



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 424 OF 1997

SHABBIR HUSSEIN HEBATULLAH1ST PLAINTIFF

SULTAN S. RASHEED.....2ND PLAINTIFF

VERSUS

CASTOR & LINSEED LIMITED.....1ST DEFENDANT

ALL VENTURES LIMITED.....2ND DEFENDANT

JUDGEMENT

There are four reliefs sought in the plaint namely:- (a) Order of Specific Performance of two Agreements of Sale dated 23-10-87 for sale of LR17/195 and LR No. 17/197.

(b) Order that the transfers be registered free of encumbrance to the second defendant.

(c) Alternatively, that first defendant do pay off the mortgage to the second defendant.

(d) Costs and where necessary a Bullock or Sanderson order for costs of the second defendant.

As pleaded in paragraph 8,9, and 10 of the plaint the first defendant, property was encumbered by a caveat registered by plaintiffs and a charge in favour of the 2nd defendant. The suit was filed on 21/2/97. Although defendants counsel has made long submissions encompassing many matters. It is not necessary that I deal with all the matters raised.

By paragraphs 4 and 5 of the plaint, the agreements of sale sought to be enforced were entered into in November, 1987. The date of the Agreements was amended in the course of the trial to read 23rd October, 1987. So, by a suit filed on 21-2-97, plaintiffs are seeking to enforce contracts made on 23-10-87 – more than 9 years before the suit was fixed.

A claim based on contract must be filed before the expiry of six years from the time the cause of action arose as provided by S.4(1) of the Limitation of Actions Act. So the plaintiffs claims are time barred as pleaded in para.8 of the defence of the first defendant.

Secondly, 1st defendant pleads in para. 10 of the defence that the 2nd defendant as chargee or mortgagee by assignment took over possession of the property in exercise of its statutory power of sale and that first defendant has no control over the steps the second defendant has taken to realise its security.

The second defendant confirms so in para.6 of the defence. Mr. Amuirah Sultan Ali Rasheed (PW1) gave evidence on behalf of the plaintiffs on 14-2-2001. Defendants did not give evidence or call witnesses. PW1 was cross-examined by Mr. Manek on the current state of the suit properties. He testified that he has not investigated to find out whether the plots in dispute are still in the name of the first defendant and that he does not know in whose name the plots are now registered. Mr. Le Pelley for the plaintiff produced the abstract of Title sometime after the end of the trial. It shows, inter alia, that by entry No. 50, LR No. 17/197 was registered in the name of Belmain management Ltd. on 31-7-97 through a conveyance dated 28-7-97. It further shows in entry No. 47 that LR No. 171198 was registered in the name of Aviaspen (K) Ltd. on 8-10-97 through a conveyance dated 1-10-97.

That means that the suit properties are not registered in the names of the first defendant and that the mortgage in favour of the 2nd defendant was discharged. The suit has been overtaken by events as the suit properties are now registered in the name of persons who are not parties to this suit.

The remedy of specific performance is a discretion remedy. It cannot be given if it will not be an effectual remedy to the plaintiffs. Court would be acting in vain to give such a remedy because the suit properties have been transferred to persons who are not parties to the suit plaintiffs do not seek damages for breach of the Agreement of Sale or for rectification of the register.

For the foregoing reasons I dismiss the suit with costs to the defendants.

Dated and delivered this 25th day of January, 2002

E.M. Githinji

JUDGE

Mr. Munyi for the plaintiffs – present

Mr. Mogeni for the Defendants – present

Mr. Munyi – I apply for a copy of the proceedings and judgement.

Order:

Judgement and Proceedings to be typed and supplied as prayed.

E.M. Githinji

JUDGE