



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE 299 OF 1999 (OS)

HEDLEY D. MOKWENA.....PLAINTIFF

- Versus -

BOWYER MAHIHU & CO.....DEFENDANT

RULING

This is an originating summons (O.S.) brought by the plaintiff as a former client of the defendant under Order 52 Rule 4 and Order 36 of the Civil Procedure Rules seeking:-

- “1. THAT this Honourable Court be pleased to order the defendant to deliver a cash Account and make payment;**
- 2. THAT the costs of this application be in the cause.”**

The Originating Summons is supported by the affidavit of the plaintiff in which he deponed that faced with a threat by Housing Finance Company of Kenya Limited (HFCK) to sell his house which he had charged to them, he got a buyer who agreed to buy it for Sh. 1,400,000/=; that the whole purchase price was paid by Kenya Power & Lighting Company Limited (KPLC) on behalf of the purchaser to HFCK; that as he owed HFCK Sh. 260,509/= he should have been paid Sh. 1,139,491/= but he was only paid Sh. 746,130/= and therefore claims from the defendant the balance of Sh. 393,361/= less conveyancing fees which he owed the defendant.

The plaintiff further deponed that as there was delay in paying him he lost Sh. 358,939/= he would otherwise have earned as interest if he had been paid on schedule and invested the money in Treasury Bills. He accuses the defendants of delaying the completion of the transaction and claims that sum from them. In the same vein the plaintiff also claimed that he lost rent he would otherwise have earned from the premises had he not given possession of it to the purchaser in January 1998. Finally the plaintiff claimed a sum of Sh. 51,929/= which the defendant deducted from the amount due to him and paid to the purchaser without his authority. He annexed to his affidavit copies of the sale agreement and a statement from the defendant showing how the sum of Sh. 746,130.35 that he was paid was arrived at. I will advert to the figures in that statement later in this ruling.

In response Isaac Kalema, the Chief Accountant of the defendant filed two affidavits in which he denied that the defendant owes any money to the plaintiff. He also exhibited the statement of account annexed to the plaintiff's affidavit showing how the sum of Sh. 746,130.35 paid to the plaintiff was arrived at.

He further deponed that the plaintiff was not entitled to any rent from the premises as possession the same had, in Nairobi HCCC No. 627 of 1986, been decreed to HFCK which was therefore entitled to rent. The parties took directions and agreed to use the affidavits filed as their respective pleadings and call viva voce evidence.

The plaintiff testified but he did not call any witnesses. In his testimony he repeated basically what he had deponed to in the supporting affidavit and further stated that before he found a buyer for his house HFCK had filed a foreclosure suit in Nairobi – Nairobi HCCC No. 627/1986. When he got a buyer, Anastasia Mwanzwii who was an employee of KPLC, it was agreed that KPLC was to pay the whole purchase price to HFCK which it did. He admitted that out of the purchase price of Sh. 1,400,000/= paid by KPLC to HFCK only Sh. 977,471.25 was paid by HFCK to the defendants. As his advocates, he said, the defendants should have found out from HFCK how that sum was arrived at and obtained a statement from them on his behalf. As far as he was concerned the balance he owed to HFCK was only Sh. 260,509/=. Challenged by counsel for the defendant to produce proof for that he said he had a statement from HFCK showing that amount but he did not have it in court.

The plaintiff further testified that he did not authorize the defendants to deduct from the amount due to him the fees of Sh. 116,663.90 due to them from the purchaser or Sh. 51,925 that they paid to the purchaser for renovations. He, however, had no quarrel with the deduction of Sh. 61,527/= being fees due from him to the defendants. He prayed that the defendant be ordered to pay him rent at a rate of Sh. 16,000/= per month from January 1998 when he gave possession of the house to the purchaser to the date of payment in addition to the other sums claimed in the supporting affidavit.

The defendant called two witnesses. Isaac Kalema, its Chief Accountant testified that the defendant received a sum of Sh. 977,471.25 from HFCK. On 30th September 1998 he was given a letter of even date and asked to make a cheque for Sh. 746,130.35 to the plaintiff which he did. He said the letter referred to Sh. 116,663.90 payable to them by the purchaser which he deducted from the purchase price pursuant to clause 9(b) of the sale agreement. He said he did not know anything about Sh. 1,400,000/= or Sh. 260,509/=. He said his firm does not owe the plaintiff Sh. 393,361/=. His firm he said was concerned with the amount it received from HFCK all of which it had accounted for as stated in the letter of 30th September 1998.

In cross examination Mr. Kalema said that other than making the said cheque he did not deal with any other issue relating to the transaction. He said that there was no letter in their file signed by the plaintiff authorising them to pay Sh. 51,925/= to the purchaser for renovations.

The defendant's second witness was Anastasia Mwanzwii, the purchaser of the plaintiff's house, and an employee of KPLC. She stated that upon executing the purchase agreement she paid Sh. 140,000/= being 10% of the purchase price to the defendants. When KPLC paid on her behalf the whole purchase price of Sh. 1,400,000/=: she took it that the fees of Sh. 116,663.90 due from her to the defendant was to be deducted from the amount she had paid. She said she did not understand how that amount was again deducted from the amount due to the plaintiff adding that it was the defendant who can explain that.

As regards the sum of Sh. 51,925/= paid to her by the defendants she said she had agreed with the plaintiff that the house required renovations which would cost Sh. 70,000/= and that either of them could carry out the renovations. If she did that she was to recover the cost from the plaintiff but if the plaintiff carried them out he would be entitled to the full purchase price. The plaintiff carried out some of the renovations costing Sh. 18,075/= and she carried out the rest. They therefore agreed that the sum of Sh. 51,925/= was to be deducted by the defendants from the amount due to the plaintiff and paid to her. That was the evidence placed before court in this matter in the light of which I now wish to consider the plaintiff's claims in this matter.

As I have already said the plaintiff accuses the defendant of having delayed completion of the transaction and claims Sh. 358,939/= he would otherwise have earned as interest if he had been paid and invested the amount in Treasury Bills. He also claims a sum of Sh. 16,000/= being loss of rent per month from January 1998 when he gave possession of the house to the purchaser. The plaintiff also claims that it was the duty

of the defendants as his advocates to challenge HFCK's claim for interest and put HFCK to strict proof of the amount they claimed the plaintiff owed them.

If I understand the plaintiff well, he is accusing the defendants of professional negligence. If that be so then he has not approached the court properly. Claims of professional negligence have to be brought by ordinary suits in which the particulars of negligence are clearly set out in plaints. They cannot be brought as it were through the back door in originating summons. The originating summons procedure is intended for settling simple matters without the expense of a full trial and not for serious and complex issues. In **Wakf Commissioners Vs Mwaijabu [1984] KLR 346** the Court of Appeal held that where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave the parties to pursue their claims by way of an ordinary suit. The plaintiff's claims therefore for loss of inconvenience as a result of the alleged delay and the defendants alleged failure to challenge HFCK's claim for interest are complex issue of professional negligence which should have been brought by an ordinary suit. True after the directions were taken the affidavits are to be treated as pleadings and the matter be deemed as having been commenced by filing of a plaint. However, looking at the plaintiff's supporting affidavit there are no particulars of negligence given against the defendants. The plaintiff did not adduce any evidence of any instructions he gave to the defendant to challenge the amount claimed by HFCK.

The claim for loss of rent is a special damage claim which the law requires to be specifically pleaded and strictly proved. Neither of these was done. The plaintiff was content with an assertion that he would have earned Sh. 16,000/= per month for a period he did not specify. He did not even say why he holds the defendants liable for that having himself given possession of the house to the purchaser. For these reasons the plaintiff's claims for loss of rent and interest are accordingly dismissed. That leaves us with the plaintiff's claim for a cash account and payment. Before I deal with it I would like to state that under Order 52 Rule 4 an advocate can only account for cash that has been paid to him by a client or by someone else on behalf of a client. He cannot account for what has not been paid to him.

In this case the entire purchase price of Sh. 1,400,000/= was paid by KPLC to HFCK. The plaintiff admits as much in paragraph 9 of his affidavit and in his oral testimony. Out of that sum the plaintiff also admits in his testimony that only Sh. 977,471.25 was paid to the defendants. That is the only amount the defendant is required to account to the plaintiff.

In their letter of 30th October 1998 the defendants accounted for the sum of Sh. 977,471.25 as follows:-

"- A mount received from HFCK towards Anastasia's loan account Sh. 977,471.25

- Less bank commission on loan Proceeds cheque Sh. 1,225.00

- Less amount deducted to cover our Fees payable by Anastasia as per the enclosed fee note Sh. 116,663.90

- Less amount deducted to cover our Fees payable by yourself as per our Amended fee note enclosed Sh. 61,527.00

-Less amount payable to Anastasia towards renovation as per the enclosed letter from Anastasia Sh. 51,925.00

- Net proceeds payable to you Sh. 746,130.35"

Of these deductions items 1 and 3 which relate to bank charges and the fees payable by the plaintiff to the defendants respectively are not disputed. However, the plaintiff disputes the other two deductions which relate to the fees of Sh. 116,663.90 payable by Anastasia and Sh. 51,925/= paid to her for renovations.

With regard to the amount for renovations, the plaintiff asserts that he did not authorise the defendants to pay any amount in that regard to Anastasia and seems to take comfort in the fact that there is nothing in

writing from him to that effect. Against that evidence is that of Anastasia who said that she had agreed with the plaintiff that the house required renovations which would cost Sh. 70,000/=. The plaintiff carried out some renovation leaving the rest which would cost Sh. 51,925/= to be carried out by her. Having watched her demeanour I am satisfied that she was a honest witness. If she wanted to defraud the plaintiff she could have claimed the whole sum of Sh. 70,000/=. The plaintiff was not honest on that claim. I therefore find that the sum of Sh. 51,925/= was properly deducted from the amount due to the plaintiff and paid to Anastasia.

The remaining item is the sum of Sh. 116,663.90. It was accepted all round that that sum was payable by Anastasia, the purchaser of the plaintiff's property, to the defendants as legal costs. Anastasia herself stated that over and above the purchase price of Sh. 1,400,000/= paid by her employer KPLC to HFCK she had paid Sh. 140,000/= to the defendants. She said that should have taken care of the legal costs presumably with some refund to her. She further stated that the defendant explained to her and the plaintiff how that sum was utilised and she was satisfied. She did not give us that explanation. She, however, concluded her evidence by stating that she did not understand how that sum payable by her was deducted from the purchase price due to the plaintiff.

Mr. Odhiambo, counsel for the defendant, in his submissions contended that the sum of Sh. 140,000/= paid by Anastasia to the defendant was passed on to HFCK. With respect this submission does not find support in any aspect of evidence placed before court. Mr. Kalema, the defendant's Chief Accountant, who, one would have expected to say that, said nothing of the sort.

In the defendants fee note dated 7th August 1998, there is mention of Sh. 30,000/= "paid to HFCK towards redemption" but in the defendants letter dated the 10th September 1998 a copy of which is annexed to the replying affidavit it is clearly stated that that sum was not paid to HFCK with the result that the defendants gave the plaintiff credit for the interest he suffered arising from the failure to pay HFCK that sum. In the said fee note there is also mention of a sum of Sh. 80,000/= said to have been "reimbursed to Standard Chartered Bank". Nobody has said that any amount was due from the plaintiff to Standard Chartered Bank.

It appears to me that the sum of Sh. 140,000/= that Anastasia paid to the defendants was used to settle her own accounts and she was, as she said, satisfied with its utilisation. That, however, did not concern the plaintiff in the least. He remains, as I also do, unclear as to how the legal costs of Sh. 116,663.90 payable to the defendants by Anastasia could be deducted from the purchase price due to him. I hold that that sum was wrongfully deducted from the amount due to the plaintiff. Consequently I enter judgment for the plaintiff against the defendant for that sum and order that the defendant do refund the said sum of Sh. 116,663.90 to the plaintiff with interest from the date of filing of this suit.

As regards costs, the plaintiff has failed in a substantial part of his claim. I order that he is entitled to half the costs of this suit.

DATED and delivered this 13th day of June 2005.

D.K. MARAGA

JUDGE