



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO.538 OF 199

BAKARI ALI KASMANI PLAINTIFF

VERSUS

STANLEY MURMA WANGUYE DEFENDANT

Coram: Before Hon. Justice Mwera

Omolo for Kamoti for the Plaintiff/Applicant

Muthama for the Defendant

Court clerk – Sango

R U L I N G

The plaintiff's notice of motion dated 27-4-04 was brought under O.35 r. 1, O12 & 6 Civil Procedure Rules and S.3A Civil Procedure Act and by it the court was asked to order:

- 1. That summary judgment be entered in favour of the plaintiff as set out in the plaint, credit being in the sum of Sh.580,000/- already paid by the defendant during the pendency of this suit.**
- 2. That alternatively judgment be entered for the plaintiff in the sum of Sh.1,390,000/- on the defendant's admission of the debt.**

The grounds stated that the defendant was well and truly indebted to the plaintiff in the sum of Sh.1,620,000/- less Sh.580,000/- paid since the institution of the suit amended on 1-3-2000. That the defendant had in previous letters and on affidavit admitted being indebted to the plaintiff. And so he had no defence to the claim and whatever was filed was only a sham intended to delay the settlement of the debt.

An affidavit in support on record carried a sale agreement dated 10-9- 98 between the litigants when the defendant bought for Sh.1,800,000/- land parcel No. KWALE/TUME/96 from the plaintiff. He was initially paid up to Sh.180,000/-. There were other terms of sale and in any case that agreement was not much in dispute because it transpired that the plaintiff (seller) did convey the said land to the defendant (buyer). He got a title deed dated 14-9-98 even before completing payment of the purchase price. Also as an annexure was a letter dated 1-11-2000 from the defendant's lawyers to the plaintiff's lawyer showing that the former had so far paid Sh.340,000/- of the balance of the purchase price. That the defendant was pleading for "some reasonable time" to pay the balance. Also annexed was the defendant's

own earlier letter of 13-11-99 in which he was arranging to sell the subject property to a buyer he had found. He promised to pay off the plaintiff on being paid by that buyer. And he swore a supporting affidavit in this very suit on 16-3-2002 stating inter alia:

“3. That I paid a sum of Sh.410,000/- leaving a balance of KSh.1,390,000/- .”

Therein the defendant added that he had fallen on hard economic times and thus become unable to pay the balance. That with this he had even offered to retransfer the property to the plaintiff who had declined. That in that very affidavit he proposed to make some payments in the meantime sell this property and thereafter liquidate the whole balance due to the plaintiff. Apparently that never materialized in full hence the present application. Mr. Omolo argued the plaintiff’s case on the same basis as per the pleadings, affidavits and annexures while Mrs. Muthama put up the following arguments in opposition, based on six (6) lengthy grounds a 35 paragraph replying affidavit.

The court was told that the amended defence and counter claim of 16- 6-2003 raises triable issues touching on fraud and misrepresentation to the effect that the plaintiff used influence to get the said land and irregularly so. That he could thus not pass a good title to the defendant; that even if the sale agreement was silent on vacant possession, the plaintiff was bound to give the plot to the defendant without the squatters whom he had since found on the land. That the defendant cannot move them out and/or sell the land. That as such consideration failed.

In the counter claim it was averred that the defendant had since paid in excess of Sh.1,050,000/- to the plaintiff who did not acknowledge the whole sum. That with the failure of consideration the defendant sought refund of this money. So he prayed for the court to declare that the sale agreement should be rescinded. The court was told that all these matters can only be investigated by evidence at a trial and accordingly this was not a suitable case for summary judgment. Mr. Muthama added that the manner in which the plaintiff allegedly irregularly obtained the initial title to the subject land (the defendant termed it “grabbing”) exposed the said land to repossession by the minister responsible for land matters – all to the loss of the defendant.

As regards the judgment on admission the court was told that the defendant did swear the affidavit hereinbefore referred to in peculiar circumstances and so he cannot be said to have been its author. That he did so when the plaintiff was executing the default judgment, which has since been set aside, by having the defendant committed into a civil jail. That it was while he was there that he swore this affidavit admitting the debt. But it was not disputed that the defendant’s lawyers had written e.g. the letter of 1- 11-2000 admitting owing a balance of the purchase price and asking for reasonable time in which to pay it. This was before the civil jail, so it was admitted by Mrs. Muthama, and also that this defendant made further payments before and while he was not in the civil jail. With this it becomes hard to understand how the defendant can claim that he was not truthfully admitting what he owed on 16-3-2002 when he swore the affidavit apparently in an application to stay execution (of committal to civil jail). The court also wonders what seriousness it should attach the defendant’s apparent stand in this matter and that he could admit a debt on oath at one point and refute it later as and when it suited him. The court was nonetheless urged not to grant the order sought, and some cases were cited which the court may revert to it found necessary.

As remarked on above the court went over the principal pleadings as it heard the submissions based on the application, affidavits and annexures. A prayer for summary judgment for a sum of Sh.580,000/- paid as the suit was pending was put forth, but in the alternative the plaintiff sought judgment in the whole sum as per the plaint.

This court is aware of the case law enjoining it to give leave to a party to defendant a suit even if it has only one triable issue raised when dealing with an application (under O. 35 Civil Procedure Rules) for summary judgement. That leave can be given with or without conditions. The court is also aware that judgement on admission can issue under O. 12 r. 6 Civil Procedure Rules if the admission is express or implied either on the pleadings or otherwise e.g. correspondence:

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgement being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract.” (see Madan JA. In Lalchand Choitram & Ors vs. Herta Nazari – C.A. 8/82 C.A)

Having the above in mind, this court is minded to give judgment on admission and for the following reasons: The parties had a sale agreement of the subject land, which did not touch on the state of occupation. Payments were made save for the balance – the basis of this suit. The defendant even got title to the said land and could have sold it had he found buyers. On 1-11-2002 the defendant’s lawyers wrote a letter to the plaintiff’s lawyers saying inter alia:

“--- that our client is ready to pay the correct balance of the purchase price if he can be given some reasonable time.”

The same letter added:

“Out of the purchase price of KSh.1.8 million this leaves a balance of KSh.1,460,000/ -

and two copies of paid cheques were enclosed to show that the defendant had made some payments before 1-11-2000. He made further payments after the suit was filed leaving a balance sought in the alternative prayer for judgment on admission Sh.1,390,000/-. And for this the defendant admitted under oath as per the affidavit of 16-3-2002. The same is already reproduced above but breaks no bone to repeat.

“3. That I paid a sum of Sh.410,000/ - leaving a balance of Sh.1,390,000/ -.”

In this court’s view the admissions are plain and obvious. No magnifying glass is required to see that the parties had passed off the stage of negotiation and gone to a concrete spot of specific performance. The plaintiff conveyed the title to the defendant. The defendant made some payments but for one reason or another had not completed it. He then confirmed even on oath what was due – Sh.1.39 m. That is what the plaintiff seeks, not doubt giving credit for whatever sums that have been paid since the suit was filed. He will have it. Telling the court that the defendant said different things in different circumstances is neither here nor there. In sum the alternative prayer herein is granted and with costs. A counter claim is as good as a separate suit. The defendant can see what to do with his counterclaim later.

Orders delivered on 28th July 2004.

J.W. MWERA

JUDGE