IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Apaloo JJA &Masime Ag JA)

CIVIL APPEAL NO 72 OF 1984

BETWEEN

WAGICHIENGO..... APPELLANT

AND

GERALD..... RESPONDENT

(Appeal from the Judgment of the High Court at Nairobi, O'Kubasu J)

JUDGMENT

October 28, 198**8 Masime Ag JA** delivered the following Judgment.

By his judgment delivered on 27th July 1983 O'Kubasu J dismissed with costs the appellant's suit for specific performance of an agreement for the sale and purchase of premises known as LR 7660/35 Tigoni, Kiambu (hereinafter referred to as "the suit premises") at the price of Kshs 1.2 million. That decision followed from the learned Judge's findings on three issues which had been debated by the parties before him during the trial which may be summarized as follows:

(1) There was a valid contract between the parties evidenced by a memorandum or note in writing signed by the respondent and sufficient to satisfy the provisions of section 3(3) of the Law of Contract Act Cap 23 of the Laws of Kenya.

(2) It was one of the essential terms of the contract, indeed a condition precedent, that of the purchase price a sum of stg £20,000 had to be deposited in the respondent/vendor's bank account in Jersey for the contract to be binding and enforceable. Despite his efforts the appellant did not comply with this condition precedent.

(3) Time was of the essence of the contract and on the evidence it was clear that by the set completion date the appellant/purchaser had not effected the contractual payment.

It is from these findings and the decision based on them that this appeal arises. The memorandum of appeal contains a total of twelve grounds of appeal but their sum total is really a challenge to the learned trial judge's findings summarized above. The respondent for her part filed a notice of two grounds for affirming the decision of the trial judge as follows:

(1) That on the evidence before him the learned trial judge should have found that there was no concluded agreement between the parties relating to the sale of the suit premises.

(2) That if there was such an agreement it was unenforceable by reason of section 3(3) of the Law of Contract Act (Cap 23 Laws of Kenya).

The learned trial Judge's finding that there was a valid contract is challenged in grounds 4, 5, 6, 7, 8, 9, and 10 of the memorandum of appeal. The appellant complains that the trial Judge failed to assess, evaluate (or do so sufficiently) the evidence before him; that he did not pay attention to the glaring discrepancies, contradictions and untruths in the respondent's evidence and as a result erred in his finding on the credibility of the respondent's case. As to his proper task the learned trial judge said:

"Sitting as the trial court I have to consider the documents produced and the oral evidence adduced and make my own assessment of all this and then come to a conclusion based on all the evidence before me."

I can find no misdirection in this and see that that this is precisely what he proceeded to do. He held that there was a valid contract which became unenforceable by the plaintiff because of his own failure to comply with an essential term thereof namely the condition precedent. Having so held we consider that it was unnecessary to deal with the alleged repudiation of the contract by the respondent (ground of appeal No 8).

In the light of these complaints by the appellant I have carefully perused through the record of evidence. On the vital issue of whether there was required as a condition precedent that the appellant deposit some stg. £20,000 in the respondent's bank account in Jersey the appellant's evidence at the trial included the following:

"They wished that I could pay them some of the money outside the country. I had told them that I had been in U.S. where I taught and so they expected me to have some money overseas. They gave me the account number where they would like their money sent….."

a little later in his evidence he says:

"As they were to leave the country after selling the farm they wished to be paid £20,000 or more in their joint account in Jersey. I told them that I would try my best as I had funds in U.S and in U.K."

Later on in his evidence the appellant tries to resile from that – position and says:

"They agreed to receive any amount I could deposit their overseas account."

But this does not hold for soon he returns to it and says at page 73 of the record:

"The Gerrards requested me whether I could pay £20,000 or more or whatever I could raise overseas."

In cross examination he says:

"They requested me whether I could pay some of the money outside the country as they knew that I had been in America. I agreed (underlining mine) They said £20,000 or more or whatever I could pay. I told them I had about £15,000 to £16,000 outside the country. They mentioned £20,000 or more."

The appellant goes on to confirm the correctness of the notes exhibit 5 which start with the provisions: "(1) No action until confirmation of arrival of funds with my bank (their advice to me) (2) Immediate conference then to be arranged with lawyers" – for various reasons which are itemized in the notes. Having carefully considered the appellant's complaints *vis a vis* the evidence on record before the learned trial Judge, I cannot find any merits in the grounds of appeal. That takes care too of the complaints in grounds number 1 and 3 in the memorandum of appeal.

Turning to the second ground of appeal I find that there was abundant evidence to support the learned Judge's finding that time was of the essence of the contract. Consequently I do not agree with the respondent's first ground for affirming the decision of the learned trial Judge. There was clearly a valid contract the terms of which he spelt out correctly.

Finally as regards the application of section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya the respondent addressed the court at length. He submitted that no reliance should be placed on exhibit 5 and 6 as evidence since they are not signed by the appellant. In Civil Appeal No. 49 of 1981 between the same parties but concerning the caveat which the appellant had lodged against the title to the suit premises Madan JA as he then was said:

"The two documents of March 21st and 22nd are memoranda or notes of an agreement between the parties upon which the plaintiff's suit may be founded and they both together, as well as severally satisfy the requirement in section 3(3) to charge the defendant for the disposition of her interest in the suit property.

Despite this apparent finding the court recognized that "the issues in controversy between (the parties) require to be decided at the trial." The finding of the learned trial judge that there was a valid but conditional contract for the sale of the suit premises was clearly based on the evidence that the terms of the contract were spelt out in – Exhibits 5 and 6. both the appellant and her husband (DW 2) admitted as much.

So the signature of the respondent on the document was not really necessary to prove the contract. All that can be said is that the particular circumstances of each case must be considered to determine whether or not a document satisfies the provisions of the Law of Contract Act (Cap 23 of the Laws of Kenya).

In the result I find no merit in the grounds of appeal against the findings and decision of the learned trial Judge. I would order that this appeal be dismissed with costs.

Nyarangi JA. I too, for the reasons given by Masime JA agree that this appeal should be dismissed.

I agree with the construction which Apaloo and Masime JJA have put upon sub-section 3 of section 3 of the Law of Contract Act, Cap 23 whereby it is provided, *inter alia*, that

"Memorandum or note thereof, is in writing and is signed by the party charged…"

Signature is the act of putting one's name at the end of an instrument to attest its validity. A signature is usually handwritten – see *Hindustan Construction Co Ltd v Union of India,* A.I.R. 1967, S.C. 526: 69.

Handwriting is the form of writing peculiar to a person and all that gives style and individuality to one's writing and distinguishes it from that of all others; *Law Lexicon* vol. II page 991. Sub-section (3) of Section 3 directs that the Memorandum or note be in writing as well as being signed. If the sub-section is

construed as was suggested by Madan JA in the interlocutory ruling in Civil Appeal No 49 of 1981, the provision will fall out of place.

To equate handwriting with signature does not seem to me to be a likely intention of parliament. In enacting the language of the sub-section, the legislature much more intended that the two terms ‘handwriting’ and ‘singed’ should refer to two separate acts.

Clearly, writing is not signing.

The order of the Court, therefore, is that the appeal is dismissed with costs. If there is a caution on the land, it shall be removed.

Apaloo JA. This appeal was argued in great earnestness and with characteristic ability by experienced Counsel on both sides. But at the end of the day, I felt no doubt what my conclusion must be, namely, that the appellant fails on the facts and in law.

The facts are, in a large measure, agreed. The respondent, who is now a widow, seems to have lived here with her husband for some time. The couple had a farm at Kiambu. That farm is LR 766/35 Tigoni. At some time prior to December 1980, they made up their mind to dispose of the farm.

On the 21st December 1980, they ran into the appellant and his wife at a shopping centre by chance. They engaged themselves in conversation. The Geralds, that is, the respondent and her husband mentioned to the appellant and his wife their desire to dispose of their farm at Tigoni. The appellant showed interest and an appointment was there and then made for the appellant and his wife to visit the Geralds and view the farm. They kept the appointment and were shown the farm that very day. It was a tea farm of about 5 acres in acreage. The appellant fell in love with the farm and expressed a wish to buy it.

It is common ground that the asking price was Kshs 1.2 Million. The appellant was so taken by the farm, that he said he did not bargain. He said he was agreeable to buying the farm at that price. It is also not in dispute that the respondent, obviously as a condition of a contract asked that at least £20,000 of the purchase price be paid in convertible currency. As the couple were apparently minded of leaving Kenya, this request made good sense.

The appellant said he had funds outside the country and could meet that condition. He did not appear to have the balance of Kshs 800,000/= readily. But he said he could raise it and indeed succeeded in raising it. This was lodged with the well-known law firm of Advocates, Kaplan & Straton.

The only sticking point was the foreign currency component of the purchase price. This was to be paid to the respondent’s bank account in Jersey. A consideration of the evidence as a whole, satisfied me that the appellant meant well and endeavoured in all good faith to meet this payment. With all the good will in the world, he was only able to raise a total of £11,145.06.

Between December 1980 and the end of March 1981, the Geralds and the appellant and his wife developed close friendship and the appellant spoke of the Geralds in amiable terms. He said they had become their parents. The Gerards reciprocated this feeling of warmth by attempting to help them as much as they could. For myself, I feel no doubt that it was in this vein that Mr.s Gerald, made out the unsigned and undated calculation that was produced in evidence as Ex. 6.

At sometime which the evidence does not exactly specify, the respondent suggested and the appellant

agreed that the sale should be concluded by the 31st March 1981. There is evidence that about six days or so before that date, that is on the 25th March 1981, the appellant called on the Geralds at their home. He then confessed to them his inability to raise the remainder of the foreign currency component of the purchase price. He pleaded for more time.

The Geralds then concluded that the appellant could not raise the balance of the foreign currency element notwithstanding the fact that they agreed to help him with £300 being the penalty he paid when he withdrew his fixed deposit before due date and also sought to debit themselves with 3 years' rent in sterling which they proposed to set off against the balance of the sterling component. The respondent and her husband decided that the "deal" be called off.

On the morning of the 30th March, 1981, the respondent's husband telephoned the appellant's home and related this decision to the appellant's wife. The latter in turn relayed it to her husband. The evidence is that on learning this, the appellant visited the Geralds at home and made no secret of his indignation at this decision. He himself said he was upset when he heard:-

"that my friends had decided to cancel the deal and that they had found somebody else who was prepared to pay more money."

On the next day, the appellant sent a cheque for 75,000/- to Kaplan and Straton ostensibly as the balance of the purchase price. This was received by the firm on the 1st April but was returned for reasons which I consider of no relevance to the issues debated in this case. The appellant believed, I am satisfied, errornously that the Geralds reneged on the deal because they found someone who offered more money.

I find that belief to be ill-founded. The evidence satisfied me that the respondent sold the farm to a Mr. Kariuki in April 1981 for the same amount. The only difference was that he was able to raise the £20,000 in sterling indeed he paid £25,000 and has since been put into possession.

The appellant then brought the plaint which culminated in the judgment from which this appeal was brought. He sought specific performance of the agreement, or in lieu, damages for breach of contract. The respondent denied the breach and *inter alia* pleaded that:

"the agreement for the sale of the property…. Was subject to the condition that the said sum of £20,000 would be deposited with her bank in Jersey. The said sum has not been deposited. If, which is denied, there was or is such agreement between the parties, the defendant says the same was dependant upon a prior condition which has not been fulfilled."

So the real and only issue which the learned trial Judge was called upon to decide was whether there was a binding contract between the parties such as can be enforced by the equitable remedy of specific performance. The learned Judge's answer to this question was expressed by him as follows:

"Having considered the evidence on record, ……..I find that while there was a valid agreement between the parties to sell the land in question, one of the terms of that agreement was that the plaintiff had to pay £20,000 in the joint account of the Geralds overseas. I have, I hope, already shown that the plaintiff was unable to fulfil that condition."

The Judge held that as the plaintiff (meaning the appellant) was in default, the action failed and he proceeded to dismiss it. The Judge also held that the parties agreed to make time of the essence of the contract. The completion date was to be the 31st March 1981. The Judge said completion could not take

place on that date because the plaintiff could not pay the £20,000 by that date and was in default on that as well.

Before I deal with the grounds on which the judgment was challenged, it is necessary to relate one issue of law which the respondent raised in the pleadings. In paragraph 3 of the statement of defence, it is averred that:

“If, which is denied, there was any agreement between the parties relating to the sale and purchase of the land concerned, the defendant says the same is unenforceable at law by reason of section 3(3) of the Law of Contract Act, Cap 23.”

That is a reproduction of section 4 of the Statute of Frauds 1677 in very slightly altered language.

When this suit was brought, the appellant lodged a caveat against the respondents’ title. When the time was due for its removal, he applied to the court below for its extension or in the alternative, an interim injunction restraining the respondent from selling, alienating or disposing of the property until the final determination of the suit.

The learned Judge refused to grant that application. Although he did not speak clearly, the judge seems to have thought that there was no note or memorandum to satisfy section 3(3) of the Contract Act. His order of dismissal was appealed to this Court which reversed it. And one of the matters this court had to consider was, whether there was a note or memorandum which satisfied the statute. The Court held that there was in a fairly long ruling. In the penultimate paragraph of the ruling at page 8 Madan JA who spoke for the Court said:

“At this stage the Court can only look at the various matters for their apparent substance theoretically and for their prima facie value for the suit has not yet proceeded to trial.”

When the suit eventually reached trial stage, the respondent again raised the issue of the unenforceability of the contract. The learned trial Judge felt the matter was to be decided by him afresh. But like this Court in its ruling, he also held that a note or memorandum which satisfied the statute was available. Although the Court’s eventual conclusion favoured the respondent, the latter again asked us to affirm the judgment of the Court below apart from other grounds, on the ground that there was no note or memorandum ot satisfy section 3(3) of the Contract Act.

The appellant submitted that there was and pressed us with the ruling of this Court which found for the appellant on this question. As to whether section 3(3) was complied with, I will say more anon.

The memorandum of appeal contains 12 grounds, but the long and detailed argument addressed to us centred on two main grounds formulated as follows:

1. The learned Judge after having found that there was a valid contract between the parties for the sale of the land in question to the appellant, erred in holding that the payment of £20,000 abroad in a joint account of the Geralds was a condition precedent.

2. The learned Judge erred in finding that time was of the essence of the contract and that completion date was 31st March 1981 and that the respondent was entitled in law to rescind the contract if payment was not made by 31st March 1981.

In my opinion, there can be no gainsaying the fact that the payment of £20,000 into the respondent’s

overseas account featured prominently in the discussion of the parties. The appellant's recollection is that the Geralds told him that:

"As they were to leave the country after selling the farm, they wished to be paid £20,000 in their joint account in Jersey……. It was only their wish that I should pay them any amount overseas. They did not say that unless I paid them £20,000 overseas they could not sell."

The respondent's version was stated by her as follows:

"We asked for £20,000 or more to be paid into our account in Jersey. We said that once the money was paid into our account overseas we could go ahead. Going ahead I mean with the sale of the farm. Until £20,000 was there, we were not prepared to go ahead with the sale of the farm. As we were not lawyers, we did not know what was involved in selling the farm."

It seems clear that the respondent's version of the story is the more probable of the two and that was what the Judge preferred. There is solid evidence for this. The appellant was pressed in cross-examination to say:

"They mentioned £20,000 or more. As I discussed the matter with Mr. Gerald and my wife they agreed that £20,000 had to be paid to Mr.s Gerald. At that time I could give anything she wanted because I wanted the farm. I had the money."

It is difficult to think or anything more supportive of the respondent's version of the facts. There is also the evidence of Mr. Aronson of Kaplan & Straton. Mr. Aronson testified *inter alia* that:

"Mr.s. Gerald told that the terms of the sale would be for the purchaser firstly to pay £20,000 into a bank account in Jersey and it was only after that payment had been made that the sale would proceed."

This was said in the presence of the appellant. He did not contradict this. So Mr. Aronson told the parties that:

"If £20,000 was paid, a formal agreement for sale would be drawn up for signature by the parties and if the sale did not proceed to completion the £20,000 would be refunded or paid to the order of Mr. Wagisiengo."

On or about the 20th March1981, the parties discussed a variety of matters about the proposed sale and Mr. Gerald, the respondent's husband made contemporaneous notes of the discussion. It was said in point 9 that "this is a not walk-in and walk-out agreement". But it is significant that point one of that agreement states that:

"No action until confirmation of arrival of funds with my bank". (Their advice to me).

The appellant himself tendered this document in evidence. That the respondent's account is the truth of the mater, is also shown by the affidavit the appellant swore in support of his application for enlargement of the caution and which is part of the record of appeal submitted to us. In paragraph 2 of that affidavit, the appellant *inter alia* deponed that:

"We agreed on a purchase price of Kshs 1.2 million. Mr.s Gerald expressed the wish that £20,0000 out of the purchase price should be paid overseas and the rest in Kenya. She gave me their account number with Barclays Bank…….and this is where she wanted the £20,000 to be deposited."

It is clear this is what Mr. Gerald put in his note Exh 5 as point “nine” that:

“No action until confirmation of funds with my bank”.

On this aspect of the matter, the respondent’s evidence was weighty and impressive and was practically admitted by the appellant *ante litem metam*. The appellant said he had funds and would deposit the £20,000 in the respondent’s overseas account. It turned out that he did not have that much money. That was why he returned to the Geralds in late March and sought extension of time to make the payment.

Looked at from the standpoint of the law of contract, I think the proper conclusion to draw, is that the respondent offered to sell their Tigoni farm to the appellant for the sum of Kshs 1.2 million on condition that of the purchase price, £20,000 should be lodged into their overseas account before the conclusion of a binding contract of sale.

It is common ground that until he lodged his plaint, the appellant had not met that condition. I would, in the circumstances conclude that no binding contract capable of being enforced by specific performance eventuated.

As I said, the appellant also submitted that the Judge was wrong in holding that time was of the essence of the contract. The parties did not enter into a formal contract. Had they done so, no doubt there would have been some stipulation for the date of the completion. But both felt that this conditional contract could not remain indefinitely. So both said the sale should be concluded by the 31st March 1981.

In the context of this case, this can only mean that the condition, namely, the lodgment of the £20,000 should be made on or before March 31st, 1981. Indeed that was how the appellant understood it. In paragraph 4 of the plaint, it was averred that:

“The said agreement provided *inter alia* that the sale should be completed on or before the 31st March 1981”.

The learned Judge rendered it in legal language as follows:

“I also find that the parties agreed to make time to be of the essence of the contract and that completion date was 31st March 1981.”

Had the appellant not understood it in this way, his attempt to beat the deadline by forwarding a cheque which Kaplan and Straton received on the 1st April 1981, would make no sense. With respect, I do not find this a profound point.

In holding that:

“There was a valid agreement between the parties to sell the land in question, one of the terms of this agreement was that the plaintiff had to pay £20,000 in a joint account of the Geralds overseas”.

The learned judge had the sense of the agreement alright but I think instead of saying the parties entered into a valid agreement, it would have been more accurate to say they entered into a conditional agreement and that as the appellant failed to fulfill the prior condition, no valid and enforceable contract came into existence. But inasmuch as the judge concluded that the appellant was in default and that his claim for specific performance failed on that ground, I would not disturb his conclusion.

As I said, the respondent also pressed us to say that even if there was a concluded oral agreement, it was unenforceable by section 3(3) of the Law of Contract Act Cap 23. In view of my holding that there was no concluded agreement, this point does not arise for decision.

But the enforceability or otherwise of the "agreement" was debated before us at great length and with some depth of feeling by counsel on both sides. I think, therefore I owe it to Counsel to express myself on it.

Section 3(3) of the Contract Act, has an ancient ancestry, having been derived almost wholly from section 4 of the Statute of Frauds, 1677. What is a memorandum or note within the true intendment of that statute, has been the frequent source of litigation and decision of great refinements have been rendered as to what form the note or memorandum should take, what it should contain and the like. But for the purpose of this case, the important requirement of the section is that the note or memorandum should be in writing "and signed" by the party to be charged, or by a person authorized to sign it."

It has been held that the note or memorandum may be in more than one document provided they refer to each other but one must be signed by party against whom it is sought to be enforced.

Neither Exchs 5 & 6 which have been set up as the notes, was signed by either the respondent or her husband. But this court in the interlocutory ruling, speaking through Madan JA, said:

" ……the two documents of March 21st and 22nd which are in the handwriting of the husband and wife respectively are "signed" by then even though they do not bear their signatures. The handwriting of each of them is the signature of each them."

That is a difficult holding. It equates handwriting with signature. If that had been the true legislative intent, the statute would simply have said the note or memorandum should be in the hand writing of the party to be charged.

It is clear that the statute requires that the note of the agreement should be autheticated by some sort to of signature. And signature has been held to include a mark, a sign or any hieroglyphic which is intended to authenticate the note or memorandum. With respect, when the statute says, the document must be signed, it seems to me to do considerable violence to language to say the handwriting of a person is the same thing as his signature.

The only authority for this interpretation of "sign" is the decision of the self-same learned judge in the High Court in *Mawji v US International University & another* [1976] KLR 185 at 192.

Apparently, this interpretation of the word "sign" has never been considered by this Court. For myself, it would take a lot to persuade me that the condition of "signing" mandatorily required by the statute, is satisfied by unsigned handwriting.

But a contention such as the one made to us was roundly rejected in the old case of *Selby v Selby* 3 Mer 2 where, as here, an unsigned letter written by a mother to her son was argued to be "signed" for the purpose of the Statute of Frauds. Lord Grant, Master of the Rolls disposed of that contention in these words:

"That is a very forced construction of the words of the statute to say that the use of the mere ordinary terms of ceremony constitutes a compliance with the regulations.

It is not enough that the party may be identified. He is required to sign. And after you have completely identified, still the question remains whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without signing; that is without the party having either put his name to it or done some other act intended by him to be equivalent to actual signature of the name – such as a person unable to write making his mark. But it was never said because you may identify the writer, therefore there is a signature within the meaning of the statute."

With respect, that reasoning appeals to me and without the guidance of this case, that is the view of the matter that I would feel disposed to take. Although Mr. Gautama for the appellant urged us not to follow *Selby v Selby,* he himself gave us a photo copy of an extract from a book entitled "Words & Phrases Defined" and under the caption "signature" the authority of *Selby v Selby* was acknowledged.

That case provides a more natural and acceptable meaning of the word "signed" as used in section 3 (3) of the Law of Contract Act. And I would add that that construction, conforms with the well-known golden rule of legislative interpretation.

Although I was at one time exercised in my mind whether we should depart from the interpretation put on the word "signed" by this Court as recently as June 1982, I think on reflection, that we should not allow ourselves to be hamstrung by an interpretation made at the hearing of an interlocutory appeal, an interpretation which the Court itself acknowledged to be a "theoretical" exercise.

The parties did not, it seems invite the Court to construe the words at that stage as if the Court were hearing the substantive appeal. And having allowed Counsel to present full argument to us, it would be wrong to burk an independent decision of our own. True, the *Mawji* decision has stood, apparently, unquestioned for 12 years. But it cannot be said that any rights were founded on the construction put on the word "signed" in that case.

I think, with great respect, its uninterrupted 12 year life is undeserved and it ought now to be overruled. I would accordingly hold that the respondent was right in contending that if an agreement for the sale of the farm was in truth concluded, there being no note or memorandum of it in writing signed by the respondent or her agent, that agreement was unenforceable. In my opinion, the learned Judge's contrary holding was erroneous.

Accordingly, as I began saying, the appeal fails both on the facts and in law and like my brothers, I would dismiss it with costs and if the caution is still on the land, it should now be removed.

Date and delivered at Nairobi this 28th day of October , 1988

J.O NYARANGI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR