

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

Civil Case 206 of 2001

FREMAR CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

MINAKSHI NAVIN SHAH.....DEFENDANT

J U D G E M E N T

When this case came up for hearing the Court of Appeal having struck out the defence filed by the Defendant the same proceeded by way of formal brief.

The Plaintiff's evidence was given by Peter Fredrick Mbugua PW1. He stated that he runs a business under the name of Fremar Construction Company Limited. He said that he was the Managing director of the said company. The Plaintiff was the registered owner of the property Nairobi/Block 82/1966. He said that the Plaintiff had borrowed money in 1996 from Savings & Loans (K) Ltd to develop the aforesaid property. The loan was for Kshs. 6 million. The Plaintiff serviced the said loan up to the year 2000 when it was faced with financial problems. It was therefore decided that the aforesaid property which had been used as security for the aforesaid loan be sold to pay off the debt which at that time was Kshs. 9.2 million. He said that the Plaintiff sought the assistance of Muita & company who identified a buyer by the name of Minakshi Navin Shah the Defendant herein. PW1 said that the Plaintiff entered into a sale agreement which agreement was exhibited before the court. The agreed sale price was Kshs. 11.5 million. After execution of the sale agreement the Defendant paid to the Plaintiff's advocate Kshs.1.5 as the deposit. The said advocate held that money as stakeholders. The completion date for the sale was 90 days from execution of the agreement. Accordingly the completion was due on or before 3rd August, 2000. PW 1 said that the Defendant failed to complete the sale for she failed to pay the balance of the purchase price. PW1 said that it transpired that on execution of the sale agreement the Defendant had placed a caveat on the property. A copy of the caveat was also exhibited before the court. The same had been registered on 16th May, 2000. PW1 said that after the 90 days period the Savings and Loan requested for payment. On behalf of the plaintiff PW 1 said he sought time from Savings & Loan (K) Ltd for payment to be made. However the patience of Savings and Loan ran out in the 2003 when they auctioned the said property. PW1 exhibited documents relating to the auction. He said that the property was sold for Kshs. 8 million. After the sale by auction Savings and Loan transferred the said property to the purchaser. PW1 said that when this case was first filed amongst the prayers the Plaintiff sought was the removal of the caveat by the Defendant over the said property since the Defendant had failed to remove the said caveat despite requests being made. After filing of this suit a consent was recorded whereby the caveat was removed. PW1 said that the Plaintiff was claiming the loss that is the difference between the amount of auction and the amount the Plaintiff had contracted to sale the property. He stated that the amount he now pays is Kshs.3.5 million. He said that the Plaintiff was blaming the Defendant for the breach of the contract. He said the Plaintiff had been ready to fulfill its part of the contract. He also stated that the Defendant who registered the caveat within one month of the agreement had frustrated the Plaintiff in its effort to sale the property to some other person. In this regard PW1 exhibited letters written by Estate agents who although had identified other buyers stated that the other buyers were reluctant to proceed with the transaction in view of the caveat that had been registered by the Defendant. The Plaintiff did not call any other witness and sought judgment as prayed on the basis of the evidence tendered by PW1.

The court having considered the evidence presented before it and the exhibits is of the view that the Plaintiff has proved its case on a balance of probability. The Plaintiff seeks a prayer of declaration that the Defendant breached the sale agreement and also a prayer for damages for unreasonably lodging a

caveat against the Plaintiff property plus costs and interest. The court having considered the evidence indeed finds that the Defendant did breach the sale agreement. Further the court is of the view that the Plaintiff is entitled to damages as consequence of the unreasonable lodging of the caveat against its property. The court will therefore grant judgment for the Plaintiff and in so doing is guided by the case of **Njoroge v Kenya Commercial Bank Ltd (1992) LLR 2357** which held:-

“it means that the Appellant is entitled to, in terms of money, to be put in the same position as he was immediately before he was wrongfully deprived of his land and the development being and erected thereon. Since he cannot, now, have the return of his land, this court can only deal with the matter in terms of money”.

The court finds that the Plaintiff is entitled to damages being the difference between the auction price and the contracted price that is Kshs.3.5 million. From this amount the court will deduct the amount of deposit paid to the Plaintiffs advocate that is Kshs.1.5 million. The difference therefore is Kshs.2,350,000.00 The judgment of this court therefore is as follows:-

1. ***That court does hereby declare that the defendant was in breach of the sale agreement of the purchase of property No. Nairobi/Block 82/1966 and accordingly the defendant forfeits the deposit paid that is Kshs.1.5 million.***
2. ***That the court does hereby award judgment in favor of the Plaintiff for Kshs.2, 350,000.00***
3. ***The costs and interest of the suit are awarded to the Plaintiff.***

MARY KASANGO

JUDGE

Dated and delivered this 30th day of October 2006.

MARY KASANGO

JUDGE