



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1872 of 1994

GRACE E. WAMBWAPLAINTIFF

VERSUS

CONTINETAL DEVELOPMENTDEFENDANT

RULING

The plaintiff sued the defendant seeking:

- (a) Specific performance of the Sale Agreement
- (b) An order that the defendant do deliver the lease and title deed in respect of L.R Nairobi/block 82/3231 to the plaintiff immediately.
- (c) General damages to be assessed by the court and costs and interest.

The defendant filed a defence in which, he denied the plaintiff's claim and the suit was set down for hearing. But on the hearing date neither the defendant nor the advocate appeared. The suit proceeded ex parte. At this time the defendant had released the title deed to the plaintiff. The judge in his judgment delivered on 18th Mary 2004 made a finding that since the title had been released before the hearing, prayer (a) and (b) of the plaint had been overtaken by events but award the plaintiff Shs.4,300,000 general damages.

By a Chamber Summons dated 25th March 2004 the defendant sought orders to set aside the ex parte judgment of 18 the March 2004. The Chamber Summons was successfully argued and the ex parte judgment was set aside on the following conditions:

- (1) The defendant pays part of the judgment sum to wit Shs.1,000,000/= in an interest earning account to be opened and operated by both advocates representing the parties herein.
- (2) This should be done on or before 30th December 2005.
- (3) However, if the condition set above is not met by the defendant by 30th December 2005 the plaintiff will be at liberty to execute and recover the judgment sum.

The plaintiff was also awarded costs.

On 13th December 2005 the defendant brought this Chamber Summons challenging those conditions.

The defendant sought orders that the condition for depositing Shs.1,000,000/= imposed upon the

defendant by the order of 1st December 2005 be set aside and or be varied.

Mr. Rach for the applicant submitted that the ex parte judgment having been set aside there was nothing to execute and therefore the conditions imposed by the judge had no basis as there was no judgment sum.

Mr. Ritho for the respondent submitted that the condition imposed upon the defendant of depositing Shs.1,000,000/= was quite in order as the same was only a small fraction of the judgment sum which was Shs.4,300,000/=.

He further submitted that the trial judge had a discretion to impose such conditions and the same cannot be interfered with unless it is proved that discretion was not judiciary exercised. With due respect to counsel for the plaintiff once the ex parte judgment was set aside there was no judgment for execution and therefore the order by the learned judge that failure by the defendant to deposit the ordered amount of Shs.1,000,000/= the plaintiff be at liberty to execute was not tenable as there was no judgment that the plaintiff would execute. The judgment having been set a side the only condition which would be just in the circumstances would have been award of costs.

For the above reasons I allow the defendants' application in terms of Prayer 4 of the Chamber Summons dated 13th December 2005. Prayers 1 and 2 having been granted by Njagi J on 13th December 2005. I award costs of the Notice of Motion dated 6th May 2004 to the plaintiff. But the costs of this chamber Summons dated 13th December 2005 will be costs in the suit. Those are the orders of this court.

Dated and delivered at Nairobi this 23rd day of February, 2007.

.....

J.L.A. OSIEMO

JUDGE