



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Commercial Case 9 of 2004

HEINZ A. THEISSINGPLAINTIFF

VERSUS

DIANI HOMES LTD.DEFENDANT

R U L I N G

In a plaint dated 1st November 2004, Heinz A. Theissing the plaintiff herein, sued Diani Homes Limited, the defendant herein claiming for interalia:

- (a) An order compelling the defendant to carry out repairs and rectification of a house standing on L.R. No. Kwale/Galu Kinondo/762 to a proper standard/condition as per the terms of the agreement between the parties.
- (b) In the alternative, the defendant be compelled to pay the sum of Kshs.3,644,200/- to enable the plaintiff carry out the necessary repairs.
- (c) General damages
- (d) Costs and interest.

The plaint and the summons to enter appearance were served but the defendant failed to enter appearance nor file a defence and this gave rise to an interlocutory judgment being entered against the defendant in default of appearance on 1st February 2005.

The suit proceeded for hearing as a formal proof before Lady Justice Khaminwa on 7th September 2005. Judgment was given in favour of the plaintiff on 16th December 2005.

In a summons dated 14.2.2006, the defendant applied to have the entire judgment set aside on various fronts. The defendant also prayed for leave to defend the suit. In a ruling delivered on 8th May 2006, this court gave the defendant leave to defend the suit on condition that it deposited the decretal sum in an interest earning account jointly held by both lawyers within 45 days failure to which the summons would stand dismissed.

The defendant has now come back to this court seeking for the order to be varied in a motion dated 8.6.2006. That motion is the subject matter of this ruling which is supported by the affidavit of Josef Brunlehner sworn on 8th day of June 2006. Basically the defendant seeks to be allowed to deposit title deeds instead of cash as earlier ordered. The defendant's reasoning is that the company is not yet financially endowed with liquid cash to enable it readily avail in court.

The motion is strongly opposed by the plaintiff who filed a replying affidavit he swore on 3rd July 2006. the plaintiff accused the plaintiff of seeking to procrastinate this matter thus frustrate the plaintiff from enjoying the fruits of his judgment. The plaintiff pointed out that the defendant has not shown that it is unable to financially raise the money.

I have considered the arguments for and against the motion. I have also perused at the pleadings presented to this court plus the accompanying affidavits. The defendant proposes to deposit in court titles Nos. Kwale/Galu/Kinondo/634 and Kwale/Galu/Kinondo/635. These titles are in the names of Narriman Khan Brunhehner. The defendant has filed a valuation report of the property in which each is estimated to be worth Kshs.2,000,000/-. Of course the valuer only considered the market value. He did no take into account the forced sale value. The purpose of providing for security is to ensure that the decree can readily be satisfied in the event that the defendant loses the suit. In this case it is quite evident that if the defendant is allowed to provide security in form of titles as proposed it will be extremely difficult and costly to get the decree satisfied in that it will involve the plaintiff in another circus of filing a suit against the title holder. Even if it was easy, still the plaintiff is not assured of the value of the property. It is admitted by the defendant that the area where the plots are situated is an area which is prone to tribal clashes. This will obviously adversely affect the value of the property. This court will be doing a great injustice to the plaintiff if it acceded to the defendant's prayer. There is no evidence that the defendant is unable to raise the decretal sum. In the end I am not satisfied that the defendant is entitled to the orders prayed for in the motion. The order directing the defendant to provide the decretal sum within 45 days was made on 13/4/2006 and delivered on the 8th day of May 2006. It is now about eight (8) months since the order was made without the defendant complying with the aforesaid order. The plaintiff has been anxiously waiting for justice to be done to enable him reap from the benefits of his judgment or to at least see to it that even if the matter delays he will be compensated by some interest accruing on some amount easily accessible at the end of the matter.

In the end I see no merit in this motion, it is dismissed with costs to the plaintiff. The defendant is directed to comply with the order dated 13/4/2006 and delivered on 8/5/2006 within 15 days from the date of this ruling. In default the consequences prescribed in the order of 8/5/2006 shall take effect immediately.

Dated and delivered at Mombasa this 12th Day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Wameyo for the applicant and Mr. Omondi for the Respondent.