



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

Civil Case 46 of 1988

DR. MAGDALINE WAMBUI WARUI.....PLAINTIFF

VERSUS

KERAGU GECAGA.....1ST DEFENDANT

RUTH NJERI GECHAGA.....2ND DEFENDANT

JUDGMENT

The Plaintiff filed this suit against the defendants for specific performance for breach of a contract of sale dated 1st July 1987. The Defendant on being served with summons filed a defence and counter-claim for breach of the contract on the part of the Plaintiff. The suit was heard by Bosire J (as he then was) and was dismissed with costs on 9th February 1996. But the issue of counter-claim for the assessment of quantum of damages payable to the Defendant for breach of the contract by the Plaintiff was not settled.

It was agreed by both Counsel appearing for the Plaintiff and Defendant that the assessment of damages would proceed by way of formal proof. The suit was fixed down for hearing on 27th June 2005. But when the case came up for hearing both counsel addressed the court in the following manner.

Mr. Okeyo for the Defendant submitted as follows:-

“The Defendant obtained judgment against the Plaintiff on 9th February 1996 and the matter was fixed down for formal proof. But the parties have been negotiating and there are serious offers on the table. The parties found it necessary to engage the services of a Certified Public Accountant but unfortunately the report of the accountant is not ready. The Plaintiff has quantified to settle at Sh. 50,000/= but the Defendant expected a larger figure than that which necessitated the services of an accountant.

The negotiations started on 2nd June 2004. This hearing date was taken while the negotiations were on. The problem was the money to pay the accountant for the settlement of the accountant’s fees to enable him to release the report which we will table in court. I have talked to counsel for the Plaintiff and he has agreed to indulge the subject to the court’s indulgence”

Mr. Thangei appearing for the Plaintiff confirmed that negotiations were going on and that the matter was going to be settled out of court and that if done would save the court’s time. On that basis the court

was persuaded to grant the adjournment and the matter was adjourned to 29th July 2005 for mention to record a settlement.

On 29th July 2005 when the matter was mentioned settlement had not been realized and the matter was by consent stood over to 2nd November 2005 by which time the parties would have reached an agreement for settlement.

Thereafter nothing took place until 15th April 2008 when both counsel appeared before me and recorded a consent order in the following terms:-

“By consent parties to file written submissions on damages within 14 days. The matter to be mentioned on 29th April 2008 to confirm compliance”

The earlier consent order was recorded on 27th June 2005 when both counsel informed the court that negotiations were at an advanced stage to settle the suit out of court and on that ground they secured an adjournment and agreed on a date when they would appear in court to record a settlement.

This departure about 4 years later and without first informing the court to what became of the negotiations for settlement amounts to an abuse of the process of the court and cheating on their clients. This is absurdity. When advocates have been hired to represent parties in court they are duty bound to accord their clients guidance and professional advice and should not muddle with the case.

This suit was filed by the Plaintiff on 8th January 1988 seeking general damages for breach of contract. The Defendant on being served with summons filed a defence on 16th March 1988 in which they denied the Plaintiff's claim and at the same time filed a counterclaim against the Plaintiff for general damages for breach of contract.

The suit was heard by Bosire J (as he then was) who delivered a judgment on 9th September but ordered that the counter-claim could be determined later.

On 12th May 1998 both Counsel for the Plaintiff and for the Defendant appeared before Githinji J. (as he then was) and it was agreed and a consent order was recorded that the hearing for formal proof do proceed before any judge for assessment of damages.

Thereafter nothing took place until 4th May 2004 when both counsel for the Plaintiff and the defendant appeared before Ojwang J. and applied for adjournment on the ground that the witness the Defendant needed to call for the counterclaim who is an accountant was not in court and negotiations to settle the matter out of court had commenced. The matter was taken out of the hearing list and stood over to 4th June 2004 for mention to record a settlement. On 4th June 2004 there was no appearance for the parties. The matter again resurfaced on 29th November 2004 when Counsel for the Defendant informed the court that he was not ready to proceed with this counter-claim because his only witness who is an accountant had lost a relative and therefore he would not be available.

When the matter came before me for hearing on 27th June 2005 the same story by Counsel for the Defendant the only witness he intended to call was an accountant but unfortunately his report is not available since the Defendant has been unable to pay the accountant his fees to enable him release the report which he would table in court and sought a mention date to come and record a settlement. The court indulged Counsel and the matter was adjourned to 29th July 2007 for mention to record a settlement. On 29th July 2005 when the parties appeared in court no settlement had been reached and the matter was adjourned to 2nd November 2005 for mention to record a settlement. On 2nd November 2005 when the matter came up again both Counsel informed the judge that parties had not reached a settlement and requested for the matter to be stood over generally.

Thereafter nothing came up until 15th April 2008 when the parties recorded a consent order in the following manner:

“By consent parties to file written submissions on damages within 14 days.”

There were no submissions filed by the Plaintiff. But the Defendant did file his submissions in which he submitted that the Plaintiff had instituted this suit and obtained an injunction which restrained the

Defendant from selling the property to a third party. The Defendants had identified a third party who was willing to purchase the property at the time the suit was instituted and who was willing to pay a purchase price of Sh 1,800,000/=. The proposed transaction was not

able to proceed to conclusion in light of the suit and the consequential temporary injunction that was obtained by the Plaintiff. That is not enough to enable the court to assess damages for the Defendant.

A departure from the earlier order that the counter-claim do proceed by way of formal proof was a misdirection. The Defendant ought to have been led in evidence and produce documentary evidence to prove that there was actually a Sale Agreement between the defendant and the 3rd party and the agreed purchase price and what became of it. Failure by the defendant to formerly prove his counterclaim was fatal and it follows that his claim in the counterclaim must fail as there is no sufficient material before the court to enable it assess the damages.

Accordingly the defendant's counterclaim for damages is dismissed. Due to peculiar circumstances of this case I make no order as to costs

Dated and delivered at Nairobi this 11th day of July 2008.

J. L. A.OSIEMO

JUDGE