REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL SUIT NO 3149 OF 1997

BHIMJI DEVCHAND JINA DHRONA …….....…… PLAINTIFF

VERSUS

EDNA CHERONO BORE ……..…….. DEFENDANT

RULING

The Plaintiff filed this suit against the Defendant seeking Judgment for Kshs.2,000,000/= and interest on that sum at the rate of 30% per annum with effect from 22nd September, 1995 until payment in full. According to his Plaint the Plaintiff averred that the Defendant agreed to sell and he agreed to buy from the Defendant Land Reference Number 21183 – NAIROBI (hereinafter referred to as "the land") for a consideration of Kshs.2,000,000/=. He goes further to state in the same Plaint that the Defendant represented to him that the land belonged to her and was registered in her name. Subsequently, after he purchased the land, the Plaintiff received a notice from the Commissioner of Lands to surrender the title of the suit land on the ground that it was private land and had never been surrendered.He, therefore, sought a refund of the purchase price together with interest thereon as set out above.

In her defence, the Defendant denied having entered into any agreement to sell the land to the Plaintiff nor that she ever received Kshs.2,000,000/= from the Plaintiff. She also denied that the land was ever registered in her name. She raised other matters some of which I will allude to later but the same are not relevant to the determination of this application.

Subsequently, the Plaintiff filed an application stated to be brought under Order VI Rule 13 (1) (a), (b), (c) and (d) and Rule 16 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law. In the application, the Plaintiff sought the following orders:

> ***"1. That the Defendant's defence to struck out***
>
> ***2. That Judgment be entered for the Plaintiff against the Defendant as sought in the Plaint***
>
> ***3. (Costs)."***

The application was supported by an affidavit sworn by the Plaintiff on 17th July, 2001. In his affidavit, the Plaintiff said that the Defendant approached him in September 1995 "with a view to sell her allotment and title in … (the land)". After several negotiations, he agreed to purchase the land for Kshs.2,000,000/=. He went further and said that they (him and the Defendant) "sealed the said agreement" on 13th September, 1995. He did not annex the Agreement to his affidavit. He said that after "sealing" the agreement, he paid the Defendant "a down payment" of the purchase price and the balance was to be paid when the Defendant delivered to him the title of the land.He said in paragraph 10 of his affidavit that the Defendant delivered to him the title Deed in his name and he "cleared" the balance. Later, he received a letter dated 5th November, 1996 from the Commissioner of Lands which shocked him. What were the contents of that letter? The letter addressed to the Plaintiff was in the following words:

> "***Your letter of allot ment ref 5674/VI/26 of 30 th June, 1996 refers.***
>
> ***It has now been established that the plot allocated to you vide the said letter is in fact private land which was never surrendered.***

In light of the above, the allocation of the same to you is null and void . We suggest that you urgently get in touch with the persons(s) who sold you this land have (sic) the transaction reversed.

Meanwhile, you are advised to surrender back the title issued, to facilitate the refund of monies."

That letter was copied to the Defendant among others.

The Plaintiff annexed to his affidavit a bundle of documents which he said showed payments he made to the Defendant. The Documents included a Banker's cheque No. 006408 drawn on Giro Bank for Kshs.1,300,000/= in favour of the Defendant; a petty cash voucher dated 22nd September, 1995 showing payment of cash of Kshs.465,000/= and the amount of the Bankers cheque set out above to the Defendant; and another Petty Cash voucher dated 13th September, 1995 showing payment of Kshs.235,000/= vide cheque No. 006283 to the Commissioner of Lands " by the Purchaser".Both Petty cash vouchers bear a signature similar to the one on the Replying Affidavit of the Defendant sworn on 13th September, 2001 in opposition to the application.

In the Replying Affidavit, the Defendant once again denied knowledge of the transactions on which the Plaintiff based his claim. Before I consider the submissions of Counsel, I would like to deal with an issue raised in paragraph 7 of the Replying Affidavit of the Defendant. She said that she had been advised by her Advocates which advice she believed to be true that the suit had abated once the original summons expired and there was, therefore, no suit before the court. This matter was also raised in her Defence.That issue was dealt with by the Honourable Mr. Justice Githinji when he was still a member of this court before his elevation to the Court of Appeal. The matter had been raised before him as a Preliminary Objection and it was dismissed. There is no evidence that the Defendant appealed against that decision and in my view that settled the issue. It cannot be raised again before me.

In his submissions before me, Mr. Letangule for the Plaintiff argued, and properly so, that this court is entitled to strike out a pleading in clear cases only. He said that the issue before the court was not about the land but whether the Defendant was liable to refund the moneys claimed. He said that the Defence was evasive and a mere denial which was insufficient to constitute a sufficient defence as enunciated in ***Raghbir Singh Chalte vs National Bank of Kenya Ltd Kisumu Civil Appeal No 50 of 1996 .***

Mr. Kabiru for the Defendant, on the other hand, opposed the application saying that the application did not state the grounds upon which it was based and that it was not specific under Order VI Rule 13 of the Rules it was made. These are red herrings. Mr. Kabiru did not tell me what grounds he thought were more proper than those stated in the body of the application. As to the specific Rule under which the application is made, this was resolved on 13th May, 2004 when it was ordered by consent that the application be deemed to be brought under Order VI Rule 13 (1) (b), (c) and (d). The authority of **Menze & Others vs Matata (2003) 1 E. A 151 is** therefore not relevant to this application.

Mr. Kabiru also challenged the affidavit of the Plaintiff on the ground that it sought summary Judgment in paragraph 7 and not striking out of the Defence which is what was sought in the application. This is another red herring. The affidavit was specifically sworn to support the application before the court. Reference to summary Judgment was obviously an error that did not prejudice the Defendant in any way. Mr. Kabiru did not suggest before me that reference to summary Judgment had caused any confusion that would prevent his client from properly responding to the application. In fact, he argued the application clearly knowing it was one for striking out of the defence. The objection in this respect is, therefore, rejected.

Considering the substance of the application, I will say as follows. Striking out of pleadings by a court of law is a drastic remedy which should be exercised with the gravest circumspection (See generally ***D. T. Dobie & Company (K) Ltd vs Muchina (1982) KLR 1*** **)**. In embarking on an exercise to strike out a pleading, the court must be satisfied that the pleading sought to be impugned cannot be sustained completely. This is because summary jurisdiction should not be applied to displace the function of trial which results in careful examination of the rights of the parties before an adjudication is made.

In the case before me, there is a claim by the Plaintiff that he paid money to the Defendant the consideration of which has wholly failed. The Defendant denies having entered into the transaction for which the consideration was allegedly given nor that she received the alleged consideration. As was seen earlier, the Plaintiff annexed to his affidavit in support of his application, among other things two petty cash vouchers which bear the Defendant's signatures. One of the vouchers was for Kshs.1,765,000/= paid by cheque number 006408 to the Defendant but the other voucher was for an amount not paid to the Defendant but to the Commissioner of Lands although signed for by the Defendant. It is, therefore, obvious that not all of the amount claimed was paid to the Defendant.Also, although there is evidence of a Banker's cheque paid to the Defendant, the question begs whether the sum of that cheque was in fact paid. There was also no evidence upon which the Defendant claimed interest at the rate of 30% per annum. These are matters which can only be resolved by a careful examination of evidence and are, therefore, not matters which can be resolved by this summary process. This is, therefore, not a clear case in which this court can reject the Defendants defence summarily.

I am, therefore, unable to allow the Plaintiff's application dated 17th July, 2001 and dismiss the same with costs to the Defendant.

Dated and delivered at Nairobi this 21st day of July, 2004.

ALNASHIR VISRAM

JUDGE