



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 861 OF 2009

GEORGE MUTURI MUNGAI PLAINTIFF

VERSUS

FRANCIS MBUGUA GIATHI DEFENDANT

JUDGMENT

The plaintiff filed this suit on 24th November, 2009. He stated that by an agreement dated 14th March, 1994, the defendant agreed to sell to him a parcel of land known as **Limuru Township/325C** comprising 0.028 Hectares, hereinafter referred to as “**the suit property**”, at a price of Kshs.610,000/=. The defendant was required to obtain the necessary consents for sub-division and transfer of the property. The plaintiff averred that he paid the entire purchase price but the defendant had failed to obtain the necessary consents to enable a transfer of the property. Regarding payment of the purchase price, the plaintiff stated that the defendant continued to receive money from him even after lapse of the contractual completion period thus abrogating his right to terminate the contract.

The plaintiff further stated that the defendant had employed fraudulent manoeuvres and schemes to avoid his performance of the contract and set out particulars of fraud as hereunder:

- “(a) Various claims of an increase of the purchase price of the plot above mentioned.**
- (b) Changing goal posts at the mention and demand for implementation of the terms of the contract.**
- (c) Dilly-dallying and undue dalliance at concluding the contract.**
- (d) Unusual reluctance at implementation of a straight forward matter.**
- (e) Demand for extra and additional payment for the plot.”**

In view of the foregoing, the plaintiff sought judgment for:

- “(a) Specific performance of the contract.**
- (b) In the alternative, that the Deputy Registrar of this Honourable court be ordered and empowered to execute any and all documents pursuant to a conveyance of the defendants interest in plot known as Limuru Township/325C in accordance with the orders of this court.**

- (c) **In the other alternative, a refund of Kshs.610,000,00 and all accrued interest from the date of purchase by the plaintiff.**
- (d) **Damages for the deliberate and unnecessary delay occasioned by the Defendant in effecting the necessary sub-division and transfer.**
- (e) **Loss of use of the suit property occasioned by the defendant by delaying the process and transfer.**
- (f) **Damages for breach of contract.**
- (g) **Costs of this suit.**
- (h) **Interest on (c) to (g) above at court rates.**
- (i) **Any other relief that this honorable court may deem appropriate to grant in the circumstances.”**

The defendant filed a statement of defence and admitted that on 14th March, 1994 he entered into a sale agreement with the plaintiff in respect of the suit property for Kshs.610,000/= but denied that the plaintiff paid the entire purchase price in 1994. He stated that the plaintiff, having not paid the entire purchase price by 17th June, 1994, which was the completion date, had breached the sale agreement. He added that the said agreement is statute barred under the **Limitation of Actions Act** and is therefore unenforceable.

The defendant further denied all the other averments in the plaint and urged the court to dismiss the plaintiff's suit.

By way of a counterclaim, the defendant claimed from the plaintiff Kshs.75,000/= being arrears of rent for two coca-cola kiosks situated on the suit property. The defendant stated that in 2004 he granted the plaintiff space on the suit property to install the two kiosks at a monthly rent of Kshs.500/= per kiosk but the plaintiff had sublet the kiosks to other tenants.

In a reply to the defence and defence to counterclaim, the plaintiff stated that the suit is not time barred as alleged by the defendant. He added that payment of the purchase price was completed within the confines of time and law. He further denied the defendant's claim for Kshs.75,000/= on account of rent.

The advocates for the parties filed a statement of agreed issues which are as follows:

- “1. Is the Sale Agreement dated 14th May, 1994 valid and enforceable between the parties?**
- 2. Is the sale agreement dated 14th May, 1994 statute barred?**
- 3. What is the extent and amount of purchase price so far paid in accordance and in compliance with the agreement?**
- 4. Has the defendant made any efforts and or attempt to perform the contract?**
- 5. Has the defendants continued to hinge on the agreement and receive monies thereof subsequent to be completion date?**
- 6. Is there a breach of contract on the part of the defendant?**
- 7. Has the plaintiff persuaded the defendants to transfer the agreement plot to the plaintiff?**

8. Are there fraudulent attempts by the defendant to deny or frustrate the plaintiff's claim?
9. Does the plaintiff hold any lawful claim against the defendant?
10. Did the plaintiff suffer and incur loss as a result of the defendant's refusal and or neglect to transfer the suit property to the plaintiff?
11. Did the plaintiff suffer and or incur loss as a consequence of the defendant's delay in transferring the purchase property to the plaintiff?
12. Was a demand letter and or notice of intention to sue served on the defendants?
13. Who bears the costs of the suit?"

Both parties testified but none called any witness. The plaintiff produced the agreement in respect of the suit property as **P.Exh. 1**. The suit property is a commercial plot within Limuru Township. On execution of the agreement the plaintiff paid a sum of Kshs.460,000/= and the defendant acknowledged receipt of the same. Clause 4 of the agreement stated that:

“the vendor undertake (sic) to effect a valid transfer into the name and title of the purchaser immediately on clearing the balance of shillings one hundred fifty thousand (Kshs.150,000/-) only and after issue of the lease in the course of the next three months from the date hereof.”

The plaintiff further testified that on 11th May, 1994 he paid a sum of Kshs.100,000/= and on 16th May, 2002 he paid the balance of Kshs.50,000/=. The plaintiff was issued with 2 receipts, (P.Exh.2) but the last one showed that there was a balance of Kshs.100,000/=. He added that after he had paid Kshs.100,000/= on 11th May, 1994 the defendant purported to have increased the purchase price. As a result, the plaintiff registered a caution against the suit property at the Kiambu Lands Registry.

In cross examination, the plaintiff stated that he had gratuitously agreed to pay the defendant some more money upon getting the title document from him but denied that there was any agreement regarding increment of the purchase price. He further explained that the defendant failed to process the title document within the agreed period of time and for that reason he could not pay the balance of the purchase price within three months from the date of the sale agreement.

On the other hand, the defendant testified that the plaintiff was unable to pay him the balance of the purchase price in good time and for that reason he informed the plaintiff that he had revised the purchase price to Kshs.710,000/=. They agreed that the plaintiff would pay an extra Kshs.100,000/= and a memorandum to that effect was drawn in the presence of several witnesses, one of whom was named as James Kimani Kiratu.

The defendant further stated that the current market value of the suit property is Kshs.5 million. He alleged that it is the plaintiff who breached the sale agreement and urged the court to dismiss his case with costs.

Regarding the counterclaim, the defendant testified that the plaintiff had leased a portion of the suit property at an agreed monthly rent of Kshs.500/= per kiosk and had placed two coca-cola kiosks there. He had however failed to pay the rent which had accumulated to Kshs.78,000/=. He urged the court to enter judgment in his favour for that sum.

In cross examination, the defendant conceded that there was no formal supplementary agreement between himself and the plaintiff regarding payment of the additional Kshs.100,000/=. As regards the claim for Kshs.78,000/=: the defendant stated that although there were invoices which he used to give to the plaintiff, none had been produced in court.

Mr. Marete for the plaintiff and Mr. Shairi for the defendant filed their respective written submissions

which I have carefully perused.

The long list of issues for determination can be compressed into 5 main issues as follows:

1. **Is the plaintiff's suit statute barred?**
2. **If so, what is the consequence thereof?**
3. **Between the plaintiff and the defendant, who breached the sale agreement dated 14th May, 1994 and what is the consequence thereof?**
4. **Is the defendant entitled to the relief sought in his counterclaim?**
5. **What order should be made as to costs of the suit?**

I will proceed to determine the above issues as hereunder.

It is not in dispute that the parties herein entered into a sale agreement in respect of the suit property on 14th May, 1994. The plaintiff's cause of action is therefore based on contract. **Section 4 (1) of the Limitation of Actions Act Cap 22** states that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The plaint herein was filed on 24th November, 2009, almost 15 years from the date of signing the contract. The plaintiff alleged that the defendant employed fraudulent tactics to avoid transfer of the suit property, even after he had received the entire purchase price. These alleged fraudulent manoeuvres involved mainly demand for further payment before he could transfer the property to the plaintiff.

I believe the plaintiff alluded to the allegation of fraud in a desperate attempt to fulfill the requirements of **Section 26 of the Limitations of Actions Act** which provides for extension of limitation period in case of fraud or mistake. The section states that:

"26. Where, in the case of an action for which a period of limitation is prescribed, either –

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or**
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:**

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or**
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."**

For a suit that is otherwise time barred to qualify for extension of time under **Section 26**, the suit must be based upon fraud of the defendant or his agent or the plaintiff must demonstrate that his right of action was concealed by the fraud. In such instances, the period of limitation begins to run from the date when

the plaintiff discovers the fraud.

The plaintiff's suit herein is not based on fraud, it is premised upon alleged breach of contract. The alleged particulars of fraud are no more than acts of the alleged breach of contract. But even if the plaintiff's suit was based on fraud, the plaintiff did not demonstrate that the fraud was not discovered until November, 2009. Since 2002 when the defendant indicated on the payment voucher dated 16/5/2002 that there was a balance of Kshs.100,000/= due, the plaintiff was well aware that the defendant intended to alter the terms of the contract. From 16th May, 2002 to 24th November, 2009 is more than six years. The plaintiff did not give any valid reason as to why he did file his suit within six years after 14th June, 1994, the contractual completion period.

In **DIVECON LIMITED vs SHIRINKHANU SADRUDIN SAMANI**, Civil Appeal No. 142 of 1997, the Court of Appeal held that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract.

I do not entertain any doubt in my mind that the plaintiff's suit is statute barred in terms of the provisions of **Section 4 (1)** of the **Limitation of Actions Act**. Such a suit cannot be entertained by this court and must be dismissed.

Notwithstanding the above finding, I will proceed to consider, albeit briefly, who between the plaintiff and the defendant breached the sale agreement of 14th May, 1994. Clause 4 of the agreement was clear that the balance of the purchase price amounting to Kshs.150,000/= had to be paid within three months from the date of signing the agreement. Upon receipt of the said balance the defendant was required to transfer the suit property to the plaintiff. The plaintiff paid a sum of Kshs.100,000/= on 11th May, 1994 and as per the agreement, the balance of Kshs.50,000/= ought to have been paid by 14th June, 1994. However, that sum was not paid until 16th May, 2002. No proper reason was advanced for the eight years' delay.

Even assuming that after payment of the Kshs.100,000/= on 14th May, 1994 the defendant unlawfully varied the purchase price by demanding any sum beyond the balance of Kshs.50,000/=, the plaintiff would have been entitled to resist the defendant's demand but was contractually bound to pay that balance within the agreed period of time then file a suit for specific performance. The plaintiff did not tell the court that before expiry of the three months' period he offered the balance of the purchase price to the defendant and the money was rejected.

If the plaintiff had paid the full purchase price, Kshs.610,000/=, within the stipulated period of time but the defendant, for whatever reason, failed to transfer the suit property to him, the defendant would have been in breach of the agreement. But given the facts as stated hereinabove, it is the plaintiff who breached the terms of the sale agreement.

In view of that breach and in view of the plaintiff's inordinate delay in filing this suit, performance of the contract cannot be enforced and neither can the plaintiff's claim be sustained.

Turning to the defendant's counterclaim, he did not adduce sufficient evidence to prove the same. The defendant testified that there were invoices which he used to forward to the plaintiff but none was produced in court. The defendant's claim is unsustainable.

In view of the foregoing, the plaintiff's suit as well as the defendant's counterclaim are hereby dismissed. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Alex/Muriithi – court clerks

Mr. Marete for the Plaintiff

Miss Owando for Mr. Mwaura for the Defendant