



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 487 OF 2009

SAGAR BUILDERS LIMITED.....PLAINTIFF

VERSUS

SPEEDWAY INVESTMENTS LIMITED.....DEFENDANT

JUDGMENT

1. By a plaint dated 7th July 2009 and amended on 3rd March 2014, the Plaintiff seeks for Judgment against the Defendant as follows:-

(a) Kshs. 5,500,000;

(b) Interest on the said sum at the rate of eighteen percent (18%) per annum to be compounded after six (6) months from 25th March 2009;

(c) Costs of the suit;

(d) Any other relief the Honourable court deems fit and just to grant.

2. The Plaintiff's case is that, on 20th April 2004, the parties herein entered into an whereby the Plaintiff was to construction and complete for the Defendant; Cedar Springs Apartment comprising of 32 units, on five (5) levels in three (3) Blocks, and carry out other works at the Defendant's Evelynne College and Residential house. The total cost for the works was of Kshs. 14,113,083.16. The Defendant paid the said leaving a balance of Kshs. 6,027,502.09, as at 30th April 2007 which the

3. By a subsequent an agreement dated 25th March 2009, the parties agreed that the balance of Kshs. 6,027,502 would be settled as full and final payment at Kshs. 5,500,000 and be paid within six (6) months. The sum would be derived out of the income received from the Defendant's property on; Plot No. L.R. No. 330/667 situated on Masanduku lane and was to attract, compounded interest at 18% p.a. upon default.

4. However, the Defendant did not make the payments, despite a demand and notice of intention to sue, served through a letter 18th June 2009. That as at 31st March 2013, the sum owing was Kshs. 12,419,785.10, plus interest which continues to accrue at the rate of 18% until the said sum is fully paid.

5. However, the Defendant filed a statement of defence dated 13th July 2011, admitting the existence of the agreement dated 25th March 2009 and averred that it instructed its Bankers to draw down the payment of Kshs. 6,576,784, in favour of the Plaintiff as part payment in respect of Certificate No. 940200. The Defendant also conceded that the sum of Kshs. 5,500,000, was payable from the proceeds of sale of the Apartments within a period of six months.

6. That having instructed its Bankers to make the payment, the Plaintiff thus suit prematurely and before the period by which the Defendant was required to pay the said amount had expired. Further since the process of the sale of the Apartments from which the proceeds was to be paid from is still ongoing, the claim herein is premature and contrary to the agreement of the parties.

7. Be that as it were, the case proceeded to a full hearing on 21st June 2018, however the Defendant was absent despite the fact that the date for hearing was taken inter parties. The plaintiff relied on the witness statement he recorded dated 24th October 2014 and filed in court, and

the accompanying documents filed in court on 9th October 2015.

8. At the close of the case, the Plaintiff's Counsel filed submissions literally reiterated the averments in the amended Plaintiff and hen invited the court to consider the following issues for determination;-

a) *Did the Plaintiff enter into an agreement with the Defendant in which the Plaintiff was to erect Cedar Springs Apartments comprising of 32 units on five (5) levels in Three (3) works and other associated works as well as further works at the Defendant's Evelyn College and residential house;*

b) *Out of the payments that were made by the Defendant, was there a balance of Kshs. 6,027,502.09 (debt) still outstanding;*

c) *Did the Plaintiff and the Defendant agree on reducing the debt to a sum of Kshs. 5,500,000;*

d) *Did the Plaintiff and the Defendant agree on the terms of payment;*

e) *Were the terms of payment contained in an agreement;*

f) *Did the Defendant honour the agreement;*

g) *Did the agreement provide for action to be taken in the event of default by the Defendant; and*

h) *What is the amount due from the Defendant?*

9. I have considered the evidence in total and the documents produced and I find that, there is no dispute that the parties entered into the agreements dated 25th March 2009 and 20th April 2014. From the pleadings and in particular under paragraph 10, 11 and 12 of the defence, it is clear that, the Defendant admits liability to pay the Plaintiff a sum of Kshs. 5,500,000 from the proceeds of sale of the apartments, within six (6) months.

10. That it instructed its Bankers to draw payment for the same in favour of the Plaintiff save the suit was filed prematurely expired; as such the Defendants are not disputing the claim. The Plaintiff has produced a demand letter dated 18th June 2009, but there is no evidence that the demand was honoured. Further, although the Defendant was aware of the hearing date, they did not attend to the hearing nor adduce evidence in support of the statement of defence and/or to rebut the Plaintiff's evidence.

11. In the given circumstances, I find that, the Plaintiff has established and proved its case on the balance of probability and I enter judgment for the Plaintiff as against the Defendant as prayed for under paragraph 13(a) and (b) of the Plaintiff, in particular, in the sum of Kshs. 5,500,000 plus interest on, at the rate of eighteen (18%) per annum, to be compounded after six (6) months from 25th March 2009. I further award costs to the Plaintiff.

12. It is so ordered.

Dated, delivered and signed in an open court this 22nd day October 2019

G.L. NZIOKA

JUDGE

In the presence of:

Ms. Kitonga for the Plaintiff

No appearance for the Defendant

Dennis -----Court Assistant