



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 85 OF 2002

FREMAR CONSTRUCTION CO. LTD.APPELLANT

AND

MINAKSHI NAVIN SHAHRESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Osiero, J.) dated 12.02.2002

in

H.C.C.C. NO. 206 OF 2001)

JUDGMENT OF THE COURT

This appeal arises from the ruling of the superior court, Osiero J. dated 12th February, 2002 in which the learned Judge dismissed an application made by the appellant for striking out the defence in the main suit. The appellant had taken out an application under *Order 6 rule 13(1)(b), (c) and (d)* of the Civil Procedure Rules asserting that the defence on record consisted of mere denials; it was scandalous, frivolous, or vexious; may prejudice, embarrass or delay the fair trial of the action; and was otherwise an abuse of the process of the court. That is essentially the wording of the rule itself. In an elaborate affidavit, the appellant illustrated the genesis of the dispute and attempted to show how unmeritorious the defence on record was. None of the facts stated in the affidavit was controverted, nor did the respondent appear before the superior court to oppose the application in any other way despite having been served with the application. It was the same story before us, as this appeal was argued *ex parte*, the respondent having been served but choosing not to respond or attend court. Nevertheless, Osiero, J considered the pleadings and the law as he understood it, and came to the conclusion that there were at least two triable issues although only one was sufficient to grant a defendant the right to defend the suit. Is this a suitable case for the remedy envisaged under *Order 6 rule 13(1)(b), (c) and (d)* of the Civil Procedure Rules? We must look at the undisputed facts as presented in the pleadings and affidavits on record.

The appellant M/S. Fremar Construction Co. Ltd (hereinafter, "the vendor") was at all times material to this suit, the registered proprietor of all the leasehold interest in LR. No. Nairobi/Block 82/1966. The property was charged to M/S. Savings & Loan Kenya Ltd and the vendor was desirous of selling it to pay off the outstanding loan. On 3rd May, 2000, the vendor entered into a written agreement with the respondent, Mrs. Minakshi Navin Shah, (hereinafter "the purchaser") wherein the purchaser agreed to buy the property for Kshs. 11.5 million. Both parties were represented by advocates of their choice who witnessed execution of the agreement. The main clauses of that agreement were as follows: -

“3. The purchase price is Kenya shillings Eleven Million Five Hundred Thousand only (Kshs. 11,500,000/=) of which a sum of shillings one Million One Hundred and fifty Thousand (Kshs. 1,150,000/=) being the 10% deposit has been paid to the Vendor's Advocates as Stakeholders.

4. The completion date is Ninety (90) days from the date of execution of this agreement time being of the essence.

9. The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions in this agreement.

10. The purchaser is financing a portion of the purchase price (up to Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/=) through a loan to be a secured by a charge against the property herein agreed to be sold save that the purchaser shall procure the said loan within the completion period time being of the essence.

11. On or before the completion date the purchaser shall deposit with her advocates the balance of the purchase price (other than the portion being financed through a loan) and her said advocates shall confirm being in possession of the said moneys and shall further give their professional undertaking to the vendor's advocates to release the said sum to them in terms of Clause 15 hereunder. The purchaser's advocates shall further furnish a professional undertaking acceptable to the vendor's advocates guaranteeing the payment of the portion being financed through a loan. The vendor's advocates will in return avail to the purchaser's advocates the following documents: -

(a) Original certificate of Lease Title No. NAIROBI/BLOCK 82/1966.

(b) A duly executed transfer of Lease in favour of the purchaser or nominee(s) or as the purchaser shall direct.

(c) A valid Rates Clearance Certificate.

- (d) A valid Rent Clearance Certificate.
- (e) The consent necessary for the registration of the Transfer.
- (f) A duly completed and signed Stamp duty Valuation Form.
- (g) All other documents of title relating to the property if any which may be in the vendor's possession

15. The balance of the purchase price shall be paid to the vendor's advocate or as the vendor shall direct within fourteen (14) days of successful registration of the transfer in favour of the purchaser time being of the essence."

The purchaser complied with the clause on payment of 10% of the deposit as stated in clause 3, and was expected to complete the transaction as stated in clause 4 within 90 days i.e on or before 2nd August, 2000. But by 30th June, 2000 no further progress had been made in the transaction, prompting the vendor's advocates to caution the purchaser's advocates as follows: -

"JMK/M0116/001/C01 S&L/CVY/83/99 30/6/2000

Kibuchi & Co.

Advocates

Finance House

14th Floor

Koinange Street,

NAIROBI

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Dear Sirs,

RE: FREMAR CONSTRUCTION COMPANY LTD -to-

MRS. MINAKSHI NAVIN SHAH AND OR NOMINEES

TITLE NO. NAIROBI/BLOCK/82/1966

The sale transaction herein refers.

We note that the completion date is slated for 3rd August 2000 which is approximately one month from now. Our client is ready, able and willing to complete the transaction within time. Needless to say that time is of the essence. We would wish to know as a matter of urgency your client's position and especially regarding compliance with clause 11 of the agreement.

Yours faithfully,

FOR: MACHARIA NJERU

ADVOCATES

M. NJERU"

The only response which came before the expiry of the completion period, was a letter dated 6th July, 2000 from the purchaser's advocates stating that they were seeking instructions of their client on completion arrangements. The completion date came and went without compliance. As time was of the essence, the vendor concluded that the transaction had fallen through and offered the property for sale to other parties, only to find on making a search on the Title, that the purchaser had registered a caution against it. M/S. Savings & Loan Ltd. also threatened to auction the property on account of loan repayment arrears. And so the vendor filed suit on 15th February, 2001, seeking a declaration that the deposit of purchase price was forfeited upon breach of the agreement by the purchaser, and an order that the caution registered against the title be removed. There was also a prayer for general damages.

In her defence, the purchaser averred that she was not in breach of the agreement and that the caution was lawfully registered. The matter of caution however became a non-issue when the parties had the caution removed by consent. In two paragraphs of the defence, however, the purchaser made the following averments which we reproduce *in extenso* as they were the reason for dismissal of the vendor's application to strikeout the defence:

"3. As regards paragraph 4 of the plaint the Defendant does not admit that the Defendant had agreed to finance a portion of the purchase price in the sum of Kshs.6,500,000/- as alleged or at all and puts the Plaintiff to strict proof thereof.

4. Further and in the alternative and without prejudice to the foregoing as regards paragraphs 5 and 6 the Defendant states that the Plaintiff was in breach of the

terms of the Agreement for Sale in having failed to give to the Defendant a formal 21 days notice calling for specific performance as provided for in the Agreement for sale and states that he (sic) giving of such a notice was a pre-requisite to the instituting of any proceedings for specific performance."

The view of the learned Judge was that those averments raised *prima facie* triable issues as to whether or not the purchaser was in breach of the agreement and therefore the defence could not be struck out.

Learned counsel for the appellant Mr. Njeru argued before us, and in our view correctly so, that no issue could arise on the averment that the purchaser was to finance the purchase through a partial loan of Shs. 6.5 million. The averment was borne out by clause 10 of the agreement (supra). The purchaser does not deny the existence or the proper execution of the agreement and it was exhibited with the application. In the face of the provision in the agreement therefore, the denial rings hollow and becomes a non-issue. Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues, it would be farcial to waste judicial time on it.

The second argument advanced by Mr. Njeru, and again we think he is on firm ground, is that paragraph 4 of the defence did not raise any triable issue since the law requires no completion notice where the agreement has made time of the essence. The agreement between the parties here was only subject to the Law Society conditions of sale if it did not provide otherwise. *Clause 4* of the Law Society Conditions Of Sale (1989 edition) provides for "completion" and sub-clause (7) as far as it is relevant states:

" 7. This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the completion date:

(a) In this condition "completion notice" means a notice served in accordance with this sub-condition;

(b) If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition.....

(c) Upon service of a completion notice is shall become a term of the contract that the transaction shall be completed within twenty- one (21) days of service and, in respect of such period, time shall be of the essence of the contract.

(d) If the purchaser does not comply with a completion notice:

(i) the purchaser shall forthwith return all documents delivered to him by the vendor and at his own expense procure the cancellation of any entry relating to the contract in any register;

(ii) without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.

(e)

(f)"

As stated earlier, and is evident from clauses 4 and 10 of the agreement signed between the parties, they consciously provided that time shall be of the essence in completion of the transaction. The Law Society conditions were expressly excluded and therefore it did not lie in the mouth of the purchaser to plead that she was entitled to a completion notice. That pleading was clearly self-serving and raised a non-issue.

This Court has stated many times before, and the learned Judge of the superior court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules, and exists inherently, for the court in the interests of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process. A defence which is a sham should not be left to remain in the record otherwise it will cause undue delay and expense in the determination of the suit.

We have carefully considered the defence and affidavits on record in this matter and we are satisfied that it does not raise any issues that would be fairly placed before a court for open trial. On the contrary, the pleadings are frivolous and vexatious and would unduly delay determination of the just remedies of the appellant. For these reasons we allow the appeal and set aside the ruling of the superior court. We substitute therefor an order allowing the chamber summons dated 16th October, 2001 with costs thereof to the appellant. The appellant shall also have costs of this appeal.

Dated and delivered at Nairobi this 7th day October, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR