

REPUBLIC OF KENYA

Steel Wares Ltd v Mwangi Kangethe & 7 Others

High Court, at Nairobi September 23, 1985

Cockar J

Civil Case No 1333 of 1980

Advocates

Mr C S Joshi for plaintiff, - present

Mr. K J Kinyanjui for defendants –present

September 23, 1985, Cockar J delivered the following Judgment.

This is an application by way of notice of motion under order 12 rule 6 and order 6 rule 13 of the Civil Procedure Rules and the inherent jurisdiction of the court brought as a duty judge matter.

Judgment is sought under order 6 rule 13 (1) (a) on the grounds that the defence as filed does not disclose a reasonable defence and that ground Mr Joshi strictly refrained from referring to the affidavit and relied wholly on the pleadings filed, judgment is also sought under order 6 rule 13 (b) & (c) and under order 12 and rule 6 on admissions made in pleadings and in the correspondence between the advocates of the parties.

Submissions made by both the learned counsel have been recorded faithfully. I am fully mindful of all the submissions so made. I have also carefully perused the pleadings and the correspondence attached to the affidavit of M D Patel accompanying this application. I am satisfied that the defence as filed discloses no reasonable defence to the plaintiff 's claim. I am also satisfied that there is a full admission of plaintiff's claim for specific performance and damages by way of mesne profits at Kshs 9,000 per month from August 15, 1979 onwards until the specific performance is obtained, both in the defence filed and in the correspondence attached to the said affidavit of M D Patel.

I must point out that such issues as relating to costs of the suit unstamped agreements of sale and fraud perpetrated by 4th defendant against the rent of the defendants raised in the replying affidavit of 3rd defendant are not matters raised in the defence. In any case there is no merit in any of the issues raised in the replying affidavit.

The seven defendants have their remedy against the 4th defendant against whom they took and 3rd party notice under order 1 rule 21, on July 3, 1980 but do not appear to have taken any further steps thereafter in that direction.

Sub rule (3) of order 1 rule 21 is clear and the said 3rd party notice on the proceedings that may follow it cannot operate so as to prejudice the rights of the plaintiffs against the rent of the defendants who have no defence whatsoever against the plaintiffs and against whom the plaintiffs are entitled to have judgement now.

The 4th defendant was also duly served and has neither entered appearance nor has he filed a defence. Mr Joshi sought judgment against all eight defendants jointly and severally which I now enter for specific performance of the agreement as prayed in prayer 9 (i) of the plaint. I also award damages for loss of mesne profits at the rate of Kshs 9,000 per month from August 15, 1979 up to the date the specific performance is obtained as per para 4 of the plaint.

Costs of the suit and of this application with interest are awarded to the plaintiffs against the defendants jointly and severally. Interest is awarded on damages at 12% per annum from the date of the filing of the suit till payment in full. On completion of the specific performance awarded above the balance of the purchase price less the decretal amount shall be paid to the defendants forthwith.