



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

CIVIL SUIT 295 OF 2000

KARIM JAMAL.....PLAINTIFF

VERSUS

SHAFFIQUE ALIBHAI.....DEFENDANT

JUDGEMENT

The plaintiff claims from the defendant the sum of KShs.5,000,000.00 being the sum paid by the plaintiff to the defendant as purchase price of 1 acre of L.R. No.21288 (hereinafter “*the suit property*”) which property could not be transferred to the plaintiff. The plaintiff further claims interest upon the said sum at the rate of 25% p.a. from 5.9.1997 till payment in full. The agreement of sale is said to have been made on 18.4.1997. The plaintiff also claims damages for fraud and rescission of the said agreement.

The basis of the plaintiff’s claim is that the defendant induced him to enter into the sale transaction and represented to the plaintiff inter alia that he held a leasehold title over the suit property and that he was able to transfer the suit property to the plaintiff which representation was in fact not true as the defendant was not in a position to effect the said transfer. In the premises the plaintiff pleaded that the said representation was fraudulent, false, untrue or reckless. The plaintiff further pleaded that on the discovery of the misrepresentation, he, by letter dated 21.5.1998, repudiated the said agreement and claims the said purchase price as the consideration for the payment has wholly failed.

The defendant denies the plaintiff’s claim and invokes the Doctrine of Caveator Emptor (“**Buyer Beware**”). In the alternative, the defendant avers that the plaintiff should have carried out a search of the title to know whether the defendant could sub-divide and transfer the suit property. The defendant further avers that the plaintiff has come to court with dirty hands in that the sale agreement does not disclose the advocates engaged in the conveyance; that the date of last payment is not disclosed and that the sale was to be completed within 90 days.

The defendant further pleads that the plaintiff is in breach of the sale agreement and made it impossible for the defendant to comply with the terms of the agreement. The misrepresentation, fraud and the breach alleged in the plaint are denied. The defendant has further averred that the sale agreement was conditional on payment of KShs.5,000,000.00 which the plaintiff failed to pay. The defendant has further pleaded that the completion date was 90 days from the date of issue of a Deed Plan which event has not occurred with the result that the defendant is not in breach of the sale agreement but to the contrary it is the plaintiff who has breached the agreement.

In the premises, the defendant sets up a counterclaim that the plaintiff furnishes evidence of payment of purchase price. He further avers that the plaintiff conned him of KShs. 2.4 million by way of procuring Insurancy policy abroad which turned out to be non-existing or worthless and the defendant claims the said sum by way of counterclaim.

From the above pleadings, the parties framed and filed the following issues for trial:

- 1) Did the defendant offer to sell to the plaintiff and if so did the plaintiff agree to buy from the defendant all that piece of land known as LR. No.21288?**
- 2) Was the agreement referred to in (1) above in writing?**
- 3) Was the purchase price of the suit land KShs.5,000,000.00?**
- 4) Was the agreement executed by both parties on 18.4.1997?**
- 5) Did the defendant represent to the plaintiff that:**
 - (a) He had a leasehold title to the property.**
 - (b) He was able to transfer the leasehold title in the property to the plaintiff.**
 - c) He was in a position to deliver to the plaintiff the following:-**
 - (i) A duly executed transfer of the said property in favour of the plaintiff?**
 - (ii) All consents (if any) necessary for the registration of the transfer?**
 - (iii) All documents of title relating to the property which were in the vendor's possession including the deed plan?**
 - (iv) Discharge of charge (if any) duly executed together with disbursements thereon?**
 - (d) He could cause the said land to be sub-divided into separate portions and sell one portion thereof to the plaintiff.**
 - (e) He could effect the sub-division and transfer within 90 days of the date of the issue of the deed plan.**
- (6) Did the plaintiff pay the defendant KShs.5,000,000.00?**
- (7) Were the defendant's representations referred to in 5 above true?**
- 8) Did the defendant make the said representations fraudulently and either well knowing that they were false and untrue and recklessly not caring whether they were true or false?**
- 9) Did the plaintiff repudiate the Sale Agreement vide his letter dated 21.5.1998?**

In his evidence, the plaintiff testified that he had been a long time friend of the defendant long before the agreement of sale of the suit property. Before the said agreement, the defendant owed the plaintiff money. He agreed to buy the defendant's suit property at the consideration of KShs.5,000,000.00. The agreement was reduced into writing on 18.4.1997. The defendant did not give him the title and subsequently told the plaintiff to do what he liked, thereby provoking this suit.

The plaintiff testified further that, the defendant did not own the suit property and could not therefore transfer the same to the plaintiff. The suit property was in the name of Noordin Nanji in Trust. The said Noordin Nanji was to later transfer his interest to the defendant.

The plaintiff instructed M/S Shapley Barret Advocates in the transaction and the defendant instructed M/s Archer and Wilcock. Despite correspondence that the defendant perfects his title, the title remained in the name of Noordin Nanji and Acro Traders. Before discovery of the fact that the property was not in

the name of the defendant, the plaintiff had already paid him the purchase price. The plaintiff referred to cheques drawn in favour of the defendant amounting to KShs.2,550,000.00. The plaintiff further testified that some payments were made before the sale agreement on friendly terms and all the payments were included in the purchase price of KShs.5,000,000.00.

Finally, the plaintiff testified that he sought the aid of his community to try to recover his money from the defendant. The defendant is also a member of the same community. Selected elders of the community met at Serena Hotel on 24.3.2001 and minutes thereof were taken by the defendant. In attendance were inter alia the parties hereto, the defendant's brother Ike Alibhai and their local Religious Leader DW2. The minutes were signed by the defendant. At the meeting it was agreed that the defendant pays KShs.6,000,000.00 all inclusive. The meeting was held in anticipation of the hearing of this case and the parties advocates were to record the agreement. In the same meeting, the defendant offered to transfer to the plaintiff a Naivasha piece of land at his cost.

The plaintiff further testified that the defendant did not comply with the agreement reached at Serena Hotel. He did not also transfer the Naivasha plot to the plaintiff. The plaintiff explained that the figure of 6 million arrived at at the Serena meeting was a settlement amount in an attempt to amicably settle the dispute between them. The defendant continued to flout the attempt at settlement.

In the result, the plaintiff contended that, he was entitled to the orders sought in his plaint. He produced all the 13 documents in his bundle of exhibits to support his testimony.

On cross-examination, the plaintiff testified that a transfer would take place after a deed plan and he did not know whether the same had been issued. He also testified that some payments were made before the date of the agreement and that in total he paid more than the purchase price. The plaintiff maintained that the meeting at Serena Hotel was an attempt to settle the dispute between them and not for any other purpose. He denied that he was the one in breach of the agreement.

The plaintiff called one Amin Akberali Manji (PW2). He testified that he is the Managing Director of Mini Bakeries and knows the parties hereto who also belong to his community (Ismaili Community). He was also an Imam of one of their mosques. At the behest of the plaintiff (PW 2) called a meeting to resolve the dispute between the parties hereto. The meeting took place at Serena Hotel over breakfast and was attended by, inter alia, the parties hereto and the defendant's brother Ike Alibhai. According to PW2, it was resolved that for the sum owed to the plaintiff of about 5 or 6 million the defendant was to transfer a Naivasha piece of land to the plaintiff. The witness identified the Minutes of 24.3.2001 and testified that all were in agreement and no complaints were raised even later.

The plaintiff then closed his case and the defendant took the witness stand. He testified that indeed the sale agreement was entered into by them as testified by the plaintiff but that the purchase price of KShs.5,000,000.00 was not paid by the plaintiff within the period specified in the agreement. He told the court that the plaintiff only paid KShs.2.5 million by cheques and as the balance was not paid he was not bound by the agreement. He further testified that he is the owner of the suit property as per the Trust Deed produced by the plaintiff. With regard to payments made over and above the said sum of KShs.2.5 million, the defendant testified that the same were in respect of different transactions involving insurance refunds due from the plaintiff to the defendant.

With regard to the minutes of 24.3.2001 the defendant testified that the same were in respect of insurance refunds and the property involved was different. He contended that, if the plaintiff were to pay balance of purchase price, he would complete the conveyance of the suit property to him.

On cross-examination, the defendant denied that he was in breach of the agreement and reiterated that the minutes of 24.3.2001 related to insurance issues and not the dispute before the court even though the insurance issues were not before any court. Although the defendant testified about the insurance relationship with the plaintiff, he did not produce the relevant policies of insurance and did not write to the plaintiff about his breach of agreement.

At the close of the evidence counsel agreed to submit in writing which submissions were filed by 13.7.2007. I have considered the evidence and the said submissions of counsel. Having done so, I can now answer the issues framed by the parties for trial. The answer to issue No. (1) is in the affirmative: The defendant offered to sell to the plaintiff and the plaintiff agreed to buy from the defendant one (1) acre of LR. No.21288. The agreement dated 18.4.1997, was produced by the plaintiff and was in fact admitted by the defendant in his testimony.

Issue No. 2 and 3 are also answered in the affirmative as the said agreement dated 18.4.1997 was in writing and indicates that the purchase price was KShs.5,000,000.00. The said agreement was executed by both the plaintiff and the defendant has so admitted. Issue No. (4) is therefore also answered in the affirmative.

The agreement describes the interest sold as a leasehold interest. Under the agreement the defendant was obligated to cause the said LR. No. to be subdivided into separate portions and to transfer one portion thereof within 90 days from the date of issue of the Deed Plan. The agreement further stipulated that before the completion date (**which was 90 days from the date of issue of the Deed plan**) the defendant's advocates were to deliver to the plaintiff's advocates the following documents: (1) A duly completed Transfer of the said property in favour of the plaintiff; (2) All consents (**if any**) necessary for the registration of the Transfer; (3) All documents of title relating to the property which were in the defendant's possession including the Deed Plan and a Discharge of Charge (if any) duly executed together with the disbursements thereon.

The agreement speaks for itself. The defendant under the agreement represented that he had a leasehold interest in the suit property capable of being dealt with in the manner envisaged by the agreement. However, the title of the suit property produced by the defendant shows that the same was registered in the name of Acro Traders Limited and Nurdin Nanji. The defendant's interest is not registered against the title. The defendant relies on a document called a Trust Deed to establish his interest. The document was produced by defendant. I have perused the said Trust Deed. The defendant is described as a beneficiary and his interest is held by the Trustee Noorudin Nanji who at the defendant's request has covenanted to transfer to the defendant the said beneficiary's share in the suit property.

It is clear that the defendant's interest in the suit property is not that of a lessee. Indeed his beneficiary interest is held by a third party who was not joined in the agreement of sale between the plaintiff and the defendant.

In the premises, the defendant had not perfected his title in the suit property and could not in my view comply with the terms of the agreement at all. Being of that view, the answer to issue No.5 is that the defendant indeed made representations therein to the plaintiff in respect of the suit property which representations were in fact not true.

With regard to the payment of KShs.5,000,000.00 by the plaintiff to the defendant I have found that indeed the same was made. That finding is based on several facts and circumstances surrounding the transaction between the plaintiff and the defendant. The defendant acknowledged receipt of KShs.2.5 million as being the only payment made towards the purchase price of the suit property. Other payments are acknowledged by him but he denied that the same were towards payment of balance of purchase price. His case was that those payments were in respect of insurance refunds due from the plaintiff to him. He however, did not produce a single insurance policy in respect of which any refund had been made. He further denied that the meeting convened by PW2, his Imam then, at Serena Hotel discussed the dispute in this suit. His case was that the meeting dealt with insurance issues between him and the plaintiff. That contention in my view strayed from the bare truth. The minutes of the meeting were taken by the defendant and in attendance were the parties litigating in this suit together with Amin Manji PW2 and Ike Allibhai the defendant's brother. The meeting found that the **"amount in consideration that was to be paid back by Shaffique Allibhai (the defendant) to Karim Jamal (the plaintiff) is KShs.6.0 million all inclusive"**. The finding was to be formally recorded by the two lawyers representing the parties herein.

The meeting also directed that the matter be resolved prior to the hearing date, failing which a new date in court was to be taken by mutual consent between the parties herein. The defendant conceded that the only dispute between him and the plaintiff which is in court is the present one. He admitted that the dispute involving insurance issues was not pending in any court. It is plain therefore that the meeting of 24.3.2001 held at Serena Hotel discussed the dispute between the parties in this suit.

The fact that KShs.6 million and not 5 million is stated in the minutes of 24.3.2001 cannot in my view exonerate the defendant as the sum was expressed to be all inclusive. Those minutes in my view seal the defendant's fate and his denials are not in good faith. It cannot be believed that the defendant could have admitted indebtedness to the plaintiff when he was claiming against him. It is also illustrative that PW2 who convened the Serena Hotel Meeting testified that the agreement was about whatever sums that were outstanding from the defendant to the plaintiff. The defendant did not also deny that he took the minutes of meeting.

From the above findings, issue No.6 must be answered in the affirmative. Issue No.7 has already been answered in the negative: that the defendant's representations to the plaintiff were in fact not true. They may not have been fraudulent as sufficient particulars of fraud were not given but the defendant made the representations recklessly and did not care whether they were true or not.

In view of the fact that the defendant was not in a position to transfer the suit property to the plaintiff by the completion date and is not even now in such a position, the plaintiff was entitled to repudiate the agreement of sale of 18.4.1997.

Arising from my above answers to the issues framed by the parties for trial, I find that the plaintiff has proved on a balance of probabilities that he is entitled to the sum of KShs.5,000,000.00 being refund of the purchase price of the suit property. As regards interest, the plaintiff claims the same at the rate of 25% p.a. from 5.9.1997 until payment in full. The claim is perhaps made under Clause 5 of the agreement of sale. The Clause is in the following terms:-

"5. In the event of any interest becoming due under this contract the rate of interest shall be Twenty-five per cent (25%) per annum." Interest is also mentioned in Clause 2 with respect to completion moneys which interest under that clause belongs to the vendor. There is no other provision for interest.

In the premises, there is no basis for allowing interest at 25% p.a. from the date claimed. Interest will therefore accrue at court rates from the date of filing suit until payment in full.

With respect to the claim for damages for fraud, I am afraid the same was not proved on a balance of probabilities. I doubt whether the same is awardable anyway, as the plaintiff's claim is for breach of contract.

Turning now to the defendant's counterclaim, I find that no evidence of any kind was tendered by the defendant to establish the same. The same in my view was a smokescreen. It is accordingly dismissed with costs.

In summary, I make the following orders.

- 1) Judgment is entered for the plaintiff against the defendant for the sum of KShs.5,000,000.00 with interest thereon at court rates from the date of filing suit until payment in full.**
- 2) The plaintiff's claim for damages for fraud is dismissed.**
- 3) The plaintiff shall have the costs of the suit.**
- 4) The defendant's counter claim is dismissed with costs.**

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 11th DAY OF DECEMBER, 2007.

F. AZANGALALA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 13th DAY OF DECEMBER, 2007.

M. A. WARSAME

JUDGE

Read in the presence of:-

Mr. Achungo for the defendant and No appearance for the plaintiff in open court.

M. A. WARSAME

JUDGE

13/12/2007