REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CAUSE NO. 1863 OF 1982

ROSE ONYANGO ONGECHA &9 OTHERS.................PLAINTIFFS

VERSUS

THE CITY COUNCIL OF NAIROBI.................................DEFENDANT

JUDGMENT

On June 11, 1982, nine plaintiffs filed a plaint against the defendant, City Council of Nairobi, claiming specific performance requiring the defendant (hereafter called "the City Council") to give vacant possession of specified flats to the plaintiffs; special damages and general damages for the inconvenience to each of the plaintiffs as a result of the breach of contract and, in the alternative, damages for breach of the contract and an order requiring the City Council to provide alternative accommodation for each plaintiff. On June 12, 1982, the plaintiff obtained an injunction lasting up to June 29, 1982, restraining the City Council from evicting and harassing or molesting the plaintiffs. On June 29, the injunction was extended till the plaint was amended and served on the defendant. On July 13, the amended plaint was filed and one more plaintiff was added and the particulars of special damages were stated and the flats alleged to have been promised specified, but the prayers remained the same. When the suit came up for hearing on August 18, 1982, the amended plaint was further amended with leave of the court by deleting the alternative prayer that the defendant be required to provide each plaintiff with an alternative accommodation.

The facts of the case which were agreed were that in August 1979, the City Council sent to each plaintiff, on various dates, a letter on the City Council of Nairobi official paper signed for the Director of Social Services and Housing and headed "Re: Application for Accommodation", an example of which letter (Exhibit 1(a)) sent to the second plaintiff is cited below. It reads as follows:

" City Hall, Box 30075,
NAIROBI,
KENYA.
August 20, 1979

Ref HOU 2/6
Mrs Florence Adinja,
Box 28413,
NAIROBI.

Dear Madam,

RE: APPLICATION FOR ACCOMMODATION

I refer to your application for a flat in the Buru Buru Estate and wish to inform you that flat BBF 213/3 will be available for letting when ready at a monthly rent of Kshs 850.

You will be required to pay a deposit equivalent to one month's rent such amount to be refunded at the termination of your tenancy less the cost of rectifying any damage to the Council property. If interested, you may now pay the said amount of Kshs 850 in City Hall. You will be required to pay a water deposit of Kshs 200 in advance to enable the Council to connect water in this flat. You will also be required to pay a deposit in advance to Messrs EAP& L Co for electricity to enable them to connect it.

If you do not pay the deposit within seven days it will be presumed that you do not wish to take the offer. The flat will therefore be allocated to the next applicant on the waiting list.

Yours faithfully,

For: DIRECTOR OF SOCIAL SERVICES & HOUSING."

Each plaintiff paid the required deposit in time and was issued with an official City Council "Tenancy Deposit Receipt" as Exhibit 1(b) which was issued to the second plaintiff. Besides the Kshs 850 tenancy deposit, each plaintiff paid to the City Council Kshs 200 for water deposit. The flats were under construction at Buru Buru Estate and they were each three-bedroom flats. Particulars of the flats to be let to the plaintiffs are as follows:

a. Rose Onyango Ongecha - Flat No BBF/212/15
b. Florence Awinja - Flat No 213/3 BBF
c. Consolata Kyalo - Flat No 214/13/BBF
d. Selina Musisi - Flat No BBF No 214/4
e. Lorindah Kakai - Flat No BBF 212/8
f. David Laweck Seempala - Flat No BBF 212/14
g. M Mwangi - Flat No BBF 213/5
h. Rose Musyoka - Flat No BBF 212/7
i. Roseline Mangusa - Flat No BBF 214/12
j. Bernard Chiira - Flat No BBF 214/11

The parties agreed that there was a binding contract entered between each of the ten plaintiffs and the defendant for the City Council to let each plaintiff, when completed, the flat specified in each plaintiff's letter of offer, but that when those flats were completed, they were not allocated to the plaintiffs and no tenancy agreement was entered by the defendant with any of the plaintiffs and that the same flats were offered to third parties who now, with exception of Flat No BBF 213/3 offered to Florence Awinja (second plaintiff) and Flat No BBF 212/7 offered to Rose Musyoka (eighth plaintiff), occupy them. The defendant is in the circumstances alleged to be in breach of the agreement to execute a tenancy agreement in favour of each of the plaintiffs. While the City Council agreed that there was initially a contract between each plaintiff and the defendant, the City Council's case is that that contract was frustrated in February 1982, when the Tenancy Deposit was increased by the defendant from Kshs 850 to Kshs 1,100. There was no evidence and in fact the defence's only witness, the Director of Social Services and Housing, Bernard Njogu Gituiku, testified that the increase of the Tenancy Deposit was never communicated to the plaintiffs. Mr Akhaabi for the plaintiffs therefore submitted that as far as the plaintiffs were concerned, there had been no alteration of the terms and conditions of the contract and as the increase of the deposit which was not disputed was never communicated to the other contracting parties, the

relationship was not affected and the alteration did not frustrate the contract to let the flats when completed to the plaintiffs.

What happened is that when the flats were completed, as I have already said, the City Council failed to perform its part. The real issue, therefore, is whether the contract, which is admitted was discharged by the total failure to perform by the City Council or whether it was discharged by the increase of the deposit. On this latter suggestion one has to consider whether the increase of deposit went to the root of the contract. To put it in the words of Diplock LJ in the case of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at p 66:

"Where an event occurs the occurrence of which neither the parties nor parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not. The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings""

The facts in the *Hongkong* case are different from those in this case but the argument was whether there had been frustration by breach. Frustration is a breach of a contract and so if I accept the defendant's argument that by unilaterally increasing the deposit they frustrated the contract between the parties, that would not mean that the defendant was not in breach of the contract. The answer is brief and that is, that since the plaintiffs had no notice of the increase of deposit and rejected it, the contract was not frustrated by the increase of the deposit. Who knows if the plaintiffs would not have agreed to and paid the increased deposit if they had been informed of it"

Failure of performance, whether total or partial, may constitute a breach of contract if it goes to the root of the contract as I have already stated by citing the *Hongkong* case *ibid* - also see *Chitty on Contracts* No 1 24th Edn paragraphs 1494, 1497 and 1504. In this case the City Council's failure of performance was total and it went to the root of the contract. It amounted to breach of the contract between the parties. That is the position in my view.

I now move to consider what remedies are available to the plaintiffs. They have asked for specific performance and in the alternative, damages for breach of contract besides special damages for four plaintiffs and general damages for inconvenience. At paragraph 1552 of *Chitty on Contracts ibid* it is stated as follows:

"The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damage is such damage as the law presumes to result from the infringement of a legal right or duty; damage must be proved but the claimant cannot quantify exactly any particular items in it. The main meaning of special damage is that precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in his pleadings. Special damage must be specifically pleaded and evidence relevant to it cannot be adduced if only general damages have been pleaded … so a plaintiff who bases his claim on precise calculations must give the defendant access to the facts on which they are based; thus it was held - *Perestrello & Campanhia Limited v United Paint Co Ltd* [1969] 1 WLR 570 that where loss of profits was not a necessary consequence of the alleged breach of contract the claim for such loss should be specifically pleaded, in order to give the defendant fair warning of the claim."

Special damages pleaded for; Rose Onyango Ongecha were Kshs 4,600 for damaged bed and

wardrobe; Florence Awinja Kshs 2,600 for damaged sofa set Kshs 1,000; Selina Musisi for her two lost watches and Consolata Kyalo Kshs 2,000 for her lost radio. In her evidence, Rose said that the City Council askaris broke her chairs, wardrobes, fridge and cooker, all valued at Kshs 16,000. The valuation was done by Mr Odita who did not give evidence in verification of what Rose said. I am unable to say that Rose proved her special damages. Florence Awinja in her evidence asserted that the value of her damaged property was about Kshs 18,000. The assessment was done by Mr Gaita who was not a witness in the case. She, like Rose, did not prove her special damages claim. As to Selina, the two watches did not belong to her as pleaded. One belonged to her daughter and the other to her daughter's friend none of who testified. She had no valid claim for special damages. Consolata impressed me as an honest witness. She said that what was pleaded as a radio worth Kshs 2,000 was a mistake but she lost her pocket radio which she bought for Kshs 120. I believe what she said and her claim for special damages is genuine. The claim for damages for inconvenience cannot be general but must be specifically pleaded with exact calculations which was not done and as such it cannot succeed.

I have no doubt that in the absence of specific performance, the plaintiffs would be entitled to general damages. Mr Opiacha argued that specific performance is not the proper remedy because apart from Flats No BBF/ 213/3 for Florence Awinja and BBF 212/7 of Rose Musyoka, the flats for the other eight plaintiffs have been allocated and are occupied by third parties who have paid reasonable consideration without knowledge of the contract between the parties. The flats which the plaintiffs now occupy belong to other persons who have already been allocated those flats and have paid. He referred to the case of *Dominic Muya Mbugua & 7 Others v City Council of Nairobi* Civil Appeal No 50 of 1976 (unreported). In that case, the City Council was found by the Court of Appeal to be in breach of contract to sell to the appellants a house each under a tenant purchase scheme and the court said as per Law, Vice-President, as he then was:

"It will not be possible to decree specific performance, as we have been informed by Mr Muguku that the houses have been allocated to other persons who are now in occupation … The plaintiffs will have to content to be compensated by damages under the alternative remedy sought by them."

At paragraph 9 of *Halsbury's Laws of England* 4th Edn Vol 27 it is stated:

"Specific performance. On the refusal or omission of either party to an agreement on his part, the other is usually entitled to maintain an action for specific performance. As this is an equitable remedy, the court has a discretion whether to grant it and it will not be ordered if the agreement is uncertain in any material respect or if it involves hardship for example where it would entail the ejectment of tenants in possession."

The agreement here is not uncertain in any material respect, but an order for specific performance would involve hardship as it would entail the ejectment of tenants in possession for the eight flats originally promised to eight of the plaintiffs. There would be no hardship in respect of Flats No BBF 213/3 for Florence Awinja and BBF 212/7 for Rose Musyoka, in respect of who specific performance may be ordered. The other eight plaintiffs, that is number 1, 3, 4, 5, 6, 7, 9 and 10, will have to be content with compensation by damages - under the alternative remedy sought by them. To leave them in the flats they now occupy would be to authorize the City Council to make further breaches of the contracts with other persons which the court cannot engage in. Mr Opiacha did indicate and the Director of Social Services and Housing confirmed that there were other flats in the same area though smaller which would be ready by the end of the month and in respect of which the defendant was prepared to enter into a tenancy agreement with the eight plaintiffs whose flats have been allocated to other persons.

In my view, the eight plaintiffs who are in the flats which were not originally offered to them entered those

flats with the consent of the Director of Social Services and Housing, but the entry did not create new contractual obligations between each of the eight plaintiffs and the City Council as the ingredients of a valid legal contract were lacking. No specific performance can therefore be ordered in respect of the flats the eight plaintiffs now occupy which, in any event, Mr Opiacha said were already allocated to other persons who are being kept out by the plaintiffs.

For the reasons given, the plaintiffs succeed and there shall be the following orders: Judgment for the plaintiffs as follows –

a. Specific performance for Florence Awinja and Rose Musyoka with whom City Council shall enter tenancy agreement for flats No BBF 213/3 and BBF 212/7 respectively, provided that the two plaintiffs do pay the increased tenancy deposit of Kshs 1,100 and rent in arrears from the date of occupation to date.
b. For the other eight plaintiffs, excluding the two named in paragraph (a) damages.
c. Damages to be assessed after the indication by the other eight plaintiffs whether or not they accept the alternative smaller accommodation in the same area.
d. Special damages of Kshs 120 for Consolata Kyale.
e. Costs of the suit to be paid to the plaintiffs by the defendant.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of August, 1982.

Z.R Chesoni

JUDGE

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