REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 203 of 2002

RATILAL GOVA SUMARIA ……..……. 1ST APPELLANT

PLEATED INDUSTRIES (K) LIMITED ……...…… 2ND APPELLANT

AND

ALLIED INDUSTRIES LIMITED ……..…..……. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

Nairobi (Hon. Commissioner of Assize Philip Ransley) given on 5th day of June, 2002

in

H.C.C.C. NO. 1182 OF 1991)

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JUDGMENT OF THE COURT

This is an appeal by the unsuccessful plaintiffs from the judgment of the superior court, (Mr. P.J. Ransley – the Commissioner of Assize – as he was then) delivered at Nairobi on 5th June, 2002 in which the learned Commissioner of Assize gave judgment dismissing the appellants' suit with costs to the respondent.

The appellants herein Ratilal Gova Sumaria (as 1st plaintiff) and Pleated Industries (K) Ltd (as the 2nd plaintiff) filed a plaint in which they sued the respondent Allied Industries Ltd (as the defendant) in the superior court seeking judgment for specific performance of an agreement for sale. The relevant paragraphs of the said plaint were as follows:-

"**4. By a verbal agreement made in 1986 between the plaintiffs and the defendant and evidenced in various correspondence exchanged the defendant agreed to sell and transfer to the plaintiffs land parcel known as L.R. No. 29/6/5 part "B" Baba Dogo Road, Ruaraka Nairobi at a consideration of Kshs.1,200,000/= being the total purchase price.**

5. It was an agreed term of the said agreement of sale that the 1st and 2nd plaintiffs would initially pay Kshs.120,000/= being 10% deposit towards the purchase of the said piece or parcel of land and transfer the same in favour of the plaintiffs.

6. Pursuant to the said agreement of sale on the 25th June, 1986 the plaintiffs paid Kshs. 120,000/=

to the defendant being ten per cent deposit of the purchase price. The defendant subsequently advised the plaintiffs to start developing the said plot as the defendant was in the process of sub-dividing the plot and procuring the title deed in favour of the plaintiffs.

7. In breach of the said agreement of sale the defendant has refused and or totally failed to specifically perform its part of the contract and purported to return the sum of Kshs.120,000/= deposit to the plaintiffs on 19th July, 1989 almost three years after the said agreement of sale.

8. The plaintiffs naturally and without prejudice returned the said cheque to the defendant because the plaintiffs are ready able and willing to complete the transaction at the original agreed purchase price.

9. On the 17th December, 1990 the defendants' advocates purported to pay a cheque of Kshs.120,000/= to the plaintiffs' advocate but the said cheque was returned to the defendants' advocates.

10. By reason of the matters aforesaid the plaintiffs have greatly suffered loss and damage and have been deprived the use of the said piece or parcel of land.

11. Despite repeated demands made and notice of intention to sue having been given the defendant has refused and or totally failed to specifically perform its purport of the contract."

The defendant reacted to the above by filing a defence in which it was stated, inter alia:-

"**2. The defendant denies that a verbal agreement was made between the plaintiff and the defendant in 1986 or at any other time and further denies that such alleged agreement was evidenced as alleged in various correspondence mentioned in paragraph 4 of the Plaint or as set out in the particulars of such paragraph set out in the particulars filed herein by the plaintiff or otherwise or at all.**

3. (a) The defendant avers that there were some discussions between the plaintiffs and the defendant with regard to a possible sale by the defendant to the plaintiffs of a portion of LR No. 29/6/5 Baba Dogo Road, Ruaraka, Nairobi at a price of Shs.1,200,000/= and pursuant thereto a sum of Shs.120,000/= was paid by the plaintiffs to the defendant; such discussions were preliminary and never materialized into an agreement between the parties.

3. (b) The defendant denies that the above discussions constituted an agreement of sale of the said piece of land and/or led to such an agreement of sale.

3. (c) The defendant denies existence of any agreement of sale express and/or implied and/or written and/or verbal between the plaintiffs and the defendant for the sale of the said piece of land.

4. The defendant denies the alleged agreement and also that it was a term of such alleged agreement that payment of the sum of Shs.120,000/= was to be 10% or any other percentage of the deposit towards purchase of the said piece of land as alleged in paragraph 5 of the plaint or otherwise or at all.

5. The defendant admits being paid Shs.120,000/= as alleged in paragraph 3(a) of the Plaint but denies that it was pursuant to the alleged agreement for sale.

6. The defendant avers that payment of the said sum of Shs.120,000/= was made and the plaintiffs were given permission to develop the said piece of land on the condition that an agreement drawn up by the defendant and given to the plaintiffs by the defendant for the sale of the said piece of land, was accepted by the plaintiffs and signed by the parties and also terms and conditions including those regarding payment of purchase price and other moneys contained therein, being fulfilled as therein provided. The defendant avers that the said agreement prepared by the

defendant and handed to the plaintiffs was never accepted by the plaintiffs and/or signed by the parties and further the plaintiffs never discharged other obligations under the proposed agreement.

7. Save and subject to the foregoing the defendant denies paragraph 6 of the plaint.

8. Save for the defendant's admission of having sent a cheque of Shs.120,000/= to the plaintiffs in July 1989 and save and subject to the foregoing paragraphs the defendant denies paragraph 7 of the plaint.

9. Save for that the plaintiffs returned the said cheque of the defendant, the defendant denies each and every allegation made in paragraphs 8 and 9 of the plaint.

10. The defendant denies that the plaintiffs have suffered alleged or any loss and damage and paragraph 10 of the plaint is denied.

11. Paragraphs 11 and 12 of the plaint are admitted.

12. As regards particulars filed herein by the plaintiffs, the defendant denies:-

(a) that any agreement was reached between the 1st plaintiff and Rajni P. Shah on behalf of the defendant as alleged or otherwise.

(b) that there was any agreement between the plaintiffs and the defendant as alleged or otherwise or that the terms stated in paragraph 1(c) of the particulars were the terms of the alleged or any agreement between the parties.

13. Save and except for what is expressly admitted herein the defendant denies each and every allegation contained in the plaint and the particulars filed herein as if the same were set out herein at length and traversed seriatim.

WHEREFORE the defendant prays that the plaintiff's suit be dismissed with costs."

The hearing of the suit in the superior court commenced before the learned Commissioner on 24th October, 2001 when **Ratilal Gova Sumaria** gave evidence as the 1st plaintiff. He testified as to what transaction took place between the plaintiffs and the defendant. The hearing was adjourned to 5th March, 2002 when **Paryantary Dhamishi Dhanam** gave evidence in his capacity as a director of the 2nd plaintiff. He gave evidence in support of what the 1st plaintiff had testified. The hearing was adjourned again to 18th April, 2002 when **Kirit Hansaj Shah** – director of the defendant company took the witness stand. He gave his version of what transpired between the plaintiffs and the defendant company. He concluded his evidence by stating that there was no valid written agreement between the parties and for that reason he asked the superior court to dismiss the suit with costs.

Counsel appearing for the parties filed their written submissions and the learned Commissioner reserved his judgment which he eventually delivered on 5th June, 2002.

The learned Commissioner considered all that was placed before him by way of evidence and legal submissions and came to the conclusion that the alleged agreement between the parties was not signed and hence not enforceable. In the course of his judgment the learned Commissioner said:-

"**This agreement was not signed and it not enforceable (sic). The plaintiff denied that the sale agreement was forwarded to them and it was their case that they had not seen it. Whether or not the plaintiff ever saw the agreement I do not know but it is now academic as it was never executed."**

Having so stated the learned Commissioner referred to the old section of the Law of Contract Act and concluded his judgment thus:-

"**There is in this case no written agreement nor did the plaintiffs take possession in performance of the verbal agreement.**

In fact possession was the stumbling block upon which the parties disagreed. I accept that as the defendant's witness said the defendant would only give possession on payment of the balance of the purchase price and on agreement by the plaintiff that they would pay 50% of the outgoings. This, the plaintiff refused to do demanding possession without this pre-condition.

I find that there was no written agreement and that in fact the parties were not even ad idem upon the terms of the agreement. The letter of the 9th January, 1987 does not constitute an agreement to sell as it was postulated on the basis that the plaintiff wanted possession and this the defendant could only agree to on receipt of the balance of the contents of the purchase price. Although the plaintiff denies any knowledge of the contents of the written agreement it is clear from the letter of the 25th September, 1987 that they were aware of the condition to pay site value tax as they state they had been asked to pay it.

In the result the plaintiffs have failed to prove an enforceable agreement for sale and I therefore dismiss their suit with costs to the defendant."

Being aggrieved by the foregoing, the appellants, through their counsel, filed this appeal citing eighteen grounds of appeal in which the learned Commissioner was faulted on various grounds.

The appeal came up for hearing before us on 19th September, 2007 when Mr. N.D. Muturi, appeared for the appellants while Mr. B.M. Ashitiva, appeared for the respondent.

In his submissions before us, Mr. Muturi adopted the written submissions presented in the superior court on behalf of the appellant and went on to state that none of the issues raised in those submissions was considered by the learned Commissioner. We were then referred to the agreement at **p. 67** of the record of appeal. Mr. Muturi asked us to allow this appeal.

On his part, Mr. Ashitiva supported the judgment of the superior court arguing that he was relying on Law of Contract Act. He contended that the agreement should have been in writing and that since there was no part performance, the appellants were entitled to refund which they however refused to accept. For these reasons Mr. Ashitiva asked us to dismiss this appeal and uphold the judgment of the superior court.

This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses – see **PETERS VS. SUNDAY POST LTD [1958] E.A. 424. SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAD CO. LTD. & OTHERS [1968] E.A. 123 and EPHANTUS MWANGI & ANOTHER VS. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278**. In the last case HANCOX JA (as he then was) put it thus at p. 292 of the Report:-

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

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

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

We must therefore bear the foregoing in mind as we deal with the grounds of appeal raised by the appellants in their memorandum of appeal.

The dispute herein relates to a verbal agreement between the parties in respect of a parcel of land known as **L.R. NO. 29/6/5** being part of Baba Dogo Road in Ruaraka within Nairobi. There is no dispute that there was no written agreement and that the appellants, as the purchasers, did not take possession of the suit premises. Neither did they pay the full purchase price.

The learned Commissioner of Assize considered the evidence and the law applicable and in the course of his judgment expressed himself thus:-

"**The plaintiff has based its claim on the verbal agreement made in 1986 and does not allege any agreement in writing. Further the plaintiff is not relying on the doctrine of part performance, as this is not pleaded.**

The Law of Contract Act was amended by Act 21 of 1990.

This amendment however in section 7 states that the provisions of sub-section 3 does not apply to any agreement or contract made or entitled (sic) into before the commencement of that sub-section 3. The law governing this matter is as set out in the old section of the Law of Contract Act, which states:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:-

(i) has in part performance of the contract taken possession of the property or any part thereof or,

(ii) being already in possession, continuous in possession in part performance of the contract and has done some other act in furtherance of the contact."

We are in entire agreement with the foregoing. As can be seen from the grounds of appeal and the submissions of Mr. Muturi, the main challenge was that the learned Commissioner was wrong in his findings of facts. We have carefully considered that line of submission (on findings of facts) but found no merit in any of these grounds. We are satisfied that on our own assessment of the evidence and the applicable law the learned Commissioner acted on correct principles in reaching his decision.

In view of the foregoing, we find no merit in any of the grounds of appeal. We reject all these grounds and the consequence of all that must be that all the grounds argued before us must fail. The upshot of that must be that this appeal fails and we order that it be and is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 20th day of December, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR