



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

Civil Case 274 of 2004

PETER GITHINJI MAARI.....PLAINTIFF

VERSUS

GEORGE WAWERU WANJOHI.....DEFENDANT

RULING

The plaintiff filed an application under the provisions of Order XII Rule 6, Order XXXV Rule 1(1)(a) and Order L Rule 1 of the Civil Procedure Rules seeking the following orders of this court;

- “(i) *That judgment on admission be entered against the defendant/respondent for Ksh.965,000/= plus costs thereon.*
- (ii) *That the defendant/respondent be further condemned to pay a sum of Ksh.1,300,000/= being 20% of the purchase price as agreed liquidated damages for breach of the suit contract.*
- (iii) *That, in the alternative summary judgment be entered against the defendant/respondent for Ksh.2,265,000/= being the balance of (the) consideration plus liquidated damages in terms of the suit contract herein.”*

The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Peter Githinji Maari, the plaintiff. The application is opposed. The defendant, George Waweru Wanjohi, swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the plaintiff was not entitled to the orders sought in the application. He urged the court to dismiss the application with costs.

On the 3rd May 2005, the plaintiff and the defendant entered into a consent agreement. Judgment on admission was entered against the defendant for the sum of Ksh.965,000/= plus proportionate costs and interest from the date of filing suit. The parties agreed that the application for summary judgment was to be argued before court and a ruling thereafter rendered. The plaintiff fixed the application for hearing and duly served the defendant. On the date scheduled for the hearing of the application, neither the defendant nor his counsel attended court. The court ordered the plaintiff to proceed with the application, the absence of the defendant notwithstanding.

Mr. Chege for the plaintiff submitted that the issue in dispute arose from an agreement which was entered between the plaintiff and the defendant in respect of the sale of a parcel of land at Nanyuki Township known as L.R. No.510316. The agreed purchase consideration was Ksh.6.5 million. The defendant made part payment of the purchase consideration. The plaintiff immediately transferred the property to the defendant before the defendant had completed paying the balance of the purchase consideration. Mr.

Chege submitted that the defendant subsequently failed to pay the balance of the purchase consideration within the stipulated period. He explained that in accordance with Clause 7 of the agreement which was annexed to the supporting affidavit as annexure “PGM2”, the defendant was liable to pay an amount equivalent to 20% of the purchase consideration as liquidated damages if he breached the contract.

Mr. Chege submitted that the defendant therefore ought to be ordered to pay the said sum of Ksh.1.3 million as he was in breach of the said agreement. He maintained that the defendant had recognized that there existed a penalty clause in the agreement which was binding on the defendant once it was established that the defendant was in breach of the terms of the agreement. Mr. Chege submitted that the issue of the existence of another suit at the Meru High Court should not distract the court from making appropriate findings in the present suit. He submitted that the suit at Meru was not between the parties to this application. It was his submission that the replying affidavit filed by the respondent was meant to justify his breach of the agreement. He urged the court to allow the application with costs.

I have read the pleadings filed by the parties to this application in support of their rival positions. I have also considered the submission made by Mr. Chege on behalf of the plaintiff. The issue for determination by this court is whether the plaintiff established a case to entitle this court to enter summary judgment entered against the defendant. The principle to be considered by this court is determining whether or not to allow an application for summary judgment were enunciated by the Court of Appeal in the case of **Momanyi vs Hatimy & Anor [2003] KLR 545 at page 551**; where the court held that;

“There is no discretion to be exercised if triable issues have been disclosed in an application for summary judgment. In the case of Osudo vs Barclays Bank International Ltd [1981] KLR 30 this court stated that;

‘If upon an application for summary judgment a defendant is able to raise a prima facie triable issue as the appellant did in this case, there is no room for discretion. There is only once cause for the court to follow i.e. to grant unconditional leave to defendant’.”

Summary judgment can only be entered in mixed claims such as the present case where one of the claims is liquidated and severable from the rest of the claims. In the case of **Trust Bank Limited & Michael Muhindi vs Investec Bank Limited Civil Appeal No.258 and 315 of 1999 (unreported)** the Court of Appeal stated that;

“There is authority, to wit, Gupta vs Continental Builders Ltd [1978] KLR 83, that in mixed claims where one of those is liquidated, then the court has jurisdiction, upon application to enter summary judgment only on the part of the claim which is liquidated. But, in our view, that is only possible where the liquidated claim is severable from other claims and can be dealt with separately without doing any violence to the other claims.”

In the present application, the plaintiff is seeking this court to enter summary judgment against the defendant, in what he terms as liquidated damages. There is no dispute that the plaintiff and the defendant entered into an agreement for the sale of land at Nanyuki Township which agreement provided a penalty clause in the event that either party was to breach the contract. In the case of the defendant, Clause 7 of the agreement provided as follows;

“In case the purchaser will be unable to clear the balance of the purchase price i.e. within the prescribed period, the vendor shall be at liberty to sell the said premises to some other persons and refund the amount paid to her by the purchaser less 20 % of the purchase price for breach.”

The plaintiff established by affidavit evidence that the defendant breached the agreement when he failed to pay the balance of the purchase consideration within the stipulated period. At the time the plaintiff filed the suit, the defendant had not paid a balance of the sum of Ksh.985,000/=. As earlier stated in this ruling, when the plaintiff filed the present application, the defendant conceded that he owed the said balance of the purchase price. Judgment was entered by consent for the sum of Ksh.965,000/=.

The issue for determination by this court is whether the further sum of Ksh.1.3 million claimed by the plaintiff is a liquidated claim which can be granted in an application for summary judgment. It was clear that the plaintiff is of the view that the said sum of Ksh.13 million is liquidated damages. The basis of his claim is Clause 7 of the agreement which has been reproduced above. A scrutiny of the said clause reveals that the said sum sought by the plaintiff in this application cannot be granted. The said clause envisaged a situation where the defendant would forfeit 20% of the purchase consideration. In the present case, it was evident that the plaintiff could not invoke the said clause because the property, the subject of the agreement, had already been transferred to the defendant. The remedy for the plaintiff therefore was to sue for damages for breach of contract. The plaintiff did exactly that when he filed the present suit. One of his prayers was that he should be paid liquidated damages for breach of contract. A claim for damages cannot be granted in an application for summary judgment. The jurisdiction of this court to grant an application for summary judgment is restricted to liquidate claims only.

The upshot of the above reasons is that the application by the plaintiff for summary judgment to be entered against the defendant for damages cannot succeed. It is hereby dismissed with costs to the defendant.

DATED at NAKURU this 21st day of November 2007

L. KIMARU

JUDGE