REPUBLIC OF KENYA

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

Civil Case 699 of 2005

RICHARD OGENDO…….....…..1ST PLAINTIFF/APPLICANT

HJORDIS OGENDO…….....……..2ND PLAINTIFF/APPLICANT

VERSUS

PRIPAL SINGH SANDHU…….....….DEFENDANT/RESPONDENT

R U L I N G

There are two applications before the court. The first one in time was the plaintiffs' application dated 13th March 2006, through which they sought the striking out of the Defence.

The other application was brought by the Defendant. It is dated 3rd July 2006, and seeks leave of the court to amend the Defence.

Although each of the parties would have liked their application to be heard in priority over the other, the court did direct that the two applications be heard together. The main reason why I gave those directions was that, in my considered view, if the defendant's application were found to be merited, it would imply that the defence could be rescued through an amendment. In that event, the court would have had to conclude that it was wrong to strike out the defence, implying therefore that the plaintiffs' application would be unsuccessful.

On the other hand, if the court were to hold that the proposed amendments to the defence, could not breath any life to the said defence, the court would not give leave to the defendant to amend the said defence. In that event, it would follow that the plaintiffs' application, to strike out the defence would succeed.

It is common ground that the parties herein had executed an Agreement for Sale dated 9th August 2005. The said Agreement was in relation to a parcel of land known as L.R. No. 37/729 (original Number 37/702/3) NAIROBI.

By the said Agreement, the defendant had contracted with the plaintiffs, so that he was to sell the property to the plaintiffs, for a sum of KShs. 15 million.

There is no dispute about the fact that the plaintiffs paid the sum of KShs. 1.0 million on 9th August 2005, and that the completion date was the ninetieth (90th) day from the date of execution of the Agreement.

It is the plaintiffs case that they were ready, at all material times, to complete the sale transaction within the period stipulated in the Agreement.

However, it is said that the defendant had made it practically impossible for the completion to be effected, by withholding the original title documents from the plaintiffs' advocates.

Instead of accepting the professional undertaking of the plaintiffs' advocates, the defendant was now insisting that he would only release the original document after he had received the sum of KShs. 14.0 million, which was the balance of the purchase price. In the alternative, the defendant was now insisting that the plaintiffs give to him, a Bank Guarantee for the sum of KShs. 14.0 million, as a precondition for the release of the original title document.

As far as the plaintiffs were concerned, the defendant's demands for a bank guarantee, before he could release the original title document, constituted an unacceptable variation to the terms of the Agreement.

It was for that reason that the plaintiffs then decided to bring this suit, with a view to obtaining orders that would compel the defendant to specifically perform the Agreement.

After the defendant had filed his defence, the plaintiffs filed an application to strike out the said defence, on the grounds that it did not give rise to any triable issues.

The defence was also seen as nothing more than an attempt by the defendant to prejudice and delay the plaintiffs' claim herein. Why do the plaintiffs hold that view?

They say that it was because the terms of the Agreement were so very clear about the fact that the balance of the purchase price was to be paid within SEVEN (7) DAYS from the date of the successful registration of the transfer in favour of the plaintiffs.

In order to enable the transfer be registered, the defendant was under an obligation, both contractually as well as by law, to provide the plaintiffs' advocates with the following documentation;

(i) A duly executed Transfer of the property, in favour of the purchasers, or as the purchasers were to direct.

(ii) A valid Rates Clearance Certificate and a valid Rent Clearance Certificate.

(iii) Commissioner's consent to transfer, and

(iv) The Original Title over L.R. No. 37/729 (original number 37/702/3.

It is common ground that the defendant is no longer willing to hand over to the plaintiffs' advocates, the original title document until and unless the balance of the purchase price had been paid in full.

Whilst it is clear that the defendant's demand for either payment or that a bank guarantee for KShs. 14 million be provided before he can release the original title document, is clearly an attempt to vary the terms of the original Agreement, the defendant contends that his said demands were legitimate. It is for that reason that he now wishes to amend his defence, so as to plead that it was within his rights to reject the undertaking offered by the plaintiffs' advocates. As far as he is concerned, his right to reject the proposed professional undertaking stemmed from the misgivings he had about the said undertaking.

Therefore, if he is allowed to amend the defence, the defendant intends to plead that the intended provision of a professional undertaking, by the advocates for the plaintiffs, was not in any event a fundamental condition of the contract. In the circumstances, the defendant believes that the intended amendment to the defence, would enable him demonstrate to the court that he was not in breach of any fundamental condition of the contract.

Another line of defence which the defendant hopes to introduce through his proposed amendments, was the assertion that he was dependent upon various government departments, to give the necessary certificates and consents. Therefore, the defendant hopes to persuade the court, if he is allowed to amend the defence, that the completion date "**was set at large, for the defendant to comply with the requirements of obtaining such certificates and consents, and which the Defendant had undertaken to obtain but for the bureaucracy in the lands office."**

It is also the defendant's intention to assert that the plaintiffs were obliged to mitigate their losses by placing the balance of the purchase price in an interest earning account, so that the plaintiffs did not thereafter seek compensation, on the grounds that the delay in completion forced them to incur other rental expenses.

In assessing the two applications, I do remind myself of two cardinal rules. First, that pleadings (such as the defence herein) should only be struck out if they appeared so hopeless that they could not be cured by amendment. The rationale is that courts should always strive to allow parties to have their day in court, unless the case was incapable of having life breathed into it, through amendment.

Although the plaintiffs are of the view that the application by the defendant has been brought after a period of inordinate delay, I find that three months cannot, in the circumstances of this case, be construed as constituting inordinate delay.

The plaintiffs also contend that the proposed amendments were not pertinent to the real question in controversy between the parties.

In that regard, I note that the defendant actually asserts that he is ready to complete the sale transaction. He then only blames the delay in completion on bureaucracy at various departments of Government.

Whilst I appreciate that the defendant is not obliged, at this stage, to demonstrate all the steps he had taken to ensure that he discharged all the obligations on his part, there can be no doubt that it is the defendant's responsibility to pay both land rates and land rents. It is also his responsibility to procure the requisite consents. And the defendant was aware of those responsibilities at the time he executed the sale Agreement. Therefore, unless he was to satisfy the court, by evidence, that he had done everything in his power, to discharge his obligations, the court cannot accept his contention that the defence of Force Majeure had come into play.

But then again, that line of defence is not being introduced through the proposed amendments. It was a defence which was raised from the outset. Whilst I have serious misgivings about the said defence, in the circumstances of this case, it is not right for me to deny the defendant the opportunity to improve on the defence, if he believes that the proposed amendments would assist him.

I therefore find that there is no justifiable reason for not enabling the defendant to amend the defence. Accordingly, leave is hereby granted to the defendant to file and serve his Amended Defence within the next TEN (10) DAYS from today.

As regards the plaintiffs' application to strike out the plaint, the same is struck out. The reason for so doing, is that following the grant of leave to the defendant to amend the Defence, the issues which the plaintiffs addressed their minds to (as at the time they drew up their application) may have been overtaken by events. However, I wish to make it crystal clear that this ruling is not a bar to any other application by the plaintiffs, if they should hold the view that even after the Defence will have been amended, it still did not raise any triable issues.

The defendant will pay to the plaintiffs the costs of his application dated 3rd July 2006. Meanwhile, the costs of the plaintiffs' application dated 13th March 2006, shall be in the cause.

Dated and Delivered at Nairobi this 8th day of November 2006.

FRED A. OCHIENG

JUDGE