



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 586 of 2005
GERALD MUTURI MAINA PLAINTIFF
VERSUS
MAVJI RAMJI PATEL DEFENDANT

RULING

The plaintiff entered into an agreement with the defendant for the sale of some property known as LR. No.209/1832 for a consideration of Kshs.10 million. Pursuant to the said sale agreement the plaintiff paid a deposit of Kshs.3 million upon signing of the said agreement leaving a balance of Kshs.7 million.

It was an express term and condition of the said sale agreement that the plaintiff was to pay the defendant the balance of the purchase price on or before the completion date. The said completion date was ninety (90) days from the date of the agreement which was 23rd September, 2003.

It is the plaintiff's case that the defendant has breached the terms and conditions of the said sale agreement by refusing, neglecting and/or failing to complete and/or transfer the said parcel of land to the plaintiff.

As a result, the plaintiff has filed a suit demanding that the court compels the defendant by an order of specific performance to complete the sale agreement dated 23rd September, 2003. The plaintiff also claims general damages.

In the alternative, and without prejudice to the said prayers, the plaintiff claims against the defendant a full refund of all the monies paid to the defendant pursuant to the terms and conditions of the said sale agreement with accrued interest at 30% per annum with effect from 23rd September, 2003 until final payment.

In his Statement of Defence, the defendant denied the plaintiff's claim and blamed his non performance or compliance with the said agreement on the office of the Commissioner of Lands. At the end, he prays that the plaintiff's suit be dismissed with costs. That notwithstanding, he is prepared to refund the sum of Kshs.3 Million deposited by the plaintiff in execution of the said agreement but denies that the plaintiff is entitled to interest at the rate of 30% as claimed.

There is now before me an application by way of Chamber Summons under Order VI rule 13(1) (b) (c) and (d) and rule 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the defence filed herein on 6th September, 2005 be struck out and judgment be entered against the defendant as prayed in the plaint and that, the costs of the application be provided for.

The said application is supported by an affidavit sworn by Gerald Muturi Maina the plaintiff herein, in addition to the following grounds:

- (a) **The respondent's defence is scandalous, frivolous and vexatious;**
- (b) **The defence filed herein is meant to delay the quick and fair trial of the suit;**
- (c) **The defence amounts to an outright abuse of the court process; and**
- (d) **The defendant has both the suit premises and part payment of the purchase price.**

In reply thereto, the defendant has sworn an affidavit in which he reiterates the contents of his defence but instructively, avers that the contract cannot be performed as the same has been frustrated and/or materially altered by the parties thereto rendering the same incapable

of specific performance.

In the affidavit in support of the application, the plaintiff reiterates the contents of his plaint but adds that the respondent has not demonstrated his willingness to transfer the suit premises and that he has been advised by his advocates that the defendant's defence does not answer his entire claim and that it is an outright abuse of the court process.

On my part, I have gone through the pleadings and all the material before me resting with the present application. It is trite law that the court would always seek to sustain a pleading except where it is clear and unambiguous that to retain the same would be prejudicial to the other party and that the same is likely to frustrate the completion of a suit. I also bear in mind that, the striking out of any proceeding is a drastic measure, which should be done very sparingly but in consideration of the interest of all parties.

The plaintiff paid the sum of Kshs.3 million in compliance with the terms of the said agreement. He has said in his pleadings that, he is ready, able and willing to complete his part of the sale agreement by paying the defendant the remaining balance of Kshs.7 million to enable him take possession of the suit premises. It is however, the defendant's default that has impaired the completion of the said transaction.

On the other hand, the defendant blames the office of the Commissioner of Lands for the frustration and inability to complete the transaction on his part. The foregoing notwithstanding, I have looked at paragraph 7 of his defence which reads as follows:

“The defendant avers that he is ready and willing to complete his part of the sale by transferring to the plaintiff the suit property. He is however, unable to do so until the title of the property is issued by the Commissioner of Lands.”

The responsibility to obtain title from the Commissioner of Lands was never that of the plaintiff but the defendant. There was no responsibility bestowed upon the plaintiff upon whose failure he would be held responsible for the frustration of the agreement.

Further to paragraph 7 of the defence aforesaid, paragraph 7 of the Defendant's replying affidavit reads as follows:

“That I have always been willing to perform the contract with relation to the property known as LR. No.209/1832/2 but have been unable to do so as the Commissioner of Lands has been unable to issue me with a new title to the property in spite of numerous attempts and follow-ups that I have made with the Commissioner of Lands. I annex hereto and mark “MP2” a bundle of documents evidencing the same.”

It is clear to me that, the breach is on the part of the defendant and not the plaintiff. It is clear to me also that, the frustration of the agreement cannot be attributed to the plaintiff at all. It is also clear that the defence raised by the defendant cannot be said to contain any triable issues. In that case therefore, the application by the plaintiff cannot be resisted by the defence filed and the replying affidavit that has been sworn by the defendant. On my part, taking all the issues in totality, going by the pleadings herein and the submissions filed by counsel, I find that the defence filed by the defendant on 6th September, 2005 does not contain any triable issue. If anything, it is intended to delay an early disposition of this suit.

That being the case, the application by the plaintiff to strike out the defence herein succeeds. I order that the said defence is hereby struck out with costs to the plaintiff. The plaintiff shall now proceed to list the suit for formal proof.

Orders accordingly.

Dated, signed and delivered at Nairobi this 20th day of April, 2010.

A. MBOGHOLI MSAGHA
JUDGE