



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 531 OF 2009**

**DOMINIC GITAU KAMAU ..... PLAINTIFF**

**VERSUS**

**VIJAY SINGH SANDHU ..... DEFENDANT**

**JUDGEMENT**

1. The Plaintiff and Defendant had entered into a sale agreement for the sale to the Plaintiff of the property known
2. as L.R 209/15764. In the sale agreement dated 21<sup>st</sup> July, 2006, and further supplementary agreement dated 15<sup>th</sup> June, 2007, the property was sold for the consideration of Kshs. 4,950,000/-. The purchase price was to be paid in three instalments at predetermined dates as follows: Kshs. 2,000,000/- upon the signing of the agreement, Kshs. 1,465,000/- to be paid on or before 31<sup>st</sup> January, 2007 and Kshs. 1,485,000/- on completion. The completion date was set out in paragraph 5 of the sale agreement as 31<sup>st</sup> March, 2007. The sale agreement was pursuant to the provisions of the Law Society Conditions of Sale (1989), and to such terms, conditions and acts as set in the agreement. The claim by the Plaintiff against the Defendant is detailed in the Plaint dated 29<sup>th</sup> July, 2009. Therein, the Plaintiff lays allegations against the Defendant that he was in breach of the sale agreement by failing to deliver to the Plaintiff vacant possession of the suit premises, thereby incurring loss and damage as set out in paragraphs 5 and 6, with particulars thereof set out in paragraphs 7(a) and (b). The Plaintiff further sought specific performance for possession of the suit premises, damages and interest, costs and any other relief that the Court would deem fit and necessary to award to the Plaintiff.
3. In response to the allegations set out in the Plaint, the Defendant filed his Defence and Counterclaim on 19<sup>th</sup> August, 2009. He reiterated that the Plaintiff was in breach of the terms of the sale agreement by failing to pay the instalment of Kshs. 1,465,000/- which was due on or before 31<sup>st</sup> January, 2007. It was alleged that it was a condition under the agreement that any late payment of outstanding instalments would incur penalty interest at 16% per annum. It was further claimed that the damages incurred by Defendant for the delay in payment of the instalment of Kshs. 1,465,000/- was Kshs.318, 244/- based on the agreed interest rate of 16% per annum from 8<sup>th</sup> October, 2007 to 4<sup>th</sup> February, 2009. The Defendant also pleaded for costs of the suit and interest on the above stated amount.
4. In the Reply to Defence and Defence to Counterclaim dated 21<sup>st</sup> August, 2009, it was the Plaintiff's contention that the completion date of 31<sup>st</sup> March, 2007 was moved further by the Defendant, in various letters dated 17<sup>th</sup> April, 2007 and 21<sup>st</sup> June, 2007, moving the completion dates to 30<sup>th</sup> June, 2007 and 30<sup>th</sup> July, 2007 respectively. It was further averred that the

- completion documents were not forwarded until 7<sup>th</sup> March, 2007, thereby further delaying the completion of the sale agreement. The Plaintiff further contended that the interest as claimed by the Defendant was not payable as demanded as the delay was occasioned by the Defendant and that no notice as enunciated under Condition 6(c) of the Law Society Conditions of Sale (1989) was issued. It was contended that the Defendant breached the sale agreement by failing to deliver up vacant possession of the suit premises within the prescribed time, and thus no interest was payable and due to him as per condition 8(1) of the said conditions, as he had failed to complete the purchase transaction.
5. In the witness statement filed on behalf of the Plaintiff dated 9<sup>th</sup> July, 2012, the Plaintiff admits that he was not ready to complete the transaction by 31<sup>st</sup> March, 2007 as detailed in the sale agreement. This was stated in the letter dated 29<sup>th</sup> January, 2007 sent to the Defendant's lawyer indicating that the 2<sup>nd</sup> instalment was due on or before 31<sup>st</sup> January, 2007. The final instalment of Kshs. 1,500,000/- was paid on 29<sup>th</sup> January, 2009, over two years after the anticipated completion date. The Plaintiff reiterated however, that on 15<sup>th</sup> June, 2007 he entered into a Supplementary sale agreement whereby the suit premises substituted L.R. No. 209/15750 which was in the original sale agreement dated 21<sup>st</sup> July, 2006. Between 2<sup>nd</sup> April, 2007 and 21<sup>st</sup> September, 2007 when the payment of Kshs. 1,500,000/- was paid to the Defendant as the final instalment towards the purchase of the suit premises, there had been a series of communique` between the parties and Saving & Loans Kenya Ltd who were to facilitate the payment of the final instalment. The completion date was moved twice, in two letters dated 17<sup>th</sup> April, 2007 and 21<sup>st</sup> June, 2007 to 30<sup>th</sup> June, 2007 and 30<sup>th</sup> July, 2007 respectively. As at 29<sup>th</sup> March, 2007 the amount paid to the Defendant was Kshs. 3,450,000/- as confirmed in the letter by the Defendant's Advocate dated 11<sup>th</sup> April, 2007. On 6<sup>th</sup> October, 2008 the Defendant wrote to the Defendant claiming Kshs. 1,850,000/- as interest for the delay in completion, and further on 24<sup>th</sup> March, 2009 he claimed the same under the Law Society Conditions of Sale (1989). He wrote on 10<sup>th</sup> March, 2009 demanding that the Plaintiff pays the interest before releasing the keys to the suit premises to him.
  6. In the witness statement filed on behalf of the Defendant, it was contended that delay in completion of the sale agreement and subsequent transfer of the suit premises was wholly attributable to the Plaintiff, who failed to act diligently in ensuring that the transaction was completed by the stipulated completion date. It was stated that the Plaintiff was aware that the instalments paid were to go towards the completion of the (building of) the suit premises and that delays would encumber and hinder the Defendant from executing his mandate as per the sale agreement. The Defendant reiterated that completion could not be executed as there was delay by the Plaintiff in remitting the funds and thus the anticipated date of completion of 31<sup>st</sup> March, 2007 became untenable. As regards the delay in providing and submitting the completion documents to facilitate loan facilities from Savings & Loans Kenya Ltd, the Defendant states that the same was attributable to the Plaintiff who issued the stamped Transfer on 25<sup>th</sup> June, 2008 after the Transfer had been returned for amendment to the Plaintiff on 31<sup>st</sup> August, 2006. The Defendant further referred to Conditions 8(3), 8(4), 24(1) and 24(2) of the Law Society Conditions of Sale (1989) with regards to interest, undertaking, and preparation of the Transfer and engrossment of the Transfer for execution. It was further stated that interest accrued was under Condition (c) of the sale agreement and the Plaintiff was liable for interest totaling Kshs. 318,224/- from 8<sup>th</sup> October, 2007 to 4<sup>th</sup> February, 2009.
  7. Each party to the suit contends that it was the other's fault that completion of the sale agreement was not done in time. The Plaintiff contends that the Defendant failed in delivering the requested documents in time. In the bundle of documents, all the letters dated 3<sup>rd</sup> September, 2007, 12<sup>th</sup> September, 2007, 8<sup>th</sup> October, 2007, 24<sup>th</sup> October, 2007, 26<sup>th</sup> October, 2007, 30<sup>th</sup> October, 2007, 12<sup>th</sup> November, 2007, 9<sup>th</sup> January, 2008 and 6<sup>th</sup> March, 2008 requested for documents from the Defendant in order to enable the Plaintiff to complete the transfer and subsequent release of the outstanding balance of the purchase price. The requested documents were finally forwarded to the Plaintiff's Advocates vide their letter dated 7<sup>th</sup> March, 2008.
  8. The Defendant's claim is that he was ready for completion of the transaction by 8<sup>th</sup> October, 2007 which was documented in the letter of the same date. He contended that it was the Plaintiff's fault

that the Transfer was not registered until sometime in October, 2008. He further claimed that interest had accrued as a result of the delay in completion of the payment of the last instalment of Kshs. 1,500,000/- as from 8<sup>th</sup> October, 2007. To this end, he relied upon Condition 8(4) of the Law Society Condition of Sale (1989) and Condition (c) in the Sale agreement.

9. Condition 8(4) of the Law Society Conditions of Sale (1989) reads:

**“If any payment provided for in the special conditions is not paid on the date agreed, on completion the purchaser shall pay to the vendor interest on such payment from the date agreed until actual payment”.** (Underlining mine).

The Defendant further relied upon Condition (c) under the Special Conditions Clause of the Sale Agreement dated 21<sup>st</sup> July, 2006. Under that condition, it is provided that:

**“The rate of interest in condition 2(1) of the Law Society Conditions of Sale (1989) shall be 16% instead of 8% per annum”.**

At Clause 2(1) of the Law Society Conditions of Sale (1989) the term **“interest”** is deemed as follows:

**“ ‘interest’ means the annual rate of interest specified in the Special conditions or, if none is so specified, two (2) percentage points above the maximum rate of interest which may be charged by specified banks for loans or advances pursuant to Section 39 of the Central Bank of Kenya Act, (Cap. 491); provided that, if more than one maximum rate is so specified, the lowest rate shall be applied”.**

9. It is discernible from the correspondence between the parties that the completion date as provided for being 31<sup>st</sup> March, 2007 was not viable. The Plaintiff had indicated his inability to pay the outstanding amount by then and had accordingly informed the Defendant of the same. The Defendant admitted in his letter dated 11<sup>th</sup> April, 2007 that he had received a total amount of Kshs. 3,450,000/- towards the purchase of the suit premises, and requested for a suitable professional undertaking from the bank facilitating the loan balance. The same was issued by the purchaser’s bank in its letter dated 16<sup>th</sup> April, 2007. Completion therefore, fell under the ambit and purview of Condition 4(2) (b) of the Law Society Conditions of Sale (1989). It is provided therein:

**“Where the vendor has agreed that the whole or any part of the purchase money shall not be paid upon completion but shall be secured by an undertaking from the purchaser’s advocate or the purchaser’s mortgagee or his advocate, the relevant undertaking, in form and substance satisfactory to the vendor, shall be delivered to the vendor’s advocate upon completion together with the payment of any unsecured balance of the purchase money”.**

10. The documents requested by the Plaintiff’s Advocates as well as the mortgagee’s advocates were not provided until 7<sup>th</sup> March, 2008. The Plaintiff’s advocate received the same on 12<sup>th</sup> March, 2008. The claims as alleged by the Defendant that he was ready for completion are therefore, not entirely true. Given that he was aware that the balance of Kshs. 1,500,000/- was to be paid by way of mortgage finance, he cannot turn back and refer to the Agreement claiming that it was not provided for. By the letter dated 11<sup>th</sup> April, 2007 requesting for a suitable professional undertaking from the mortgagee, the Defendant had by both inference and conduct, agreed to the terms of the mortgagee. In order to arrive at completion, as provided under Condition 4(2) (c) and read with Condition 4(2) (d) of the Law Society Conditions of Sale (1989), it was incumbent upon the Defendant to deliver documents as stated therein to enable such. Condition 4(2)(d) provides that:

**“Against payment or delivery (as the case may be) in accordance with paragraph (a) or (b) above, the vendor shall deliver or, where paragraph (c) applies, produce for inspection for the purchaser’s mortgagee the duly executed conveyance and all necessary discharges of encumbrances, consents and clearance certificates, together with, if required by the purchaser, a duly completed stamp duty valuation form”.**

Despite numerous letters and correspondence from both the Plaintiff’s and mortgagee’s advocates requesting for the same, such were not delivered up to facilitate completion until 7<sup>th</sup> March, 2008.

11. The issue of possession of the suit property was determined by Kimaru, J in his Ruling dated 6<sup>th</sup> May, 2010. The issue therefore for determination before this Court is the prayer for damages. By the letter dated 11<sup>th</sup> April, 2007 it was agreed by the parties, by conduct and inference, that the remainder of the purchase money was to be paid by mortgage finance and facilitated through a professional undertaking in order to facilitate completion. Once the parties had agreed upon this arrangement, Condition 4(2) (b) of the Law Society Conditions of Sale (1989) became applicable in the context of the sale agreement. The completion date was initially set as 31<sup>st</sup> March, 2007 but due to circumstances illustrated above, the same was moved severally. Completion was not facilitated by the Defendant until 7<sup>th</sup> March, 2008 when he delivered the required documents for completion to the mortgagee’s advocates.
12. I find that by the conduct of both parties therefore, the completion date of 31<sup>st</sup> March, 2007 was vacated and that no pre-determined completion date was set. Further, it would not have been possible for the Defendant to have been ready and capable of completing the sale agreement as he has alleged on 8<sup>th</sup> October, 2007. Leaving aside physical progress as to the suit premises on the ground, the documentation as required under Condition 4(2) (d) of the Law Society Conditions of Sale had not been delivered. On 8<sup>th</sup> October, 2007 the only document that the Defendant’s advocates had availed was the Rates Clearance Certificate. The substantive documents were only sent to the Mortgagee’s advocates on 7<sup>th</sup> March, 2008 and forwarded to the Plaintiff’s advocates on 12<sup>th</sup> March, 2008. Registration of the transfer documents was not completed until sometime in October, 2008 or tentatively in January, 2009 (the evidence is unclear) when the mortgagor finally released Kshs. 1,500,000/- to the Defendant’s advocates. The delay in the registration of the documents delivered to the Plaintiff’s advocate on 12<sup>th</sup> March, 2008 is inordinate and unexplained. However, the balance of the purchase money was paid as per the sale agreement and possession of the suit property was transferred to the Plaintiff following the determination of Kimaru, J as aforesaid.
13. The claim by the Plaintiff is for loss of rental income from 1<sup>st</sup> February, 2009, as well as interest at 16% per annum. As determined by Kimaru, J., the Defendant had no justifiable reason for holding on to the possession of the suit premises once the ownership had been transferred to the Defendant. The learned Judge also properly determined that any issues as to damages would be properly and appropriately be dealt with at the hearing of the suit. The claim by the Defendant that he was ready for completion by 8<sup>th</sup> October, 2007 is unjustified. He has not been able to present to the Court that by that date that he had satisfactorily delivered to the mortgagee’s advocates documents as set out under Condition 4(2) (d) of the Law Society Conditions of Sale (1989), following upon the acceding of the request for the professional undertaking issued on 16<sup>th</sup> April, 2007. In my view, he has unjustifiably made a claim for interest purportedly accrued from a date that he was not in a position to have completed the sale. The Defendant cannot rely on the provisions of Condition 8(4) of the Law Society Conditions of Sale (1989) as there was no completion date re-set out by the parties.
14. I find that the Plaintiff paid the purchase price as was provided in the sale agreement. Having established as above that the claim by the Defendant for interest is non-viable and a non-starter, the Plaintiff is, pursuant to the interlocutory determination by Kimaru, J., (and after careful consideration of the circumstances, facts and evidence brought before this Court), entitled to his claim for loss of rent accruing from 1<sup>st</sup> February, 2009. The rent accrued is determined from that

date up until the date in which the Plaintiff was put into possession of the suit premises. On 6<sup>th</sup> May, 2010 the Court issued orders that possession was to be given within fifteen (15) days of the date of the Ruling. As a result, the Plaintiff will be entitled to damages in the amount of Shs. 942,000/= covering the loss of rent from 1<sup>st</sup> February 2009 until 21<sup>st</sup> May 2010 at Shs. 60,000/= per month. The Plaintiff will also have the costs of this suit.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**