



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

Civil Suit 1168 of 2003

SHEM OBONDI.....PLAINTIFF

VERSUS

SEEMFOD HOLDINGS LTD.....DEFENDANT

RULING

Shem Obondi (to whom I shall hereinafter refer to as “**the Plaintiff**”) sold and transferred his right, title and interest in and to the piece of parcel of land situate in Nairobi known as L. R. No. 209/12807 (“**the suit land**”) to Seemfod Holdings Ltd. (hereinafter referred to as “**the Defendant**”) in February 1996 at a consideration of the sum of K. Shs. 5,000,000/=. That is the purchase price stated in Clause 3 of the Agreement for Sale made on the 7th February 1996 though the transfer dated the 6th May 1996 and registered on the 7th May 1996 states the consideration to have been the sum of K. Shs. 3,000,000/= — presumably to reduce unlawfully the incidence of the stamp duty payable on the instrument, but nothing turns on this as of now. Although the said Agreement for Sale was made between the Plaintiff and the Defendant, a limited liability company, it was not executed under the common seal of the Defendant. The suit land was sold with vacant possession and the sale was subject to the Law Conditions of Sale.

After acquiring the suit land, the Defendant constructed thereon a block of flats. This development started in or about May 1996 and would appear from the Defendant’s evidence to have been completed in March 1997 though the Plaintiff states that it was completed in 1999. The Defendant borrowed the sum of K. Shs. 10,000,000/= from Savings and Loan Kenya Ltd. for this purpose which was secured by a first charge over the suit land. All together, the Defendant built 18 flats 8 of which have been sold and transferred or let to third parties. At the time of the sale and transfer of the suit land to the Defendant, the Plaintiff dealt with a man called Dan Oyallo Songa (hereinafter referred to as “**Dan Songa**”) who at the material time was the Managing Director of the Defendant Company. His widow, Violet Merab Songa, depones in her replying affidavit sworn on the 19th March 2005 that her husband died on the 5th March 2003.

On the 13th November 2003, some eight months after the death of Dan Songa, the Plaintiff instituted this suit against the Defendant seeking, *inter alia*, specific performance of a term of the Agreement for Sale aforesaid by which the Plaintiff claims the Defendant agreed to transfer to him one flat as part of the consideration of the sale of the suit land to the Defendant. That term, contained in Clause 3 of the said Agreement, reads as follows:-

“3. The purchase price is K. Shs. 5,000,000/= cash and an interest of 1 No. 3 – Bedroomed flat on completion of the development of the above plot which Seemfod Holdings acknowledges the undertaking.”

Apart from an order for specific performance, the Plaintiff also seeks an injunction restraining the Defendant from transferring, alienating, charging, wasting or dealing with the suit land pending the hearing of the suit. In the alternative, the Plaintiff prays that he be paid the market value of one of the flats built by the Defendant on the suit land. To that intent, the Plaintiff on the 7th March 2005 applied by Chamber Summons under Orders 38 rule 5 and 39 rules 1 and 2 of the Civil Procedure Rules seeking a number of reliefs including an injunction in the form I have already stated hereinabove; deposit in court of the title documents relating to the suit land; deposit of the sum of K. Shs. 10,000,000/= into court by the Defendant as security; immediate transfer of one of the flats to the Plaintiff; and further that such orders be registered against the title pending trial of the action.

In paragraph 5 of his supporting affidavit sworn on the 3rd March 2005, the Plaintiff deponed:-

“THAT prior to execution of the said transfer, negotiations had taken place between the Respondent [through its then Managing Director (Dan Oyallo Songa)] and myself. As a result thereof, it was agreed between the parties that in addition to payment of agreed purchase price, the Respondent also undertook that upon conclusion of the construction of a block of flats upon the suit plot, it would transfer one unit of three bedroomed flat in my favour.”

The said Agreement for Sale dated the 7th February 1996 was signed by the Plaintiff as Vendor and by someone whom the Plaintiff alleges was Dan Songa on behalf of the Defendant as Purchaser. The two signatures were witnessed by some person alleged to be one Richard Omwela, Advocate, but whose affidavit in support of the application the Defendant did not obtain notwithstanding in particular that the Defendant’s common seal was not affixed to the Agreement giving rise to the question whether the person alleged to have signed the Agreement on behalf of the Defendant had authority to do so.

In her said replying affidavit, Violet Songa, a Director of the Defendant, denies any knowledge of the allegations made in paragraph 5 of the Plaintiff’s supporting affidavit. She denies that the Defendant ever resolved or agreed to transfer to the Plaintiff any interest in any flat. In paragraph 6 of her replying affidavit, she deponed: -

“THAT the Defendant as a limited liability company executes documents under common seal and I believe the alleged execution of an agreement (SO2) by an individual who did not have a power of Attorney from the Defendant, is null and void and not binding upon the Defendant.”

The deponent goes on to state in paragraph 9 of her replying affidavit that she was not aware of the existence of the Agreement for Sale until after the death of her husband when a copy thereof was given to her by the Plaintiff’s Advocates. This averment puts into question the authenticity of the Agreement. In these circumstances, and given that the only consideration stated in the Transfer dated the 6th May 1996 is K. Shs. 3,000,000/=, it is not unreasonable to expect and presume that if negotiations of the nature alleged by the Plaintiff had in fact taken place between him and Dan Songa, Violet Songa as a Director of the Defendant would have been involved in them or at the very least have been informed of them — but those be matters of evidence which can be established only at the trial.

It is also significant to note that apart from the averment in his supporting affidavit that the Plaintiff had been following up his claim to the flat with Dan Songa, the Plaintiff has not produced any correspondence or other evidence to support his deposition. After the letter from the Defendant to the Plaintiff dated the 25th March 1996 confirming payment of the deposit, there appears to be no other letter at all until some seven long years later when on the 13th May 2003, Advocates acting for the Plaintiff wrote to Mrs. Violet Songa raising the claim. At that point in time, the Plaintiff knew that Dan Songa had passed away. Even if the Plaintiff’s claim is genuine, he has not satisfactorily explained the most inordinate delay over those years in pursuing his claim especially in view of the fact that construction of the flats was completed in

March 1997 and that at least four flats had been sold and transferred to third parties before Dan Songa died in March 2003.

In reply to the said letter dated the 13th May 2003 from the Plaintiff's Advocates, the Defendant's Advocates in their letter dated the 9th July 2003 said, *inter alia*: -

“Your client's claim is brought immediately after the demise of our client's former Managing Director, and when the flats were completed more than six years ago. If your client's claim were bona fide (which is denied) the same would have been brought up earlier.”

It seems to me that for the Plaintiff to succeed, he must, apart from anything else, explain his inaction for over seven years and why he did not act while the person he claims to have dealt with was still alive. Given that the Plaintiff was filed on the 13th November 2003, the Statement of Defence on the 4th December 2003 and the Reply to Defence on the 22nd December 2003, one would have expected that if the Plaintiff was serious about lodging this application, he would not have left it until the 7th March 2005 to do so. The Plaintiff has attempted, quite unsuccessfully in my view, to explain this quite inordinate delay by stating in paragraph 10 of his supporting affidavit that after retiring from the Government service, he relocated to Nyamira District but returned to Nairobi from time to time to establish whether the Defendant had regularized what the Plaintiff terms **“its financial affairs with Savings & Loan Limited”** (sic) so as to facilitate formal transfer of the flat to him.

The Plaintiff's explanation is not credible for several reasons: first, because the charge in favour of Savings and Loan Kenya Ltd. was discharged on the 29th November 2000 and the caveat lodged by the same company claiming a chargee's interest removed on the 29th November 2001. Secondly, the Defendant started selling and transferring a number of flats as early as March 2002 and by Dan Songa's demise in March 2003, four flats had been duly transferred. I am persuaded that there ought to be a better reason than the one the Plaintiff has advanced as to why he left matters in abeyance until after the death of Dan Songa. Logic and prudence dictate that if the Plaintiff had a genuine claim, he would have pressed it while the person he alleges to have dealt with was still alive. Having due regard to its timing, I get the clear impression that the Plaintiff's present bid is a blatant attempt to ambush Dan Songa's widow.

I have well considered the evidence before me in conjunction with the respective submissions made by both learned counsel and the law. In my judgment, and even if there was such an agreement between the parties as is alleged by the Plaintiff, the Plaintiff cannot rely on it to impeach the Defendant's title. His claim, if any, would lie only in damages for breach of contract and even then, the Plaintiff would have to prove that Dan Donga had authority to bind the Defendant in the manner the Plaintiff alleges he did. He would also have to prove that the Defendant was at law a party to that agreement.

As several flats have already been transferred to third parties who are not defendants in this suit, I do not see how and on what basis those people can be restrained from alienating or dealing with their properties in the manner suggested by the Plaintiff. Such third parties were not parties to the alleged **“agreement”** between the Plaintiff and Dan Songa.

I think I have said enough in the course of this ruling to make it obvious that in my view, the Plaintiff has not established a *prima facie* case with a probability of success so as to entitle him to the reliefs sought. In the result, the Chamber Summons application dated the 3rd March 2005 and filed on the 7th March 2005 fails and it is ordered that the same be and is hereby dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 22nd day of April 2005.

P. Kihara Kariuki

Judge