



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 267 OF 2010

KISIMA HOMES LIMITED PLAINTIFF

versus

GEORGE KERIGA MELONYIE DEFENDANT

RULING

1. The applicant herein filed an application dated **4th April 2012** pursuant to the provisions of **Section 1A, 1B and 3A** of the Civil Procedure Act; **Order 2 Rule 15(1) (c) and (d); Order 36 Rule 1 and Order 51 Rule 1** of the Civil Procedure Orders seeking Rules that;

Summary judgment be entered in favour of the plaintiff and against the defendant for the sum of Kshs.7,000,000 being a portion of the plaintiff's claim herein as pleaded under paragraph numbers 16 A and 16 B of the amended plaint; and in the alternative, that the court be pleased to strike out the defendant's defence to the claim and enter judgement in favour of the plaintiff in the sum of Kshs.7,000,000 and the balance of the plaintiff's claim to proceed to full trial and the costs to be borne by the defendant.

2. The application is based on ground that the plaintiff seeks judgement against the defendant for a liquidated demand with interest and there is overwhelming proof of such indebtedness.

3. The plaintiff through its director Kioi John Gitau swore an affidavit in support of the application where he depones that an agreement dated 25th January 2010 was made between the applicant (purchaser) and defendant (vendor) for purchase of land at a price of Kshs.25,000,000. It was a term of the agreement that upon signing of the agreement Kshs. 1,400,000 would be paid by the purchaser as deposit leaving the outstanding balance of Kshs. 23,000,000 that would be paid on completion of the transaction. Procuring and completion of the documents was the sole responsibility of the vendor. Failure to complete the transaction attributable to the purchaser would result into forfeiting the deposit. In case the vendor defaulted then he would refund the deposit upon receiving a 14 days' notice.

The applicant was entitled to possession of the property and /or improve on the property for its own purposes.

To enable the applicant deal with the property per its wish the respondent donated to it a limited power of attorney that was registered at Kajiado Land Registry.

4. Subsequently the applicant/plaintiff paid ksh.7,000,000 to the respondent/defendant. Instead of availing the completion documents as requested the respondent/defendant wrote a letter dated 18th October 2010 advising that he was not willing to complete the transaction on the pretext that the

agreement had expired. The defendant having frustrated the completion of the agreement by failing to procure the completion of documents should return the money and pay interest at commercial rates.

5. In a response thereto the defendant/respondent in a replying affidavit dated 13th June 2012 deponed that he indeed entered into an agreement with the plaintiff /applicant. He averred interalia that the balance of Kshs.23,600,000 was to be paid on or before 31st August 2010 which the applicant failed to do leading to lack of completion hence forfeiture of the deposit. Failure to complete the transaction led to revocation of the limited power of attorney. Pursuant to his commitment to the transaction he obtained the Land Control Board consent.

6. Further, he stated that he was ready and willing to refund any amount received pursuant to the determination of which party is in breach of the agreement.

7. The application was canvassed by way of written submissions and I have duly considered the rival submissions.

8. Looking at the affidavit evidence adduced herein, it is not in dispute that the parties herein entered into an agreement for sale of Land Title No. Kjd Olchoro – Onyore /2754 for Kshs.25,000,000. Upon signing of the agreement a deposit of Kshs.1,400,000 – was paid leaving an outstanding balance of Kshs.23,600,000 which was to be paid on or before the completion date which was 31st August 2010. It was mutually agreed between the parties that in case the plaintiff/applicant defaulted to pay the balance before the completion date then it would forfeit the deposit. But, if the transaction failed due to some fault attributed to the defendant, then he would refund all the monies paid under the agreement upon receiving a 14 days' notice.

9. The applicant/plaintiff on his part argues that the defendant/respondent failed to produce and handover completion documents stipulated in clauses of the agreement that were required 14 days prior to the completion date. It is also submitted that some of the amount Kshs.550,000 was paid after the completion date and accepted by the defendant / respondent which means that he waived the requirement for strict compliance within the time scheduled and had no basis to terminate the agreement due to breach.

10. The defendant /respondent on the other hand argues that failure to comply with the terms of the agreement in respect of the completion date by the applicant was contrary to the sale agreement hence the deposit had to be forfeited. An attempt to use a third party to complete the agreement who was not privy to the agreement was also irregular. But above all he was willing to refund the money in excess of the deposit.

11. The relief sought of entry of summary judgement is provided for by order 36 rule 1 of the Civil Procedure Rules that states thus:-

“1. (1) In all suits where a plaintiff seeks judgement

for –

- a. *a liquidated demand with or without interest; or*
- b. *The recovery of land, with or without a claim for rent has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,*

Where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

It is argued by the respondent that summary judgement can only be entered where the defendant has entered an appearance but no defence has been filed. In support of his argument he referred to the case of **JAMES JUMA MUCHERU & PARTNERS LIMITED –vs- BARCLAYS BANK OF KENYA AND**

ANOTHER (2012) eKLR where the court in reference to this particular provision emphasized the fact that it only applies where there is no defence filed.

12. A strict reading of the rule only allows the court to enter a summary judgment on liquidated demand where the defendant has made an appearance but not filed a defence.

13. In the instant suit there is no document showing if the defendant filed any appearance as envisaged by **order 6 rule 1** of the Civil Procedure Rules. What is on record is a notice of appointment of advocates filed by the firm of Mulondo, Oundo, Muriuki & Company Advocates dated 17th December 2010 and a subsequent one filed by Mbugua Waihiga & Co. Advocates dated 7th February 2011. That notwithstanding a statement of defence was filed herein on the 18th April, 2012. This was after the instant application had been filed on the 11th April 2012. The defence herein having been overtaken by filing of the application the subject application is feasible. The position was well put on the case of **KYEKA ENTERPRISES LIMITED vs TANA AND ATHI RIVER DEVELOPMENT AUTHORITY(2013) eKLR** where it was stated thus:-

“It is my opinion that where a defendant has entered appearance and defence, then an application under this rule cannot be considered before court. The position may have been different if the application had been filed before the defence herein had been filed. Unfortunately for the plaintiff its application under consideration was filed on 23rd May 2013 while the defence herein was filed on 14th May 2013 with the amended defence being filed on 30th May 2013. In my view, the fact that the defence herein was filed before the plaintiff’s application is fatal to the same.”

14. According to order 36 rule 1(3) of the Civil Procedure Rules the plaintiff /applicant is required to give sufficient notice of the application to the defendant within seven (7) days after which the defendant shall then seek leave to file his defence within 14 days.

It is not clear whether the notice was given as required. What is on record is the statement of defence. No leave was sought by the defendant to file the defence. That was done after the application was duly on record.

15. The law mandates the court to enter judgment for the plaintiff if part of the claim is admitted. The defendant has admitted the fact of monies having been deposited that he is willing to refund. Other than the deposit of Kshs.1,400,000 which should either be forfeited or returned depending on who is in breach of the agreement there is a sum of Kshs.5,600,000 that should be paid for the plaintiff.

16. In the application, the applicant seeks an alternative prayer of striking out pleadings pursuant to the provisions of order 2 rule 15(1)(c) and (d) of the Civil Procedure Rules. The alluded to provision mandates this court to strike out pleadings or have them amended at any stage of proceedings where it is satisfied that they will prejudice, embarrass or delay fair trial or where it is an abuse of the court process.

17. The total sum paid by the plaintiff was Kshs.7,000,000. This was subject to the terms and conditions of the sale agreement. The plaintiff claims for a liquidated sum of Kshs.7,000,000 paid to the defendant which includes the deposit of Kshs.1,000,000 that is subject to determination of who is in breach of the agreement. The defence filed by the defendant can therefore not be dismissed as one not raising triable issues. In the premises it is not a defence to be struck out.

18. From the foregoing this is a case that calls upon this court to enter judgment for the plaintiff for part of the claim. Consequently I do enter judgment for the plaintiff in the sum of Kshs.5,600,000 plus interest at court rates.

19. With regard to the sum of Kshs.1,400,000 the defendant is permitted to defend the suit.

The issue of costs shall be dealt with at trial.

20. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 26th day of May 2015

L. N. MUTENDE

JUDGE