



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

Civil Case 118 of 2003

CYKA HOLDINGS LIMITED..... PLAINTIFF

VERSUS

JOHNSON JOSHUA KINYANJUI.....1ST DEFENDANT

VINUBHAI VIRPAL SHAH.....2ND DEFENDANT

HARITH SHETH T/A HARITH

SHETH ADVOCATE.....3RD DEFENDANT

R U L I N G

Before me is a notice of motion filed by the plaintiff pursuant to the provisions of Order XII Rule 6, Order XXXV Rules 1, 5 and 6 of the Civil Procedure Rules, Sections 3A, 25 and 81(f) of the Civil Procedure Act. The plaintiff sought summary judgment be entered against the defendants, jointly and severally as prayed in the amended plaint. The plaintiff further prayed for any further order be granted to meet the ends of justice and expediency. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Cyrus Waithaka, the managing director of the plaintiff. The application is opposed. The 3rd defendant, Harit Amritlal Sheth swore a replying affidavit in opposition to the application. Similarly, John Joshua Kinyanjui, the 1st defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard the rival submissions made by Mr. Kibanya on behalf of the plaintiff, Mr. Mugo on behalf of the 1st and 2nd defendants and Mr. Ngunjiri on behalf of the 3rd defendant. I have carefully considered the said submissions, including the authorities cited. I have also carefully read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to enable this court enter summary judgment in its favour as prayed in its plaint. The principles to be considered by this court in determining whether or not to grant an application for summary judgment are well settled. In Industrial & Commercial Development Corporation vs Daber Enterprises Limited C A Civil Appeal No.41 of 2000 (Nairobi) (unreported) the Court of Appeal held at page 1 of its judgment as follows:

“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence

subject to cross-examination – see the case of Wenlock v Moloney and Others, [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable..."

In Giciem Construction Company v Amalgamated Trade & Services [1983] KLR 156, the Court of Appeal held that the power to grant summary judgment should be exercised cautiously bearing in mind that it was intended to apply only in cases where there is no reasonable justification to deny the plaintiff judgment and where therefore it is inexpedient to allow the defendant to defend for mere purposes of delay. The court further ruled that leave to defend the suit should only be granted where the defence raises *bona fide* triable issues. At page 164, Chesoni JA (as he was then) held that:

"As a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."

The facts of this case as I can glean from the pleadings filed by the parties and the submissions made are more or less not in dispute. It is not disputed that the plaintiff on the one hand and the 1st and 2nd defendants on the other, entered into an agreement by which the 1st and 2nd defendants agreed to sell to the plaintiff three plots comprised of sub-divisions of LR No.2250/20. In the agreements the plots were referred to as plots No. 'B', 'C' and 'D'. After the subdivision was approved by the Commissioner of Lands, the said plots were re-numbered LR No. 2250/73, LR No.2250/74 and LR. No.2250/75.

According to the plaintiff, although it paid the purchase consideration in full for the three plots, the 1st and 2nd defendants only transferred to it two parcels of land, being LR No.2250/74 and LR No. 2250/75. It was the plaintiff's contention that it had paid to the 1st and 2nd defendants the sum of KSh.1,000,000/= being the agreed consideration for the said parcel of land known as LR No. 2250/73 (*hereinafter referred to as the suit property*). The plaintiff paid a further sum of KShs.110,000/= being the stamp duty and registration charges. At the time of the conveyance, the 3rd defendant was the advocate of the parties in the said transaction. The plaintiff stated that it paid the sum of KShs.75,904/= as legal fees to the 3rd defendant.

From the pleadings filed, it was apparent that the 1st and 2nd defendants, instead of transferring the suit property to the plaintiff, sold the same to a third party for a higher consideration than the one it had obtained from the plaintiff. The agreements in respect of the said three parcels of land were entered into between 1992 and 1994. Although the 1st and 2nd defendants denied that they were paid the said purchase consideration by the plaintiff, from the evidence which was adduced under oath by the witnesses who testified the criminal proceedings that arose from the said frustrated transaction, it was evident that the plaintiff, through its director, Cyrus Waithaka paid the amount pleaded in the plaint to the 1st and 2nd defendants, either directly or through the 3rd defendant who was the advocate for the said defendants.

The plaintiff annexed documents in support of its application, particularly the letters by the 3rd defendant dated 10th March 1993, 28th February 1994 and 14th March 1994. The plaintiff further annexed copies of the cheques that he either paid directly to the 1st defendant or to the 3rd defendant on behalf of the said defendants. The 1st and 2nd defendants wrote a letter to the plaintiff on 23rd February 1993 acknowledging receipt of the sum of KShs.949,375/= from the plaintiff being in respect of the purchase consideration of the suit property. It was therefore evident that the 1st and 2nd defendants protestations that they had not received the said purchase consideration from the plaintiff lacked any factual basis. The

plaintiff was able to establish, to the required standard of proof on a balance of probabilities, that it paid the full price for the purchase of the suit land. The 1st and 2nd defendants failed to fulfil their part of the bargain by failing to transfer the suit property to the plaintiff. Instead, the 1st and 2nd defendants sold the suit property to a third party for a higher consideration.

It is evident that since the plaintiff can no longer obtain ownership of the suit land, it is only just and fair that the plaintiff be refunded the purchase consideration it paid to the 1st and 2nd defendants. In its defence, the defendants raised an issue regarding whether the plaintiff's suit was barred by the Limitation of Actions Act. It was apparent from the pleadings filed by the plaintiff and the annexures it relied on in support of the present application that the transaction that forms the basis of the cause of action in this suit occurred between 1992 and 1997. The plaintiff filed the present suit in 2003. If it was considered that the agreement in respect of the sale of the suit property was concluded in 1993, then by the time the suit was filed in 2003, the plaintiff's suit was barred by Section 4(i)(a) of Limitation of Actions Act that requires a suit founded on a contract be filed within six (6) years of the date of the said contract.

In the present suit, it was evident that between 1993 and 1997 the 1st and 2nd defendants led the plaintiff to believe that the process of subdividing the original LR No. 2250/20 was being undertaken at the offices of the Commissioner of Lands. It was after 1997, that the plaintiff became aware that the 1st and 2nd defendants had frustrated the contract by failing to have the suit property transferred to it. The plaintiff became aware of this development on 16th June 1997 when the 3rd defendant sent to the advocate of the plaintiff conveyancing documents in respect of the two other parcels of land without transfer documents in respect of the suit property. The plaintiff filed suit on 5th March 2003. It is clear that the plaintiff filed suit within the requisite period of six (6) years. I therefore hold that the plaintiff's suit was not time barred.

Even if I was to agree with the thrust of the defendants' submissions that the plaintiff's suit was time barred, by his undated letter annexed to the affidavit of Cyrus Waithaka as annexure 'CW9', the 1st defendant referred to a meeting which was held at the offices of the advocates of the plaintiffs on 12th May 2000. In the said meeting, the 1st defendant agreed to transfer another parcel of land to the plaintiff in compensation for the suit property. Under Sections 23(1) and 24 of the Limitation of Actions Act, where a party acknowledges indebtedness to the other party, such an acknowledgment constitutes a fresh accrual of right of action. It is therefore evident that under both scenarios, the plaintiff's suit cannot be time barred.

The upshot of the above reasons is that the plaintiff established that it paid to the 1st and 2nd defendants the amounts pleaded in the amended plaint being the purchase price for the suit property which the said defendants failed to transfer to the plaintiff. The agreement for the purchase of the suit property was therefore frustrated. The defence filed by the 1st and 2nd defendants does not raise any triable issue. I therefore enter summary judgment in favour of the plaintiff as against the 1st and 2nd defendants in respect of the amount it established to have paid to the said defendants. For the avoidance of doubt, the 1st and 2nd defendants are hereby ordered to refund to the plaintiff the sum of KShs.1,185,904/= being the purchase consideration paid, the stamp duty/registration fees and the legal fees paid in respect of the frustrated agreement. I will not enter judgment for the sum of KShs.2,050,000/= which the plaintiff claims as damages for loss of bargain. The plaintiff will be required to adduce oral evidence in support of its claim for damages. Damages cannot be awarded in an application for summary judgment.

As regard the 3rd defendant, I decline to enter summary judgment against him since his defence raises triable issues, including the fact that he was acting as an advocate of the parties during the impeached land sale transaction. The 3rd defendant is granted unconditional leave to defend the suit.

In the premises therefore, the application for summary judgment is allowed as against the 1st and 2nd defendants in terms specified above. The plaintiff shall have the costs of the application and part of the claim that it has been able to establish. Interest on the amount adjudged as payable to the plaintiff shall

be at court rates from the date of filing the suit.

It is so ordered.

DATED at NAIROBI this 12th day of NOVEMBER, 2008.

L. KIMARU

JUDGE