



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 305 OF 1998

KANAMARINA LIMITED PLIANTIFF

- Versus -

1. MOHAMED BWANA BWANADI

2. ABDULRAZAK KHALIFA

3. ABDULRAHMAN KHATORDEFENDNTS

RULING

The applicant filed a suit claiming a liquidated sum of shillings one million with interest at the rate of 32% from 20/11/96 and costs of the suit. The claim is arising out of an agreement of sale to the plaintiff assignor of an agreement for sale of plot owned by the Defendants descendants on agreed price of shs. 10,500,000/=.

The plaintiff states that in part performance Defendants were paid shs. 1,000,000/= but the transaction never finalized. In their defence the administrators of the deceased owner of the property say that no conveyance was even tendered for execution as the instrument forwarded on 16/8/1996 was not in compliance with the contract. The defendants said they were ready and willing to perform the contract. However they are willing to refund the deposit less shs. 288,368/= expended by the defendants on the behalf of plaintiff.

I have perused the pleadings of both parties and the application together with affidavits filed in support and in reply. I have also considered the submissions of both counsel. I find that the agreement entered into and admitted by both parties dated 30/6/1996 was to be completed on 120th day of execution of the same that is from 30/6/1996. The completion date would have been on 28/10/1996. However time was not made of essence in the agreement. However by 25/8/1998 this suit was filed. By 24th October 1996 before the completion date a dispute had arisen on sale agreement and the counsel for the plaintiff gave a notice that if the dispute was not resolved by 30/10/1996 the contract shall ipso facto be terminated and the plaintiff shall be entitled to a refund of the deposit.

By the defendants' letter dated 8/11/1996 the defendants through their advocates set out conditions to resolve the dispute mentioned above. To this the plaintiff was of the view that there was an effort by the Defendants to vary the sale agreement which they rejected and called for the refund of deposit. That was on 20/11/1996.

On 23/2/1998 the Defendants wrote through their advocate saying:

“As explained earlier, we have been instructed to confirm that our client is making every effort to look for an alternative buyer and once a deal is sealed your clients’ claim will be settled on priority basis”.

That was in February 1998 and the suit was filed on 25/8/1998. I find therefore that by February 1998 the Defendants were already seeking alternative buyer of their property and were offering to refund the purchase price and most importantly they considered the sale agreement as terminated. The time for completion which is not normally of essence in sale agreements was fixed by the plaintiff’s letter dated 24/10/1996 to 31/10/96 which was not agreed upon by the Defendants. The completion date was therefore already passed when suit was filed.

On the issue of deductions it is clear no counter-claim has been made by the defendants for the sum of shs. 288,368/=. No documents in support of this sum is exhibited and therefore I find it is not a defence or triable issue in this case.

On the issue of interest the counsel for plaintiff submitted that the interest is to be paid at court rates instead of the pleaded 32%. On the pleadings no party has claimed specific performance or damages although both parties claim breach of the agreement by the other issues raised in the arguments are not relevant. The court cannot proceed to grant relief not sought by litigants, the straight forward provisions of the admitted agreement override arguments which states:

“4. the vendors shall refund the purchase price in full in the event that the sale is not completed within the stipulated period but without damages or costs”.

The refund is unconditional. For the above reasons I am inclined to allow the application. Orders are granted as prayed in the application with costs.

Dated at Mombasa this 19th day of February, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE