**Michira v Gesima Power Mills Ltd**

**Division:** Court of Appeal of Kenya at Kisumu

**Date of Judgment:** 9 July 2004

**Case Number:** 197/01

**Before:** Omolo, O’Kubasu and Githinji JJA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Land – Sale Agreement – Rescission – Whether inactivity by either party in endeavouring to perform*

*contract may amount to rescission.*

*[2] Land – Sale Agreement – Uncertainty – Whether there was a meeting of the minds – Whether*

*agreement capable of being performed – Whether a party may recover damages on an uncertain*

*agreement.*

**Editor’s Summary**

The respondent by an Agreement of Sale, agreed to sell land reference number 209/4194/16 situated in the city of Nairobi to the appellant at a price of KShs 10 000 000. The sale agreement provided *inter alia*, that KShs 1 000 000 (being 10% of the purchase price) shall be paid by the purchaser upon the vendor executing the agreement; that part of the balance of the purchase price namely KShs 2 000 000 shall be paid to the respondant within seven (7) days of the respondent delivering the parcel of land in vacant possession to the applicant. At clause 6 of the agreement it was provided that “the respondant undertakes to accomplish and deliver certificate of title in the applicant’s name to the applicant free of any encumbrances excepting the existing occupation within ninety (90) days from the date of execution of this agreement and further that this condition is of essence to this contract”. There was also a term in the sale agreement that any party in breach of any conditions would be liable to the other party to pay 40% of the purchase price. The appellant paid the KShs 1 000 000 to the respondent. The transaction did not go through and the respondent ended up selling the property to another person. The appellant filed suit, claiming damages of KShs 4 million, refund of KShs 1 000 000 and special damages of KShs 90 000. The appellant contended that the respondent was in breach of the agreement by failing to obtain agreed consents and delivering vacant possession; further that the respondent was in breach of the agreement, clause 6, by failing to deliver the certificate of title to the appellant within the stipulated 90 days from the date of agreement. The respondent denied any breach of the agreement and averred that the sale agreement was conditional on delivering vacant possession, and claimed damages by way of counterclaim for breach of the agreement by the appellant. The parties partially compromised the suit by consenting to the refunding of KShs 1 000 000 to the appellant. The issue of damages proceeded to trial. The Court found that neither of the two parties to the agreement was at any time in a position to perform its part of the agreement since the agreement was vague, uncertain and contradictory and further that there was no meeting of the minds. The agreement was found to be void and incapable of enforcement. The appellant appealed to the Court of Appeal.

**Held** – There was no meeting of the minds of the contracting parties thereby making the contract incapable of performance. The agreement did not provide for the time within which the balance of purchase price would be payable or secure the payment. The fact that the agreement was uncertain on the fundamental term on the payment of the purchase price made the entire agreement void for uncertainty. Further, the agreement was capable of being construed as providing for two different dates for giving vacant possession by the respondent and this was evidence of uncertainty. Neither party could be held to be in breach of the uncertain agreement or be entitled to any damages from the abortive agreement. Alternatively, since neither party actively endeavoured to perform his obligations in order to bring the contract to fruition, it can be inferred from that inactivity that the parties had mutually rescinded the agreement by abandoning it thereby discharging each party from the performance of the agreement. Appeal dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Openda v Ahn* [1984] KLR 208 – **C**

*Selle v Associated Motor Boat* [1968] EA 123 – **F**

*Shah v Shah* [1988] KLR 289 – **F**