

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2275 OF 1999

DR ELLIE ONYANGO OSIR.....PLAINTIFF

VERSUS

WANGUI B. MWANIKI.....DEFENDANT

RULING

In dealing with the application for summary judgment, the courts do not make the practice of throwing partings out of courts of justice unless their cases cannot stand on even a single issue even after amendments.

In the present case, it is common ground that the parties were parties to a contract which failed for lack of financial assistance from a financial institution. The contract did not provide that the deposit would be forfeited on failure to complete nor did it provide that it would be refunded if financial assistance is not given. In the case of the contract, the applicant made time of the essence while the respondent, asked that the deposit be utilized for rentals as he was in possession of the suit premises.

The claim is however for rent or lease profits which the defendant does not deny that it was due but seeks to state that the deposit should be set against it.

Mr. Onguto for the applicant, submitted that it was entitled to forfeit the deposit and obtain mesne profits awaiting to the deposit as his client, the plaintiff had made time of the essent and the defendant/respondent had failed to complete the transaction. In his view a deposit is always justified if made as a counter. Consequently, the defence raised is triable issue. To support this submissions he referred court to Halisbury Laws of England Vol 34 3rd Edition paragraph 547 which states that when the contract is in the present case does it give express right to forfeit, if pursuant respondents contract and it could arise rapidly if on the date of completion he fails to do so.

Mr. Nyibui , however is of contrary view. He stated that the contract was frustrated by the failure of the finance company to make the advance required to complete the transaction, a matter which the plaintiff applicant was aware. Hence thought could not arise as it is it provided fro in the contract. He also stated that the summary judgment should not be granted as no rent was owed by the respondent as the deposit was utilized for the rent.

As can be seen, the claim is for rent claim is not denied. Whether or not the deposit for a different transaction not connected with the rent should be set off against the rent is not a defence for non-payment of rent. It could be the subject of a different suit or counterclaim which has not been pleaded in the defence herein. I therefore find that the defence is irrelevant and does not disclose a reasonable defence to the plaintiffs claims for rent.

In view of the above I allow this application as prayed. Orders accordingly.

Dated and delivered at Nairobi this 9th day of December, 2002.

G. P. MBITO

JUDGE

