



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

Civil Case 776 of 2003

KENYA REINSURANCE CORPORATION LIMITED.....PLAINTIFF

VERSUS

DR. JOSEPH N. K. ARAP NGOK..... DEFENDANT

RULING

By a Plaint dated 3rd December 2003, the plaintiff prayed for judgement against the defendant in the following terms:

- "(i) An order of eviction from the property known as Land Reference No. 1160/613, House No. 8, Ndege Road, Karen, Nairobi.**
- (ii) A declaration that the sale agreement between the plaintiff and the defendant dated 10th November 1996, as amended by the agreement dated 6th August 1999 has been rescinded.**
- (iii) Mesne profits at the rate of Kshs.70,000/= per month with effect from 1st July 2000 until the defendant vacates the suit premises L.R. No. 1160/613.**
- (iv) A declaration that the plaintiff is entitled to off set the accumulated mesne profits from the deposit of the purchase price held by them.**
- (v) Costs and interest of the suit."**

The defendant filed his defence on 3rd February 2004. That defence was subsequently amended to incorporate a counter-claim, on 7th October 2005. Significantly, the defendant seeks damages for breach of contract; damages for false misrepresentation; a declaration that the he had paid the full purchase price; and specific performance compelling the plaintiff to transfer the suit property to the defendant.

After giving due consideration to the Defence and Counter claim, the plaintiff concluded that it did not raise any triable issues. The plaintiff therefore filed an application, by way of a Notice of Motion, seeking the following orders;

- (a) Vacant possession of the suit.**
- (b) Mesne profits at the rate of Kshs.70,000/= from 1st July 2000 upto the date when the defendant hands over the premises.**

(c) **Striking out of the counterclaim.**

(d) **Costs of the suit and of the counterclaim.**

It is the plaintiff's contention that after the parties had executed the agreement for sale dated 10th December 1996, the defendant took possession of the house, as a licensee. The said licence is said to have expired on 1st July 2000, when the defendant was given a notice to either complete the sale or move out of the house. As far as the plaintiff was concerned, from 1st July 2000 the defendant was a trespasser on the suit property. And, as the defendant has continued to occupy the house without paying rent, the plaintiff is seeking mesne profits at the rate of Kshs.70,000/= per month, from 1st July 2000, upto the date when the defendant hands over the suit property to the plaintiff.

When the application was first placed before me, I did pose the following question to the plaintiff;

"What is the legal position of someone selling a property that was not registered in his name?"

In an endeavour to answer that question, the plaintiff commenced its submissions by illustrating the historical background to the dealings between the parties herein. It was explained that the suit property was created after the subdivision of the original title, which was L.R. No. 1160/452/9. At the time when the parties executed the Agreement for sale on 10th December 1996, the plaintiff had title to the original property. That title was then surrendered by the plaintiff, in exchange for the various titles to the subdivision, which included the suit property.

In view of the fact that there was no title to the suit property as at 10th December 1996, the said property was described in the Agreement for Sale as "House No. 8, Karen". It is the plaintiff's submission that the incomplete description of the suit property did not nullify the sale agreement.

In any event, the defendant is said to have failed to timeously object to the state of the title to the property, as required by the clause 10 of the Law Society's Conditions of Sale. And even later, when the title was issued, the defendant did not object to the said late issuance, therefore, the plaintiff submits that the defendant is estopped from disputing the plaintiff's title to the suit property.

On his part, the defendant points out that the subject matter of this suit was L. R. No. 1160/613, and not L. R. No. 1160/452. As the plaintiff contends that L. R. No. 1160/613 was created after the subdivision of L.R. No. 1160/452, the defendant submits that the plaintiff will have to lead evidence to prove that metamorphosis. It is the defendant's case that as at 13th December 1996, the plaintiff misled him that the said plaintiff was the registered owner of L. R. No. 1160/613, whilst that title did not even exist then.

Insofar as the Sale Agreement dated 13th December 1996 does not cite L. R. No. 1160/613 or any other L.R. number, I am unable to find the basis of the defendant's allegation that the plaintiff had made a misrepresentation to him, to the effect that it was the registered owner of the suit property, as at 13th December 1996. That sale agreement simply identified the suit property as House No. 8, Karen.

The plaintiff then makes the point that after signing the sale agreement and paying a deposit towards the purchase price, the defendant took possession of the suit property, as a licensee.

In response, the defendant states, at paragraph 3D of the Amended Defence and Counterclaim that he **"took possession of the premises exercising the purchaser's Interest having signed the sale agreement and paid the agreed deposit of Kshs.4,441,222/=..."**

Whilst that appears to be a formidable issue, I nonetheless hold that it does not give rise to a triable issue. The reason for so saying is that it is common ground between the parties herein, that the sale agreement was subject to the Law Society Conditions of Sale. Condition 6 (1) of those conditions stipulates as follows;

"6 (1) Where the purchaser takes possession of the property before completion other than under a lease or tenancy entered into before the contract, the purchaser occupies the property as licensee of the vendor and not as tenant and the taking of possession is not an acceptance of the vendor's title or a waiver of the purchaser's right to make requisitions or objections to title."

There is no doubt that by the time the defendant took possession of the suit property, he had not completed making payment of the purchase price. Also, the actual title to the suit property was yet to be created through the process of subdivision of the original title from where it was eventually extracted. Therefore, the sale was not complete.

In **TOM ELVIS OKELLO OBONDO –VS- KENYA REINSURANCE CORPORATION, HCCC NO. 1204 OF 2001**, the Hon. Mbaluto J, held as follows, when he handled a case involving a plaintiff who had taken possession before the sale, which was subject to the Law Society's Conditions of Sale, was complete;

"The plaintiff was therefore a licensee and not a tenant and consequently the defendant was entitled, after giving the plaintiff a completion notice (JFK6) to request him as was done in a further notice dated 10.5.2001, to vacate the suit premises, as obviously from the expiry of the completion notice, the transaction between the parties stood rescinded and the plaintiff became a trespasser.

In view of what is stated above, my view of the matter is that the continued occupation of the suit property by the plaintiff is not lawful. Because of that, the contention by the plaintiff that his suit has high chances of success would appear unjustified. There is therefore no basis of granting the injunctions sought..... "

On the basis of the foregoing decision, should I not declare the defendant's occupation of the suit property as unlawful?

The defendant says that I should not. He asserts that he has in fact paid more than he was required to pay as the purchase price, and that he is therefore entitled to have the property transferred to himself.

The defendant says that he had paid a total of Kshs.13,953,038/30. Therefore, as the purchase price was Kshs.12,000,000/-, he had overpaid the purchase price. It was for that reason that the defendant had lodged a counterclaim for specific performance, to compel the plaintiff to transfer the suit property to him.

It is common ground that the defendant had paid Kshs.4,441,222/-. The plaintiff described that sum, in paragraph 6 of the Plaint, as the deposit "as required". The plaintiff also stated that the balance of the purchase price was then Kshs.7,558,778/-. So, has the defendant paid the balance or not?

The plaintiff says that the balance has not been paid, but the defendant contends that he has paid more than the said balance. In support of the defendant's contention, he has given the following particulars of the payments made;

- (i) Kshs.4,441,221/-, which has been admitted by the plaintiff.**
- (ii) Kshs.5,032,086/30, which is the interest earned on the deposit of Kshs.4,441,221/-.**
- (iii) Kshs.205,522/-, which the defendant paid as the 1st instalment for the mortgage which the plaintiff was supposed to have registered over the title to the suit property.**
- (iv) Kshs.4,480,000/- which the Investment Promotion Center paid to the plaintiff.**

In response, the plaintiff disputes the alleged payments number (ii) and (iv), above.

As regards interest which the defendant says he earned on the sums which he had paid as a deposit, the plaintiff submitted that the deposit did not attract any interest whatsoever. The plaintiff relies on Condition 8(1) of the Law Society Conditions of Sale, to support its case. The said condition provides as follows;

"Subject to sub-condition (2) hereof, where completion is delayed beyond the completion date by an act or default of the vendor or his mortgagee no interest is payable on the purchase money."

To my mind, there can be no doubt, that from a contractual perspective, the deposit paid by the defendant did not attract any interest. However, the defendant then pointed out that by a letter dated 27th November 2001, M/s Muriu; Mungai & Company Advocates wrote to him, indicating that the deposit had earned interest at the rate of 18% per annum, thus raising a sum of Kshs.5,032,086.30.

I have looked at that letter. First, it is marked "Without Prejudice", and therefore the plaintiff has contested its admissibility in evidence. Secondly, the letter expressly makes the following point;

"As you are no doubt aware, the agreement for sale is clear that NO INTEREST is payable on the deposit of the purchase price. However, entirely without prejudice, and in the hope that there can be an amicable and expedient conclusion to this matter our client proposes as follows;

- 1. Your computation has interest at 18% simple interest on your deposit of Kshs.4,441,222/-.**
- 2. Using the said rate, the interest accrued on the deposit would be Kshs.5,032,086.30 as opposed to your Kshs.5,066,674.40, a difference of Kshs.34,588.10. Our client's workings are enclosed. Confirm that our client's working are accurate.**
- 3. If you wish to be allowed interest at 18% p.a. on your deposit (despite the contractual provisions) our clients will oblige PROVIDED that you pay interest at 18% p.a. for the period they forego revenues owing to your failure to complete the sale. The interest thereof works out to Kshs.4,807,913.70 at per the enclosed schedule II."**

In my considered view, the letter dated 27th November 2001 does not constitute an admission by the plaintiff that the deposit of Kshs.4,441,222/- had definitely earned interest at 18% per annum. The letter was an without prejudice offer. And it was conditional upon the defendant also agreeing to pay interest at the same rate.

If the defendant is able to demonstrate that he did accept the terms of that letter, so that it could be admitted in evidence as being an agreed settlement, the defendants would only be entitled to a credit of Kshs.5,032,086.30, less Kshs.4,807,913.70. By my calculations, that would amount to Kshs.224,172.60.

Meanwhile, as regards the defendant's payment of Kshs.4,480,000/-, it is noteworthy that the said sum was paid to the plaintiff, by the defendant's employer, at the time, the Investment Promotion Centre. The said payment was made pursuant to a lease agreement dated 6th August 1999, between Kenya Reinsurance Corporation Limited and Investment Promotion Centre. The latter was the tenant, and in turn it enabled the defendant to occupy the suit property. As I have already indicated, the defendant was an employee of the Investment Promotion Centre.

It is significant that on 6th August 1999 the defendant also signed a separate agreement with the plaintiff, pursuant to which the parties agreed, inter alia, that the period between June 1996 and 30th June 2000 would be treated as a period when the defendant's occupation of the property was a tenancy. Paragraph 5 of that agreement reads as follows;

"That all deposits or monies paid pursuant to the accepted letter of offer and mortgage offer shall be applied solely for purposes of the sale and mortgage transactions and shall not be deemed as credit towards or for the benefit of the lease agreement with Investment Promotion Centre."

The provisions would appear to support the defendant's contention that the payment should be credited towards the purchase price.

Another issue taken up by the defendant was to the effect that even after 30th June 2000 he could not have become a trespasser. In his view, after the tenancy between the plaintiff and the Investment Promotion Centre lapsed, the parties reverted to their former position. As far as he is concerned, he is a purchaser for value, as opposed to a licensee. Of course, if the defendant can demonstrate that he has paid the full purchase price, he cannot be a trespasser: He would be entitled to have the property transferred to his name.

In that regard, as the plaintiff did not address the court on its prayer to have the counter-claim struck out, I hold the view that the defendant's said counterclaim cannot be struck out, as no foundation was laid for so doing. The said counterclaim raises very serious issues, which are closely intertwined with the plaintiff's claim.

In CAMILLE –VS- MERALI [1966] E.A. 411 at 419, Spry J. A. held as follows, when determining an application for summary judgement;

"The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham."

Having given due consideration to the Defence and counterclaim herein, I hold the view that they are not a sham. They give rise to issues which ought to go through the process of a full trial, so as to enable the court come up with an informed decision, after receiving all the evidence from the parties. For instance, the plaintiff may well have to justify its actions for failing to give a loan to the defendant, even after it had told the defendant that it would do so. By saying this, I do not mean that the plaintiff might be compelled, by an order of this court, to give the defendant the loan. However, it might imply that the conduct of the plaintiff played some role in the failure by the defendant to pay the balance of the purchase price timeously. What the trial court may make of the plaintiff's said conduct, and its impact on the claim and the counterclaim, is not for me to second guess.

The plaintiff's application dated 18th April 2005, (as amended on 11th November 2005) is hereby dismissed, with costs. Finally, I direct the parties to take action to complete the pre-trial procedures, such as discovery of documents and the framing of issues within the next 30 days. I further direct that this suit be set down for hearing on a priority basis.

Dated and Delivered at Nairobi this 31st day of May 2006.

FRED A. OCHIENG

JUDGE