



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 1171 OF 1996

BENUNA CHEMISTS LIMITED.....
PLAINTIFF

-versus-

CATHERINE MORAA NYAMATO.....
DEFENDANT

J U D G M E N T

The Plaintiff instituted this suit by a Complaint dated the 9th January 1996 and filed on the 14th May 1996 in which the Plaintiff sought judgment against the Defendant for: -

- a) specific performance of the contract of sale dated 9th August 1993; and
- b) in the alternative, a refund of K. shs. 950,000/- paid to the Defendant pursuant to the said contract together with all proven penalties paid to the Plaintiff's financiers.

The Defendant subsequently filed her Statement of Defence dated the 13th June 1996 on the 17th June 1996 which on application by the Plaintiff, was struck out and judgment entered for the Plaintiff by Ang'awa J. in a Ruling dated the 28th September 2000.

The suit then proceeded for hearing by way of formal proof leading to this judgment.

In his evidence, Dr. Benson Odewa, the Chairman of the Board of Directors of the Plaintiff company, testified that on the 8th August 1993 and responding to a press advertisement for the sale of the suit property, namely Title Number Nairobi/Block 103/312, he contacted the advertiser, a company known as Mapis Ltd. of Mombasa Road, Nairobi and was introduced to the Defendant.

The parties, each of whom was represented by an advocate, executed an Agreement of Sale of the said property on the 9th August 1993 at the price or sum of the K. shs. 3.5 million pursuant to which the ten per cent deposit of K. shs. 350,000/- payable thereunder was duly paid by the Plaintiff to the Defendant's Advocates, Messrs. Nyachae & Company who acknowledged receipt by letter dated the 11th August

1993.

Dr. Odewa, for and on behalf of the Plaintiff and with the Defendant's full knowledge and concurrence, then applied for a loan of K. shs. 2.5 million from the Housing Finance Company of Kenya Ltd ("**HFCK**") which was approved. The Plaintiff, as evidenced by documents produced in evidence, paid a total sum of K. shs. 239,870/- to HFCK in connection with the said loan including application, mobilization and legal fees as well as insurance premiums and commissions and other charges. The Plaintiff having fulfilled the terms and conditions of the offer of loan, HFCK instructed its Advocates, Messrs. Waruhiu & Gathuru, by letter dated the 1st November 1993 to prepare and register a legal charge over the suit property which was then charged to the East African Building Society.

Dr. Odewa further testified that despite several requests made by his Advocates, Messrs. Arum & Company, to the Defendant's said Advocates for the title documents to facilitate the preparation of the Instruments of Transfer and Charge, the same were not forthcoming even by February 1994. This delay resulted in a further payment to HFCK of the sum of K. shs. 50,000/- extension fees on the 2nd February 1994 which sum is included in the sum of K. shs. 239,870/- for which Dr. Odewa tendered receipts or letters of acknowledgement thereof. In addition thereto, the Plaintiff at the Defendant's request made in the Defendant's letter to Messrs. Arum & Company dated the 12th November 1993 and also paid the Defendant through his Advocates on the 1st September 1993 a further sum of K. shs. 600,000/- on account of the purchase price which Messrs. Nyachae & Company acknowledged on the 1st December 1993.

Finally, Dr. Odewa testified that the suit property was never transferred to the Plaintiff but to one Mugoya Vegetable Shop Ltd. in November 1995. He asked that the Vendor be ordered to refund all moneys already paid to her by the Plaintiff and the expenses incurred by the Plaintiff together with interest thereon respectively and costs.

I have considered this evidence in conjunction with the two prayers in the Plaint.

Firstly, and as the suit property has already been transferred to a third party, prayer a) for specific performance of the Agreement for Sale dated the 9th August 1993 cannot lie and it is hereby dismissed accordingly.

As regards prayer b), the law is now very well settled that special damages must be pleaded with as such particularity as the circumstances permit: **Coast Bus Service Ltd. v. Sisco E. Murunga Ndanyi and Two Others** (Civil Appeal No. 192 of 1992) (unreported).

In paragraph 5 of the Plaint, the Plaintiff pleaded that a total sum of K. shs. 950,000/- was duly paid on account of the purchase price – the Plaintiff in evidence has proved that such sum was duly paid to and acknowledged by the Defendant's Advocates, Messrs. Nyachae & Company and also in a handwritten memorandum dated the 7th September 1994 from the Defendant to the Plaintiff.

In paragraph 7 of the Plaint, and though the Plaintiff has not given a breakdown of how the sum is made up, the Plaintiff avers that it paid "***a total of K. shs. 120,110/- to HFCK towards various fees under the said agreement of loan***" whereas in prayer b) aforesaid the Plaintiff prays for a refund of "***all proven penalties paid to the Plaintiff's financiers.***" _ _

In the **Sisco case** (supra), the Court of Appeal went on to hold that:-

" If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the Plaint that a claimant will be allowed to proceed to the strict proof of those particulars....."

At the hearing, I invited learned counsel for the Plaintiff to consider whether it was necessary to seek leave to amend the Plaint to include particulars of special damages which may have been omitted; he did not move the court for such leave. As it turns out, and though the Plaintiff in its evidence was able to prove payment to HFCK of the sum of K. shs. 239,870/-, the Plaintiff's claim must be limited to, and it may only recover, the sum of K. shs. 120,110/- pleaded in the Plaint.

In the result, it is hereby ordered that the Defendant do pay to the Plaintiff the following sums that is to say:-

- a) K. shs. 950,000/- together with interest thereon at the rate of Twenty two and a half per centum (22½ %) per annum in accordance with Special Condition 6 of the said Agreement of Sale dated the 9th August 1993 from the date of filing suit upto and including the date of payment thereof in full; and
- b) the sum of K. Shs. 120,110/= together with interest thereon at court rates from the date of filing suit upto and including the date of payment thereof in full.

The Plaintiff having failed to claim any interest in the Plaint, the order for payment of interest hereinabove is in exercise of my discretion under section 26 of the Civil Procedure Act [Cap. 21].

The Plaintiff has also not sought the costs of the suit but the same are nonetheless hereby awarded against the Defendant in exercise of my discretion in that behalf conferred by section 27 of the Civil Procedure Act.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of November 2004.

P. Kihara Kariuki

Ag. Judge