



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1091 OF 1994

ADRIAN WEKULO MUKHEBI PLAINTIFF

VERSUS

ALCON HOLDINGS LTD DEFENDANT

J U D G E M E N T

The defence and counter-claim having been found to be mere smokescreen defence and averments, they were struck out as shown and intended merely to postpone the inevitable pay-day, and as being an abuse of the process of the court; whereupon judgement on liability was entered against the defendant, for the plaintiff. This was on March 14, 2002.

Following that finding of liability, the plaintiff set down the case for assessment of damages. This judgement is in that respectively.

The evidence concerning damages was that the plaintiff suffered loss of rents from January 1, 1993 to August 31, 1993 at the rate of Kshs.25,000/= per month, so that in all he lost Kshs.20,000/= over that period of time, over which he also lost Kshs.30,000/= in interest, at the rate of 22.5%, which was charged by the mortgagee on the overdraft facility given the plaintiff to purchase the suit property, as evidenced by the letter of offer dated October 22, 1992 [Exhibit 1].

The loss of interest came about because the defendant, after receiving the agreed purchase price from the plaintiff, unexplainably failed to hand over possession of the premises to the plaintiff. When the plaintiff finally got the late possession of the property he let it at a monthly rent of Kshs.25,000/=. That is the money he would have been receiving if he had received timeous possession of the property; but he let it for the aforesaid period owing to late delivery of possession. The lease agreement produced in court testified to this aspect [Exhibit 2].

The plaintiff purchased the suit property with the assistance of a loan obtained from Savings & Loan Ltd, namely a sum of Kshs.1,750,000/= which was advanced to him on condition that if he failed to utilize the money so lent by the stipulated deadline of January 22, 1993, he would be penalized to pay an additional 2% of the sum lent [see item 13 at page 2 of Exhibit 1]. Due to the defendant's failure to complete the sale transaction within the contract time, the penalty was exactable; but the plaintiff was forced to spend a considerable amount of his time to re-negotiate the loan facility beyond the due date [e.g. Exhibit 5], thereby incurring loss of his time.

He claims general damages for this loss of time, For his time and effort spent on the re-negotiation of the loan facility with the lender, arising from the non-utilization of the offered loan facility within the specified time limit, the court assesses general damages at a sum of Kshs.35,000/=. This represents the 2% of the loan money which the lender would have penalized the plaintiff had he not suffered time loss to

re-negotiate the loan utilization period. This time loss was due to the defendant's fault in failing to complete within the contract time space.

On entering the sale agreement, the plaintiff made a deposit of Kshs.575,000/= to the defendant on October 8, 1992. The cheque for that payment is in evidence [Exhibit 3]. In addition he met the expenses in legal fees and stamp duties (Kshs.200,000/=). These sums went out of the plaintiff's pocket, and yet the defendant stayed put in the suit property, thereby tying up the plaintiff's money for a property he remained out of after fulfilling his part of the contract. He claims interest on these monies, at the rate of 22.5% p.a., for the seven months commencing from October 1992 to April, 1993. This works to a total of Kshs.127,968/=.

This sum is justifiably claimed, because the plaintiff withdrew the monies from the bank for the deposit, legal fees and stamp duty – i.e. for the sale and purchase transaction – thereby forfeiting interest which these monies would have earned for him at his bank had he not withdrawn it. Indeed, there is correspondence [four letters in Exhibit 4] in which the plaintiff drew the defendant's attention to the fact that the plaintiff would claim interest on his withdrawn funds.

Following a delay in handing over possession (the plaintiff testified that it was an eight months delay), the plaintiff sought to withhold a sum of Kshs.252,054/50 of the purchase price to compensate himself for that delay. It would seem that he would have been happy if the defendant did not require payment of that sum for his delay. But when the defendant did not forgo this sum, a dispute arose between the parties. As a result the parties agreed that the disputed sum be paid into an interest earning bank account in the joint names of the parties advocates. This was done – at Banque Indosuez, where the sum of Kshs.252,054.50 to be placed on deposit for notice bearing interest at the rate of 20% per annum, repayable to the depositor [see Exhibit 6].

This money is still at the bank, held in the joint account. It awaits the resolution of the dispute between the parties, now through this suit. The plaintiff asks the court to order that this money and the interest on it since May 25, 1993 when it was deposited in the account, to this date, be paid out to him. Well since by the interlocutory judgement following the striking out of the defence and counter claim, the matter of liability is no longer in issue, as thereby the defendant was found to have wrongfully denied possession to the plaintiff, the defendant is not entitled to the sum of Kshs.252,054.50.

This sum, plus the interest at the bank's provided rate of 20% per annum is to be paid out to the plaintiff. Despite adequate opportunity given to the defendant to question any aspects of the evidence of the plaintiff, the defendant did not do so. At the same time the plaintiff appeared to the court to be truthful. The evidence he gave was documented in material respect. The losses suffered were demonstrated. There was sufficient evidence to show that the defendant was at fault and as a result of his wrong the plaintiff suffered damage in the various ways outlined hereinbefore. I believe the plaintiff, and find facts as laid out in his evidence summarized above.

On the evidence on record, therefore, I find that as a result of the defendant's breach of the contract the plaintiff suffered the following losses:

- (a) loss of rent Kshs.200,000/=
- (b) loss of interest on rentsKshs. 30,000/=
- (c) loss of time on re-negotiation of the loan facilityKshs. 35,000/=
- (d) loss of interest on the deposit of Kshs.575,000/= and on legal feesKshs.127,000/=

This makes a total loss ofKshs.392,968/=

Besides these financial losses, the plaintiff was entitled to withhold the sum of Kshs.252,054.50 following the defendant's eight months delay in giving possession of the property to the plaintiff, contrary to the sale

agreement as to the parties' specific performance. That sum is now to be paid out to the plaintiff. In addition, the said sum of Kshs.252,054.50 deposited on the account at Banque Indosuez on May 25, 1993 [as evidenced by Exhibit 6], shall be paid to the plaintiff with interest as specified in the fixed deposit receipt No.01 02 54, namely, at the rate of 20% per annum.

The defendant shall pay the costs of the suit to the plaintiff. Accordingly, there shall be judgement for the plaintiff against the defendant for the sum of Kshs.392,968/= in damages, and Kshs.252,054.50 deposit, plus interest, and costs of this suit and interest thereon also at the usual respective rates. Orders accordingly.

Signed and dated by me at Nairobi, this 24th day of October, 2002.

R. KULOBA

JUDGE

24.10.2002