



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 265 of 1999

SHIVJI NATHA PATEL
PLAINTIFF

V E R S U S

SEIFEE SPARES & HARDWARE LIMITED. DEFENDANT

J U D G M E N T

The plaintiff being the owner of property standing on plot no. Mombasa (Block XX22 brought this suit against the defendant, a limited liability company for orders of eviction injunction and an order compelling the defendant to remove a caution it filed against the plaintiffs title at the Lands Registry. The plaintiff admits that by agreement dated 26.6.1990 he agreed to sell to the defendant a shop situated on the ground floor of the said plot measuring 609 square feet (hereinafter called suit premises) for an agreed price of shs. 1.550.000/- prior to this date the defendant had been in occupation as a tenant and it remained so even after 26.6.90. It was an agreement of sale that payment of the purchase price would be completed by 30.6.1991. In spite of the breach of making payment by 30.6.1991 the defendant proceeded to register a caution against the plaintiffs property aforesaid. Furthermore the defendant stopped rent payments as from 26.6.1990. The plaintiff pleads that the said agreement was entered into by mutual mistake since the suit premises could not be partitioned from the rest of the building. The plaintiff also pleads that the agreement has become rescinded. That is the basis of orders sought.

On the other hand the defendant asserts that he has purchased the suit premises since 1990 and has paid the purchase price in full and that the time was never of essence in the agreement to purchase. In addition the defendant counterclaimed for specific performance.

Both parties agreed on issues to be decided by court as follows:-

1. Is the plaintiff the owner of the building standing on Plot No. Mbsa./Block XX/122?
2. Prior to 26.6.1990 was the defendants the plaintiffs tenant in the shop measuring 609 square feet on the ground floor on the said suit premises?
3. With regard to agreement dated 26.6.90 was the full purchase price payable by 30.6.1991? If so was the price paid by 3.6.199?
4. Regarding payment of purchase price was time of essence?
5. Has the purchase price been paid in full?
6. Are suit premises severable and transferable?
7. Has agreement dated 30.6.1990 been rescinded?

8. Is the defendant entitled to an order for specific performance to transfer the suit premises to itself?

9. Whether an order of eviction and of injunction should issue against the defendant?

10. Should the caution registered against plot no. Mbsa/Block xx/122 be removed?

Of issues numbered 1 and 2, I see no dispute. The suit premises is admitted to belong to plaintiff. The defendant has been in occupation of the shop since 1981 as a tenant. With regard to issue numbered 3 a copy of agreement made on 26.6.1990 entered into by landlord/owner as seller and –

1. Mr. Hassanali Akberali

2. Mrs. Yusufali Hassanali Director of Seifee Spares and Hardware Limited – Purchaser is not disputed. The terms are clear as to amount of price and the manner of payments namely shs. 500,000 on signing agreement and balance by instalments as follows:-

On 30.9.1990 Shs. 125.000/-

On 31.10.1990 Shs. 125.000/-

On 27.12.1990 Shs. 125.000/-

On 31.1.1991 Shs. 200.000/-

On 31.3.1991 Shs. 200.000/-

On 31.5.1991 Shs. 200.000/-

On 30.6.1991 Shs. 75.000/-

As it is, only sum due on 31.1.1991 amounting to shs. 200.000/- was paid on due date. There is no change in the terms of the contract but the defendants laid evidence of other payments he made outside the terms of the agreement of purchase. There is no evidence to show that the agreement was complied with by 30.6.1991. Regarding issue numbered 4 it is clear both parties were businessmen and the contract was entered into on commercial basis. It was of importance that the agreement be performed within time schedule particularly as there was the element of payment of rent for premises occupied during the period price was to be completed and considering that the title was to pass to the purchasers upon registration. However it is evident that the plaintiff would have extended the time for payment of price if the same had been sought by defendants.

Regarding the payment of purchase price it is clear the defendant may have had other dealings with the plaintiff under which he may have paid several amounts of money but there is no proof that such sums were paid with or towards the terms of the sale agreement at all. The answer to issue number 5 is in the negative.

Regarding the issue whether the suit property can be severed and transferred there is in existence The Sectional Properties Act, 1987 which came into effect on 1.4.1990 just before this agreement was entered into. The heading of that Act states :-

“An Act of Parliament to provide for division of building into units to be owned by individual proprietors, common property to be owned by proprietors as tenants in common and to provide for the use and management of the units and common property and connected purposes”.

This is the only provision that provides for sale and transfer of ownership of parts of a building. The plaintiffs building standing on Plot No. Mombasa/Block XX/122 was not and has not been brought under that Act. In the agreement dated 26.6.1990 there was no mention of the compliance with that Act. Therefore the answer to issue no. 6 is in the negative. The agreement in the circumstances could not be effected. An order for specific performance would be more than the parties bargained for. The court cannot create a contract for the parties. On the other hand the defendant has had the occupation and the use of the premises free of payments of rent since July 1990 at the undisputed rate of monthly rent of shs. 7000/- the total yield would by now be 1.134.000/-. The court therefore finds that no injustice is done by granting orders sought. Notice to quit and give vacant possession of the premises had been served up on the defendant. I, therefore, find the agreement of 26.6.1990 incapable of being complied with for non compliance with the 1987 Act aforementioned. I also find that such an agreement was breached by the defendant in failing to complete the terms agreed upon regarding the payment of the price. The defendant's counter claim is dismissed. He came to court with unclean hands. Judgment is therefore entered for plaintiff as prayed for in the plaint. The defendant shall pay the costs of the main suit and the counterclaim to the plaintiff.

Dated this 22nd October, 2004.

J. KHAMINWA

JUDGE

22.10.04

Khaminwa – Judge

Chege – Court Clerk

Mr. Kinyua Kamundi

Mr. Gikandi

Judgment read in their presence I open court.

J.KHAMINWA

JUDGE

Mr. Gikandi – I apply for certified copies for purposes of filing appeal. I apply that there be a stay of execution of judgment. My client will suffer irreparable loss.

Mr. Kinyua – I do not object to a short period being granted.

Court – Stay is granted for a period of 14 days from today to enable advocate to file formal application.

Proceedings will be supplied upon payment of copying charges.

J. KHAMINWA

JUDGE