying the full purchase price of the properties when no such money had been voted for it and why should the Appellant when it has an option to purchase within seven years bind itself, to a condition that the Respondent should be granted a loan? So whatever may have been the Respondent's intention, it is not shown that that was equally the Appellant's. Apart from this, there is evidence that the Respondent and the Appellant were clearly ad idem and in total agreement that the lease purchase agreements only and not subject to any condition, were to apply. In pursuance of the lease purchase agreements all of which the Respondent admits having signed and was thus bound under them, to discharge his part of the bargain, a first installment of Kshs.288, 536/- was paid by the Appellant in January, 1988, shortly before the Standard Chartered Bank conveyed its inability to give the Respondent the loan he had applied for. And on this point, why should this money have been paid, at all, if the lease purchase agreements were, as the Respondent sought to show a mere fiction of the

imagination? Once the Respondent executed the lease purchase agreements, he was bound by them and his invalid rescission would make no difference.

Section 73 of the Evidence Act provides that:

"The admission of a party to an attesteddocument, of its execution by himself shall be sufficient proof of its execution against him,though it be a document required by law to beattested.".

And even if oral evidence may under Sections 97 and 98 of the Evidence Act, be accepted to determine whether the lease purchase agreements were dependent on an oral condition, it has not been established by evidence that this was so.

When it is also considered that the lease purchase agreements were for a period of seven years and the options were exercised in 1990 and 1993, it cannot be said that the Appellant was guilty of laches especially when if time was of the essence as the learned "judge of the superior court wrongfully, held, the Respondent "himself, did not do anything to dispose of his Spring Valley properties after his insincere and contrived letter of 12th May, 1988, in which he in a round about manner, attempted to terminate the lease purchase agreements. We are dealing here with a shrewd and crafty Respondent who rather moved the goal posts as it suited him and who could not have laboured under a mistake of facts.

Furthermore, each of the lease purchase agreements contained the following significant clause:

"It is further understood and agreed between the Lessor and the Lessee that the Lessee has a right to purchase the said property at any time and during any year of the lease term."

All this does not support the learned Judge's observation to the effect that time was of the essence since the Respondent was "being pressed to pay off his credits." In this same letter, the Respondent sought cynically to revive the original leases, not to throw the Appellant out so that he could sell his properties quickly, which, in each of the lease purchase agreements had been clearly abrogated as follows:

"It is understood and agreed between theLessor and the Lessee that this documentcancels MEMORANDUM OF AGREEMENT-AMENDMENT NO.1 OF MAY 10, 1987 IN ITS ENTIRETY."

The Respondent's letter of 12th May, 1988, was followed by another one of 22nd December, 1988, this time, from the Respondent's Advocate in which the cheques and remittance advices sent by the Appellant and which testifies to the fact that the Appellant was performing its part of the bargain, were returned.

This letter also sets out the reasons for this namely, that the lease purchase agreements were entered into on the basis and understanding that the Appellant would make immediate payment of the purchase price to the Respondent or that the Appellant would secure for the Respondent a loan that would enable the Respondent to meet his financial commitments. This letter finally, informed the Appellant that they would continue to occupy the Spring Valley properties only as tenants in accordance with the May, 1987, lease which would expire in May, 1989. Fifteen months later, on 14th March, 1990, the Respondent wrote to the Appellant who was still in the Spring Valley properties as follows:

"Having considered the plan very carefully, Iam afraid my view is still that the leasepurchase agreements of December 7, 1987 areinvalid so far as they give USAID/Kenya anoption to purchase any of my properties inquestion. The invalidity arises out of thefrustration of the said agreements so far asthey relate to the option to purchase. Youwill recall that, in all honesty, theagreements were signed between us underan implied condition that I was to receive then immediate payment of Kshs. 6. 5 millionbeing the purchase price for my saidproperties, and that USAID/Kenya indeed agreedto and did support a scheme whereby StandardChartered Bank Ltd was to loan me the said sumof purchase price with USAID/Kenya undertakingto repay the loan by paying the annual rentalsums for the properties directly to StandardChartered. All this is borne out in thecorrespondence and the many discussions whichyou are aware of between USAID/Kenya, myselfand Standard Chartered. As it came to be, Iwas unable to get my

purchase price money whenStandard Chartered by their letter of February15, 1988 declined to give the loan on thebasis that the Government had imposed a creditsqueeze. In those circumstances, theagreements as they relate to the option topurchase were frustrated because of thesupervening impossibility of getting my moneyimmediately as was the condition betweenourselves as parties to the said agreements, thus making the options invalid. It is onthat basis that I will now proceed.

The above notwithstanding, I am willing toaccommodate USAID/Kenya in view of our already stated longstanding harmonious relationship onthe following conditions ...."

I have already expressed my views on "implied condition" andwould only say that the facts show that the Respondent could nothave been in a great hurry to sell his houses to meet pressingfinancial commitments.

After hearing the suit, the learned Judge in a somewhat is jointed judgment held as follows:

"The current documents are clearly notillegal. The law does not forbid foreignbodies from buying and/or leasing propertiesin towns. The agreements herein, on theirface, are not invalid or unenforceable.However having considered the surroundingcircumstances and the fact that *one* of them isnot even signed by the plaintiff it is clearthat they were merely conditional documentsand were to come into effect on fulfillment of other conditions, i.e. lumpsum payment througha loan from the bank. I therefore hold thatuntil the condition was fulfilled, they wereinvalid agreements and/or voidable. In factthe agreements themselves made this clear inthe case of the plaintiff. My answer to issueNo. 25 is therefore that the agreements wereinvalid and/or better still voidable.

As regards issue No. 27, namely whether theplaintiff is obliged to pay purchase price tothe defendant prior to transfer of property,the answer is largely in the agreements. Theyclearly provide that the balance of purchaseprice were to be paid before the options couldbe exercised. It is therefore clear that thepurchase price had to be paid before theproperties were to be transferred to theplaintiff if the implied condition had beencomplied with. The option could not beexercised without payment or readiness to do

The learned Judge, after submissions had been made by counselby 23rd December, 1997, and relying on his conclusions that theimplied condition had not been fulfilled and that the balance ofthe purchase price was to be paid before the option to purchasecould be exercised, which is not the position as contained in thelease purchase agreements, then went on, in his judgment deliveredon 1st September, 1998, to dismiss the Appellant's suit with costsand entered judgment for the Respondent against the Appellant fortrespass for the occupation of the Respondent's Spring Valleyproperties, for a declaration that the lease purchase agreementswere void, unenforceable and/or invalid, and for vacant possessionof his Spring Valley properties. This inordinate delay of nearlynine months in delivering his judgment by itself denudates thejudgment of reliability and respectability.

The present appeal is against this judgment. The grounds of this appeal can be summarised as follows: that the learned Judge'sjudgment is not an adequate and proper appraisal and evaluation ofthe evidence before him; that the learned Judge erred in findingthat on the balance of probabilities, the evidence before him wasin favour of the Appellant's version of events; that the learnedJudge erred in holding that the lease purchase agreements werevoidable at the instance of the Respondent because of the impliedcondition that the full purchase price would upon the execution ofthe lease purchase agreements be paid by the Appellant or a bankloan of that amount arranged by the Appellant for the Respondent.Some of the crucial issues .raised in this appeal is issues of judge's findings of fact cannot be supported by the facts before?him. This is a first appeal and I am entitled to re-hear thedispute. I keep in mind of course, that the learned Judge had theadvantage which I have not had, of seeing the witnesses who gavel''evidence before him. In the case of Marabe v Nyamuro (1982-88) 1KAR 108, Hancox, Ag JA. (as he then was) observed as follows onthis point:

-"However a court of appeal will not normallyinterfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or thejudge is shown demonstrably to have acted onwrong principles in reaching the findings hedid.".

I have also considered the authorities cited by the counsel in this appeal and I have, as it must now been apparent from my foregoing analysis and evaluation of the evidence, reached the Conclusion that the learned' Judge's finding was based on a misapprehension of the evidence before him and upon which he relied in coming, with respect, to his faulty conclusions on the law. In the result, I would allow the appeal, set aside the judgment of the learned Judge of the superior court and substitute it with an order that the Respondent transfers to the Appellant within ninety days from today, the Spring Valley properties namely, L . P. 7158/281, L.R.7158/282, L.R.7158/283 and L.R.7158/284 upon the Appellant depositing with the Deputy Registrar of this Court for the benefit of the Respondent, any sums that upon the exercise of the Appellant's option to purchase on the dates already identified, may be certified by the Deputy Registrar of this Court, as due to the Respondent under the lease purchase agreements. All sums that have been paid by the Appellant to the Respondent in respect of the

Respondent's said four Spring Valley properties by, way of rent shall be taken into account. If upon the deposit of such sums with the Deputy Registrar 'of this Court, the Respondent fails to transfer the said properties to the Appellant as herein ordered, the said properties shall be transferred by the Deputy Registrar ofThis Court to the Appellant.

The Appellant will have its costs of this appeal.

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

A. M. AKIWUMI

JUDGE OF APPEAL