



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)

CIVIL SUIT 172 OF 2009

JOHNSON DEDAN MURIMI t/a MURIMI & COMPANY ADVOCATES PLAINTIFF
VERSUS
JOHN THONGORI t/a J. THONGORI & COMPANY ADVOCATES.....DEFENDANT

JUDGMENT

1. The plaintiff took out the originating summons under **order LII rule 7(1) and (10) Civil Procedure Rules** seeking for the following orders:

“a) **An order that the defendant to honor his Professional Undertaking given to the plaintiff by his letter of 13th June 2008 together with interest at Court rates until payment in full.**

The undertaking was that the Defendant would hold Kenya Shillings Twenty Two Million as stakeholder in an interest bearing account (which interest was confirmed as 6.75%, for the benefit of the Purchaser, Mitithiru Company Limited, for whom the plaintiff was acting, for a period of 45 days (which time was extended by circumstances to 9th December 2008) from the date of receipt of the completion documents and balance to make up Kenya Shillings Twenty Two Million (Ksh.22,000.000=) was paid to the defendant (which was 9th July 2008).

The interest due from the defendant is

Ksh.22,000,000 x 6.75% p.a. x 154 = 626,547.95

b) *An order that the undertaking by the defendant to the plaintiff as set out above be honoured within such a period as this Honorable Court will fix and in default thereof an Order for enforcement do issue against the defendant”.*

2. This application is supported by the affidavit of Mr. J.D. Murimi the Principal partner in the law firm. The plaintiff’s law firm acted for Mitithiru Company Limited in the purchase of NAIROBI/BLOCK 91/131 from one R.J. Ruparel who was represented by the defendant. Both the seller and the purchaser signed a sale agreement dated 12th June 2008. According to clause 8.10 of the Sale Agreement, the defendant’s advocate was supposed to hold the purchase price of Ksh.22,000,000/- as stake holder in an interest earning account.

3. The defendant confirmed this in their letter dated 13th June 2008 in which they gave a professional undertaking to hold the sum of Ksh.22,000,000/- in terms of clause 8.10 of the Sale Agreement. The defendants further confirmed by their letter of 22nd September 2008 that the said 22,000,000 was held at Equity Bank Westland’s Branch at the interest rate of 6.75% p.a. The transfer of the property was not effected immediately due to a caution which was lodged against the property.

A suit being ELC CIVIL SUIT NO.532 OF 2008 was filed against the seller R.J. Ruparel in respect of the same property. During all this time the defendant held the money as per the undertaking until 9th December 2008 when the plaintiff authorized the defendant to release the money less the interest which was due to the purchaser. The defendant refused to release the interest thus the present suit.

4. The respondents filed written submission in which they claimed that they Paid interest accrued for 45 days amount to Ksh.103,125.00/- vide cheque No. 000537 According to the

defendants, the plaintiff is only entitled to interest for 45 days when the transfer was supposed to be affected and as per the letter of undertaking. On the part of the plaintiff they maintain that the agreement is self explanatory, the transfer was not effected and the plaintiff's client was not to blame for the delay.

5. I have analyzed the rival submissions and the pleadings herein especially the agreement entered into between the seller and the purchaser dated 12th June 2008 which provides as follows:-

“On receipt of the completion documents the purchaser shall pay to the Vendor's advocates the balance of the Purchase price to be held by them as stakeholders in an interest bearing account together with the deposit for the benefit of the Purchaser for a period of forty five (45) days from the date of receipt of the completion documents. After expiry of the Forty Five (45) days the Vendor's Advocates shall release the Purchase price to the Vendor less the interest irrespective of whether the Transfer has been registered or not.”

6. This is also confirmed by the letter written by the defendant on 13th June 2008 and a further letter dated 23rd September 2008. It is also not disputed that there was a delay due to a suit which was filed against the seller in HCCC NO.523 OF 2008 where an order of injunction was issued against the seller restraining any sale of the suit premises. The purchase price continued to be held in a fixed deposit until 9th of December 2008 when the defendants were instructed to release it to the sellers. Thus the defendant is now demanding for the interest accruing on the purchase price from 9th July 2008 to 9th December 2008. That is a total of 154 days.

7. The defendants on their part admit that the interest payable is only for 45 days, thus they claim to have paid the plaintiff a sum of Ksh. 103,125.00/-. There is no rejoinder by the plaintiff on whether or not this sum was received. Accordingly I will take it that it was paid. The issue for determination is whether the defendant should be now paid interest in regard to the remaining days. That is 109 days between the time when the money was deposited in the account and when it was released to the seller. It is not in dispute that there was delay in completion. This delay was not occasioned by the purchaser. It was caused by a suit that was filed against the seller in HCCC NO.532 OF 2008.

8. Thus the transfer could not be registered within 45 days, meanwhile it is also not disputed that the purchase price was held in an interest earning account. Can the seller benefit from his own delay that was caused by a suit filed against him? In my opinion the seller cannot benefit because the purchaser had nothing to do with the delay. Therefore the interest accruing on the purchase price for the period when the transfer was delayed up to 9th December 2008 should be paid to the purchaser. Accordingly judgment is entered for the plaintiff against the defendant for the sum of Ksh. 22,000,000 x 6.75% p.a. x 109 = Ksh.523,422.95/-.

9. The defendants are hereby ordered to honor the professional undertaking by paying the said sum within a period of 30 days from day. Failure to do so, the plaintiff is entitled to enforce the professional undertaking. The plaintiff will also have the costs of this application.

JUDGMENT READ AND SIGNED ON 26TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE