

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 255 of 2009

JAYESH SAINIPLAINTIFF

VERSUS

CHARLES MUTISYA NYAMAIDEFENDANT

RULING

1. The plaintiff's claim against the defendant is based on an agreement dated 26th January 2007 in which the defendant agreed to sell to the plaintiff a property KNOWN AS TITLE NO. NAIROBI/BLOCK 97/423 at an agreed price of Ksh.5 million. It was an agreed term in the said agreement that upon execution of the agreement, the plaintiff would pay and he paid a sum of Ksh.2 million being the deposit. The said sum was paid towards the defendant's loan account with Housing Finance Company of Kenya.
2. The balance of Ksh.3 million was supposed to be paid within 45 days after the defendant furnished the plaintiff with the completion documents. The plaintiff caused his company to issue cheque No. 002012 for Ksh.2 million which was paid on account of the defendant's loan account with HFCK. However the defendant failed to complete the transaction as agreed despite demand having been issued, the defendant also failed to refund the money according to the terms of the agreement which required the defendant to refund the money with interest at the rate of 15%.
3. The plaintiff thus filed the present suit; the defendant filed a defence and a counter claim. In the defence the defendant denied liability and filed a counter claim seeking for a declaration that there was a breach of contract on the part of the plaintiff. That is when the plaintiff filed the notice of motion dated 19th October 2009 seeking for the defence and

counter claim be struck out and judgment be entered for the plaintiff as prayed in the plaint. In the alternative, the plaintiff sought for summary judgment for the sum of Ksh.2 million together with costs and interest at the rate of 15% per annum from 26th January 2007 until payment in full.

4. This application is premised on the grounds stipulated on the body thereto and the supporting affidavit of **Jayesh Saini** sworn 19th October 2009. The applicant has annexed a copy of the sale agreement dated the 26th January 2007 between him and the defendant for the sale of property known as NAIROBI/BLOCK 97/423. The property was to be sold for a sum of Ksh.5 million. Out of which 2 million was paid by the applicant and was acknowledged by the defendant. The transaction was supposed to be completed within twenty days. The applicant annexed a copy of a letter addressed to the defendant requesting him for the completion document and giving him twenty one days notice to complete the transaction and invoking the provisions of the law society conditions of sale.
5. Counsel for the plaintiff also wrote a demand letter to the defendant but there was no response. The defendant did not file any replying affidavit; he relied on the grounds of opposition. Counsel for the defendant argued that the defence and counter claim raises triable issues which should proceed to trial especially the allegation that the plaintiff is guilty of the breach of the contract.
6. Under the provisions of order V1 rule 13 of the Civil Procedure Rules at any stage of the proceedings, the court may order to be struck out or amended any pleadings that disclose no cause of action or a defence if it is an abuse of the court process. The issue for determination in this application is whether the defence raises triable issues. The plaintiff's claim is for the deposit he paid for the sale of a property which transaction was not completed according to the agreement. The plaintiff has been able to demonstrate that he issued a cheque on account of defendant towards the sale of the property.

7. The defendant signed the sale agreement, acknowledged receipt of the cheque, but failed to complete the transaction according to the sale agreement. I have also considered the defence and counter claim by the defendant. He is alleging a breach of contract although he did not file any replying affidavit to controvert the facts regarding the sale agreement, the payments of the sum of Ksh.2 million and his failure to respond to the notices requiring him to complete the sale agreement. For whatever it is worth I will not strike the defence and the counterclaim, it can proceed for trial.

8. However I will enter partial summary judgment in favour of the plaintiff for the sum of Ksh.2 million together with costs and interest at the rate of 15% per annum from 26th January 2007 until full payment. The plaintiff shall have the costs of this application.

RULING READ AND SIGNED ON 5TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE