



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

Civil Case 13 of 2009

GREAME JOHN THOMSON.....1ST PLAINTIFF
ROSEMARY NJERI THOMSON..... 2ND PLAINTIFF

VERSUS

MARK WANDERA OKINGO DEFENDANT

RULING

Coram: Mwera J.

Mrs Wambugu for Applicant

O. Ogutu for Respondent

The Chamber summons about to be determined dated 19.10.09 was brought under Order 6 Rule 13 (1) (b), (c), (d) of the Civil Procedure Rules. The main prayer was that the defence herein (amended on 17.8.09) be struck out and judgement entered for the plaintiff, on the grounds that it was a sham, an abuse of the court process and that it raises no triable issues at all. Mrs. Wambugu relied on the supporting affidavit of the 1st plaintiff to highlight the prayers in the plaint in the face of the amended defence. Mr Ogutu filed grounds of opposition together with a preliminary point of objection – all which were argued in the proceeding.

This suit arose from a sale agreement of 15.8.2008 between the plaintiff/vendors and the defendant/purchaser of a lease interest in the property described as LR No. 1008/76 NRI. That agreement contained clauses on the consideration, the mode of paying it, giving vacant possession and issuing of notices etc.

Mrs Wambugu told the court that all the terms contained in the agreement were not in dispute save that the defendant had defaulted in either paying the initial deposit of sh. 3.5m (of sh. 35m. purchase price) and /or proceeding with his part of the bargain and accordingly the amended defence was a sham which should be struck out and judgement entered in favour of the plaintiff, in terms of the sought special damages, mesne profits etc.

The defence, it was said, admitted the existence of the sale agreement as exhibited in court. It was duly executed and thus binding on both parties. The defendant had not put up an issue in his defence that required investigation by evidence during a trial.

It was submitted that the sale agreement was not executed subject to the defendant obtaining mortgage finance from any 3rd party or at all.

The failure by the defendant not to pay the deposit and thus take possession of the property and later complete the deal, did not mean that the sale was not properly executed, or that it was invalid in any way.

As regards the issue of notice to complete by the vendors, the court heard that on 28.10.08 the plaintiff's gave such a notice and filed

this suit on 14.1.09 and in any event these were matters of fact that ought to have been deponed to in a replying affidavit.

Coming to the preliminary objection Mrs Wambugu's position was that such should only be confined to points of law that require no investigation by evidence. Mr Ogutu's point here was that the sale agreement annexed to the supporting affidavit was improperly on record and should be expunged. At the time of arguing it Mr. Ogutu cited S.19 of the Stamp Duty Act (Cap 480) to the effect that no stamp duty had been paid on it and therefore the sale agreement could not be relied on in evidence in these proceedings.

On this point Mr Ogutu continued that no affidavit was necessary to raise a point of law. He proceeded to argue that it is only at the trial stage, and not at this interlocutory stage, that the defendant would demonstrate that the sale agreement in issue was indeed subject to mortgage finance forthcoming. The court found this angle of argument rather intriguing in the light of the fact that even as the plaintiffs had argued or put forth affidavit evidence that the sale contract did not have a condition of the defendant procuring mortgage financing, yet the defendant did not find it fit to demonstrate so with affidavit evidence except to fall back on the claims in the defence. He was bound even at this stage to demonstrate by evidence, not mere claims as pleaded, that in fact the sale agreement was subject to mortgage financing and accordingly that part raised a triable issue. In this court's perusal of the sale agreement no such term/condition featured. As much as without demonstrating how the rest of the agreement hinged on the failure to pay the deposit, if not as a breach of that agreement, counsel insisted that this suit ought to proceed to trial, nonetheless, where the defendant would show why he defaulted. That this was not so clear a case as to warrant at this stage the court to strike out a pleading (the defence) and not allow parties to canvass the whole thing at the trial.

Mr Ogutu went on to argue that possession was not taken and so the plaintiffs could not claim the licensee's fees and that the defence need not appear to succeed ultimately for it to be left until the trial of suit. Raising even one single triable issue was enough. To him the issue of inadequate notice to complete (10 days given and not 21 days as per the sale agreement) together with stamp duty not having been paid on the sale agreement, were sufficient bases not to strike out the amended defence.

To begin with the preliminary point: such should be a point of pure law, with facts being accepted as pleaded, which when successfully argued, may dispose of the whole case before court. (see Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd. [1969] E.A 696). In this case the point of law was not pleaded but raised at this point when the plaintiffs sought to strike out the defence. It was not so clear in the notice of preliminary objection dated 5/2/10 but at the hearing thereof S. 19 of the Stamp Duty Act was put forth:

“19 (1) subject to the provisions of subsection 3 of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –

- (a) in criminal proceedings; and
- (b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped”.
- (3) (5)

The above is the relevant part of S.19. Mr. Ogutu told the court that the sale agreement herein had not been duly stamped under that provision of law. Mrs Wambugu did not appear to have a contrary view on this. But she intimated that the defendant appeared to approbate and reprobate here. While admitting in the defence the sale agreement in its entirety, the defendant was inclining to impeach it here. The court was disposed to agree with the plaintiffs and it adds that much as sale agreements fall under S. 19 aforesaid, they cannot become invalid because of non-stamping, and for all reasons or purposes.

The agreement here is admitted by both sides and this even if it cannot pass muster under S. 19. It is nonetheless a contract inter se. As between the parties, it is valid.

All arguments put up by Mr Ogutu did not seem to have merit in the face of this chamber summons except the one of

notice to complete as per clause 10 of the sale agreement which reads in its particular parts:

“ 10. If the Purchaser shall fail to comply with any provisions of this agreement including the provisions as to payment of the purchase price, the Vendors shall be entitled to serve a Notice in writing within Twenty one (21) days from which the date on which such Notice is served on the purchaser. If the Purchaser shall fail to remedy the breach before the expiry of the said Notice, then the Vendors shall be entitled at the Vendors’ sole discretion either

- (i)
- (ii)
- (iii) to sue the Purchaser for specific performance and or damages.”

It was argued here that such a notice was issued on 28.10.08 by the plaintiffs’ lawyers. It read that the defendant was in breach of the sale agreement by failing to pay the deposit of sh. 3.5m or the licence fee of sh. 120,000/= pm and so he had to:

“TAKE NOTICE that unless we receive the said sum of Ksh. 3,500,000/= together with the licence (sic) for the months beginning September 2008 within the next Ten (10) days hereof, our instructions are to commence court proceedings for damages for breach of contract among other things without revering (sic) back to you at your own risks as to costs.”
(underlining supplied)

While Mrs.Wambugu maintained that that was due notice under the sale agreement herein, Mr Ogutu did not agree. With the terms of the sale agreement speaking of 21 days of notice and the notice herein served referring to ten days notice the parties have a dispute. It is a triable issue, even if it is one only, to be investigated by evidence at the trial.

Accordingly the orders sought will not issue. And in the circumstances of this case costs will be in the cause.

Orders accordingly.

Delivered on 23.2.10

J. W. MWERA

JUDGE