



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1914 OF 1999

TAMIL ENTERPRISES LTD.....PLAINTIFF

VERSUS

OFFICIAL RECEIVER & LIQUIDATOR OF

CONTINENTAL CREDIT FINANCE LTD.....1ST DEFENDANT

KISAUNI PROPERTIES LIMITED.....2ND DEFENDANT

JUDGMENT

The plaintiff Tamil Enterprises Ltd. Has instituted this suit against the Official Receiver and Liquidator of Continental Credit Finance Ltd. (the 1st defendant) and Kisauni Properties Limited (the 2nd defendant) for the following orders:-

"(a) For specific performance of the said contract and orders that the Defendants do sign Transfer to the Plaintiff of the property free from all encumbrances and that it takes all steps necessary for the registration of the transfer in the name of the Plaintiff

(b) In default of (a) above the Deputy Registrar of this Court be authorized to sign the Transfers.

(c) A declaration that Kshs. 27,231,409/80 being interest on Kshs.7,621,250/= which the Plaintiff borrowed from Ragee Investments Ltd. Be counted towards the balance of the purchase price which the Plaintiff would have otherwise paid to the Defendant and the balance be paid to the Plaintiff

(d) Special damages or breach of contract being Kshs.7,500,000/=.

(e) Interest on special damages at Court rates.

(f) Costs of the suit.

The 1st defendant having been duly served with summons to enter appearance, failed to appear within the prescribed time and on application by the plaintiff's advocates, an interlocutory judgment against him entered on 14.8.2000. In the event the matter came before me for formal proof against the 1st defendant.

On behalf of the plaintiff sufficient evidence was tendered to establish, on a balance of probability, that an agreement was duly entered into between the plaintiff and the 1st defendant for the purchase of a portion of L.R. No. 4242/3 Kitsuru at a price of Shs.30,485,000/= and that pursuant to that agreement the plaintiff paid to the 1st defendant Shs.7,621,250/= on 24.5.1995 being 25% of the purchase price.

The evidence further shows that the balance of the purchase price was to be paid on completion date which was fixed 30 days from the date of the agreement. But before that could occur, an injunction was registered against the title pursuant to an order made in H.C.C.C. NO. 3462/95. As a result, the plaintiff claims that the sale has not been completed and its money has not been refunded. It now seeks orders of this court to compel the 1st defendant to refund the sum of money paid as a deposit together with interest thereon at commercial rates. The plaintiff also seeks the refund of another sum of Shs.7.5 million which is said to have been spent in drawing development plans for the property.

With regard to the claim for the refund of the deposit of Shs.7,621,250/=, I do not think there is any doubt that the contract having been frustrated by the issuance by the High Court of the injunction in another case, the said sum is refundable together with interest thereon at commercial rates. However with respect to the claim for Shs.7.5 million allegedly spent by the plaintiff in preparation of a development plan, I do not consider that a case has been satisfactorily made out for imposing the burden of that expense upon the shoulders of the 1st defendant. I say so because I consider the preparation of the plan before the completion date to have been a precipitate and premature action on the part of the plaintiff thereby rendering the alleged damages too remote to be recoverable. It is also my opinion, having considered the matter very carefully, that it has not been established that the 1st defendant was, in the first place, responsible for the imposition of the injunction. For those reasons, I reject the claim for Shs.7.5 million.

In the event I enter judgment for the plaintiff against the 1st defendant for the sum of Shs.7,621,250/= together with interest thereon as prayed in the plaint. The 1st defendant will bear the plaintiff's costs of this suit.

Dated at Nairobi this 9th day of March, 2001.

T. MBALUTO
JUDGE