

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 275 OF 1999

SYMON MWANGI KIMARU.....PLAINTIFF

VERSUS

RUTH WANZA NDUMBU.....DEFENDANT

J U D G M E N T

The Plaintiff claims a sum of Shs.1.3 from the Defendant being the Deposit paid by him to her under an agreement for sale dated the 4.11.98 in which he agreed to purchase Nairobi Block 72/1098 from a sum of Shs.4.3million special damages of Shs.496,143 general damages and costs.

It is not disputed that the sale was not completed the reason being that Housing finance Company of Kenya Limited (H.F.C.K.) had a charge over the property and that the amount due to them was in excess of the sum of Shs.2.9m. which the Plaintiff had indicated to the Mr. Kamau of Ngatia Kamau & Co. who was the advocate for both parties was due. This is borne out by the letter from Mose & Mose Advocates of the 2.3.99 (Exhibit 8) the defendant's advocates. The defendant says she relied on a figure given to her by Ahmed Nassir Abdibadir Advocates for H.F.C.K. although no evidence was adduced to corroborate this. Be that as it may it became academic as the Plaintiff who had arranged with H.F.C.K. that he would borrow from them 3m., a sum sufficient to complete the sale discount that H.F.C.K. would act release a discharge to the parties advocates as a much greater sum of Shs.4.9million was due to H.F.C.K. (See Exh. 7).

It matters not whether the Defendant was honestly of the view that only 2.9 was due to H.F.C.K. as the sale could not be completed as the sum due to H.F.C.K. in fact exceeded the purchase price. It was the duty of the defendant to repay H.F.C.K. in full and she failed to do so the sale became abortive. After the sale agreement was entered into the Plaintiff moved into the suit premises on the 15.12.98 with the defendant's agreement and started to carry out repairs and alterations to the premises. These works cost a sum of Shs.199,208 for which receipts were produced (Exhibit 4) for materials and Shs.100,000/- for labour. In April, 1999 the Defendant through the Plaintiff out of the house and removed his curtains and carpets.

In this respect I accept the Plaintiff's evidence and reject that of the Defendant. Where in fact a dispute arose from the evidence of the Plaintiff and the Defendant I preferred the evidence of the Plaintiff who appeared to me to be an honest witness. Additionally the Plaintiff whose application for a loan of Shs.3m. was accepted paid moneys to H.F.C.K. which H.F.C.K. eventually refunded same for a sum of Shs.27,000/-.

Subsequently H.F.C.K. put the suit premises up for sale and the Plaintiff bought the same at auction. This subsequent purchases should in no way be confused with the rights and obligations arising from the sale under the Sale Agreement. Mr. Keyonzo for the Plaintiff submitted that as the sale price at auction was less than the agreed contractual price the Plaintiff had suffered no loss. This is a fallacy as the transactions were totally separate. Had a stranger bought the property at public auction this would in no way have affected the Plaintiff's rights and its of no consequence whether the Plaintiff bought the property at public auction or a stranger so far as his rights are concerned.

There is no dispute that the sum of Shs.1.3m. is refundable to the Plaintiff.

On the question of special damages, I find that the Plaintiff expenses Shs.299,208 and cost 27,000/- with H.F.C.K. I therefore award these sums to the Plaintiff.

In the result I give judgment to the Plaintiff for the sum of Shs.1.3 plus 299,208 and 27,000/-which have been proved together with the costs of the suit. I award interest at 12% on the sums due from the date of judgment until payment in full. The Plaintiff is not entitled to general damages.

Dated and delivered at Nairobi this 10th day of May, 2000.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.