



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Case 210 of 2006

ANNELIESE FEILER.....PLAINTIFF

VERSUS

DIANI HOMES LIMITED.....RESPONDENT

RULING

1. The application before me was filed by the Defendant on 12th August, 2010. It seeks that the Plaintiff's suit be struck out for being scandalous, frivolous, vexatious and otherwise an abuse of the court process. The application is made by Chamber Summons under Order VI Rule 13(1) (b) (d) and Rule 16 of the Old Civil Procedure Rules.
2. The suit concerns alleged non performance of an agreement for sale by the Defendant to Plaintiff of a villa which was to be constructed on a parcel of land known as Kwale/Galu/Kinondo/1133. The price was Deusche Mark 235,000, of which the Plaintiff allegedly paid DM 135,000.
3. The grounds cited in support of the application include:
 - a) That the Plaintiffs confirm that they were informed that the villa, subject of the suit, was damaged by fire in 1998.
 - b) That the Plaintiff demanded payment of Deusche Marks 150,000/- from Defendant on 31st July, 1998.
 - c) That the Defendants issued a forfeiture notice to the Plaintiff on 31st August, 1998.
 - d) That the cause of action arose in 1998 and therefore the suit was statute barred by 2006 when filed.
4. The application was opposed by the Plaintiff on the grounds that:
 - a) the suit concerns land and therefore brought within the twelve(12) years statutory limitation period
 - b) The application is frivolous, vexatious and an abuse of the court process.
 - c) Article 159(2) (d) of the Constitution requires courts to determine cases on their merits without undue regard to procedural technicalities.
5. In their written submissions the Defendant/Applicant submitted that the claim by the Plaintiff is a

monetary claim that it is cut off by the limitation period of (6) years under Section 4(1) (a) of the Limitation of Actions Act; and that based on the copy of the contract and other communications between the parties shown annexed to the Applicant's Supporting Affidavit, the suit is time barred.

6. Section 4(1) provides

“The following actions may not be brought after the end of six years from the date of which the cause of action accrued-

a) ***Actions founded on contract”***

The Defendant/Applicant refers to the German translation of the sale agreement referred to as a **“Bill of Sale”**, Exhibit ‘JBI’, annexed to the Affidavit of Joseph Brunlehner, Managing Director of the Defendant. The Bill of sale shows that it was signed on 18th September, 1996 by both parties. According to the Defendant, the suit should have been brought within six years of the date of the agreement, and that not having been done, the suit is statute barred.

7. In her written submissions, the Plaintiff states that paragraphs 3 to 8 of the plaint reveal that the claim arises out of an agreement for sale of suit property on which was to be constructed a European style residential property. The suit therefore concerns the sale of land and recovery of the proceeds of sale. The plaintiff refers to paragraph 8 of the plaint under which the Plaintiff claims:

“...a full refund of the deposit of DM 150,000”

This being a suit for recovery of proceeds of sale of land it is not statute barred.

8. The Plaintiff points out Section 19(1) of the Limitation of Actions Act provides as follows:

“ 19 (i) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land after the end of twelve years from the date when the right to receive the money accrued.”

Accordingly, the Plaintiff argues that limitation has not yet set in.

9. The Plaintiff further argues that striking out is a draconian action to be exercised with extreme caution and only in the clearest of cases. They refer to the famous case of **DT Dobie and Company (K) Ltd vs Muchina and Another** [1978] LLR 9 (CAK).

10. I have carefully considered the parties' submissions and the documents referred to. The application here is made under, and seeks the remedy in, Order VI Rule 13(1)(b) of the old Civil Procedure Rules. That provision reads as follows:

“13 (1) at any state of the proceedings the court may order to be struck out or arrested any pleading on the ground that –

a.....

b) It is scandalous, frivolous or vexatious

c) ...

d) It is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.”

11. The Applicant's real gripe concerning the suit is that it considers it to be statute barred under Section 4(1) Limitation of Actions Act. No other form of frivolity, scandal, vexation or abuse of the court process is alleged. The only question therefore is, whether Section 4(1) or Section 19 or the Limitation of Action Act applies to this suit. That is, is the suit merely a claim in contract to which Section 4 (1)

applies, or is it one for recovery of proceeds of sale of land to which Section 19 applies.

12. In the Plaint at various paragraphs, the Plaintiff states that:

“3. In or about July 1998 she entered into an agreement with the Defendant for the purchase of the parcel of land known as Kwale/Galu/Kinondo/113 at an agreed purchase price of DM 235,000.00

.....

5. The Plaintiff states that she paid to the Defendant the sum of DM 150,000.00 in or about July, 1998 for the purchase of the aforesaid parcel of land.

....

7. The Plaintiff further avers that she has recently discovered that the Defendant illegally sold and transferred the suit property to another person.....

8. The plaintiff states that as a result of the said action she is entitled to a full refund of the deposit of DM150,000.00 with interest from the date of payment to the date of judgment.”(underlining mine)

13. Clearly, the suit set out in the above paragraphs concerns a sale of land which has gone awry. In the prayers, the Plaintiff seeks judgment for:

“(a) 76,693.78 Euro or DM 150,000

(b) Costs and interest from July, 1998 to the date of payment.”

I am satisfied that from the pleadings, the suit concerns the recovery of a deposit for sale of land. The deposit amount sought to be recovered in the DM 150,000 which the Plaintiff paid.

14. Further, I note from the Bill of Sale exhibited by the Defendant, that the buyer therein named:

“Commits herself by a binding sales agreement in connection with the following building obligation to acquire the plot in the ground plan enclosed.

...

The buyer commissions the company Diani Homes Limited to construct a house on this plot. The price for the house/small villa including plot/s Number 1133 ½ amounts to DM 165,000 another number later through division.

The purchase price is incidentally a fixed price. It contains the costs for the ready to occupy completion of the property together with external installations and all building additional costs as well as cost of the plot, standard local development and connection costs for Standard local supply and disposal pipes survey demarcation costs.”

15. I cannot conceive of clearer evidence of an intended sale of a plot and house to be constructed thereon. The claim in the plaint is clearly for recovery of the deposit paid pursuant to that sale. The statutory provision limiting the period of recovery of proceeds of sale of land to twelve years appears, on a superficial level, to apply only in respect of the vendor or seller of land. I cannot, however, see any rationale why a purchaser who has made payment for land and the sale has stalled or not succeeded, should be subjected to a statutory recovery period any shorter than would be available for a vendor.

This suit squarely fits Section 19(1) of the Limitation of Actions Act, as being for recovery of proceeds of sale of land. The mere fact that the sale was by the Defendant and not the Plaintiff, and that the recovery sought is by the buyer not the seller, does not disqualify the transaction from the benefit of Section 19(1)

of the Limitation of Actions Act.

17. Accordingly, this is not a proper case for striking out the Plaintiff. I therefore dismiss the Defendant's application with costs to the plaintiff.

Dated, and delivered this 12th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)