



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
CIVIL CASE NO. 157 OF 2007

JAMES P. MAINA MURIUKI.....PLAINTIFF

VERSUS

MOSES MAINA NGUGI.....1ST DEFENDANT

KAHAWA SUKARI LIMITED.....2ND DEFENDANT

RULING

Judgment herein was delivered by this court on 30th July 2013 in favour of the Plaintiff. The said judgment provided that the 2nd Defendant was to compensate the Plaintiff for his plot by allocating to the Plaintiff a similar plot of equivalent size to plot 3421 in Kahawa Sukari within thirty days of service upon it of the judgment, failing which the Plaintiff was at liberty to apply for further orders. The 2nd Defendant was also to meet the costs of the suit.

The Plaintiff has now filed a Notice of Motion dated 20th March 2013 seeking orders that the 2nd Defendant be ordered to pay the Plaintiff Kshs.12,500,000/= being market value of the plot as at 17th November, 2008, and to assess damages. The grounds for the application are that the 2nd Defendant was duly served with the afore-mentioned judgment and has not compensated the Plaintiff with a similar plot, and that it is the interests of justice that judgment be entered in favour of the Plaintiff in sums prayed for in the Amended Plaint of Kshs.12.5million plus damages which should be assessed.

The Plaintiff's Notice of Motion was supported by an Affidavit sworn by his Advocate Betty Laura Rashid on 20th March 2013 wherein she stated that the 2nd Defendant was personally served with the judgment delivered herein on 23rd October 2013, and that its lawyers, Ms Mwaniki Ileri & Company Advocates were served on 12th November 2012. An affidavit of service by Cosmas Kithome, a process server of the High Court of Kenya was filed in court on 13th June 2013 attesting to such service. The Plaintiff's counsel also filed written submissions dated 3rd June 2013 reiterating the facts stated hereinabove.

The Notice of Motion was heard on 20th May 2013 and counsel for the 1st Defendant submitted that he did not object to the application and would leave it to the court's discretion. The 2nd Defendant did not respond to the application nor did its Advocate attend the hearing. Affidavits of service filed on 18th April 2013 and 20th May 2013 attested to the service on the 2nd Defendant of the Notice of Motion and hearing notice respectively.

I have considered the Plaintiff's application and submissions. The issue is whether the orders the Plaintiff seeks for payment of Kshs 12,500,000/= as special damages and general damages can be granted. This issue is however *res judicata* as it was considered and determined by this court in the judgment delivered herein on 30th July 2012. The court found as follows in this regard:

“The Plaintiff sought an alternative remedy in the Plaintiff, that both Defendants to be compelled to compensate the Plaintiff for his plot at the current market value. The Plaintiff's Counsel made an oral application before the hearing on 6th December 2012, which application was allowed by this Court to amend the current market value in the said prayer from Kshs 2.5 million to Kshs.12.5 million. The Plaintiff also claimed general damages.

Can the sum of 12.5 million claimed by the Plaintiff be taken to be liquidated damages subject to be paid by the 2nd Defendant upon the entering of the interlocutory judgment against it, as was submitted by the 1st Defendant? My answer to this question is two-fold. Firstly, the fact that the prayer for payment of Kshs 12.5 million was amended and not served on the 2nd Defendant has the effect of discharging any interlocutory judgment that may have been entered with respect to the said prayer.

Secondly, the Court of Appeal in Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695 held that a sum does not become liquidated just because it is claimed, but only if it is agreed or the events on which it is based reveal it can be calculated independently of the sum claimed. If the ascertainment of the sum claimed requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand, but constitutes damages at large.

In the present suit the sum of Kshs.12.5 million claimed in prayer (b) of the Amended Plaintiff is not agreed upon, neither is there any evidence provided by the Plaintiff as to how the said sum was reached. The sum does not therefore qualify as a liquidated demand, and it can therefore only be claimed as special damages which require be specifically pleading and proving. No such proof has been provided by the Plaintiff of the market value of the suit property, or of the damage suffered by the Plaintiff, and the claim for Kshs 12.5 million and general damages must fail.”

The only remedy that this court can give in the circumstances and in the interests of justice is the refund of the purchase price paid by the Plaintiff. At the hearing of this suit and in the judgment delivered herein it was found that the Plaintiff paid the 2nd Defendant a total sum of Kshs 236,000/= being Kshs 200,000/= for the purchase of plot 3421 at Kahawa Sukari and Kshs 36,000/= for the title deed for the said plot. He produced the receipts for the said payments as his Exhibits 1 and 3. The said payments were made on various dates between 1994 and 2006, but the substantial payment was that of the purchase price of Kshs 200,000/=which was completed by 5th August 1995.

In the premises the Plaintiff's application is allowed in the terms of the following orders:

1. That the 2nd Defendant having defaulted to allocate to the Plaintiff a similar plot of equivalent size to plot 3421 in Kahawa Sukari as ordered in the judgment delivered herein, is hereby ordered to refund to the Plaintiff the sum of Kshs 236,000/= with interest thereon at court rates with effect from 1st August 1995 until payment in full, within 60 days of service of this ruling.
2. That execution shall issue upon default by the 2nd Defendant.
3. That the 2nd Defendant shall meet the costs of the suit herein and of this application.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____17th____ day of ____June____, 2013.

P. NYAMWEYA

JUDGE