REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, TUNOI & O'KUBASU, JJ.A.)
CIVIL APPEAL NO. 248 OF 1999

BETWEEN
VAIWIN LIMITED ..... APPELLANT
AND
RASIKBHAI MANIBHAI PATEL ..... RESPONDENT

(Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 11th March, 1999 in H.C.C.C. NO. 980 OF 1996)

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JUDGMENT OF THE COURT

The Appellant, a limited liability company, which we shall hereinafter refer to as the Defendant, was sued by the Respondent whom we shall hereinafter refer to as the Plaintiff, for the specific performance of an agreement entered into in January, 1987, for the sale of a maisonette by the Defendant to the Plaintiff and for which, the Plaintiff had paid the Defendant the purchase price of Kshs.1,250,000.00. Strangely, the Plaintiff did not file his suit until some nine years after the alleged sale agreement was entered into and paid for. The Defendant in its defence denied that it had entered into any such sale agreement with the Plaintiff and that even if this were so, the Plaintiff was now barred by the Limitation of Actions Act, from bringing his action. The Defendant also alleged that even though the Plaintiff was in occupation of the maisonette, he was only there as its tenant who had also rather strangely, not paid rent since he went into occupation in January, 1987. The Defendant counter claimed for the unpaid rent which came to Kshs.1,977,500.00. What strikes one right away, is that there is an important though somewhat odd, triable issue of fact that would require to be determined in a trial.

However, the Plaintiff applied under Order V r 3(c) and (d) and O 35 r 1 of the Civil Procedure Rules respectively for the striking out of the Defendant's defence and counterclaim and for summary judgment to be entered for him. This application was supported by the Plaintiff's affidavit wherein it was deponed, inter alia, that he had purchased the maisonette from the Defendant in January, 1985, and not 1987, and that he had paid the purchase price without saying to whom, by way of two cheques. With respect to the purchase, the Plaintiff annexed to his affidavit, an undated letter from two erstwhile directors of the Defendant to the effect that the Defendant had sold the maisonette to the Plaintiff for Kshs.1,250,000.00 which, without saying how, the Plaintiff had paid to the Defendant. With respect to the payment of the purchase price to the Defendant, the Plaintiff annexed to his affidavit two cheques, one dated 31.1.1987, drawn by Caren Label Manufacturers (and there is no evidence connecting the Plaintiff with them) for the odd sum of Kshs.43,980.60 and oddly, with the name of the payee left blank though the cheque is endorsed as payable to "payee a/c only". The other cheque is also for the odd sum of Kshs.1,206,000.90 drawn, again not by the Plaintiff, but by East African Building Society (and again, there is no evidence connecting the Plaintiff with them) this time, payable not to the Defendant but to Pan African Bank Limited. On their face, these cheques do not support the allegation that the Plaintiff paid to the Defendant, the purchase price of the maisonette.

Apart from showing that the maisonette as claimed in the Plaintiff's affidavit could not have been sold to him by the Defendant in January, 1985, since the Defendant was incorporated in November, 1985, the replying affidavit of the Defendant deponed to by Harakchand Padamshi a director of the Defendant, casts doubt on the authenticity of the undated letter signed by the two erstwhile directors of the Defendant. These two, Harakchand Padamshi deponed, are his brothers who have a quarrel with him, and who have because of that, forged the undated letter.

Apart from the triable issues raised in the affidavits of the Plaintiff and Harakchand Padamshi, is the issue of limitation of action raised in the Defendant's defence as well as in its affidavit in reply to the Plaintiff's motion. Whether this defence is applicable or not is really a matter that should be determined at the trial.

The relevant parts of the rather confusing and careless ruling of the learned Judge of the High Court, Ang'awa J. delivered on 11th March, 1999, which we regret to say, is not supported by the facts deponed in the affidavits, and against which the Defendant has appealed to this Court, are as follows:

> "On the 11.9.96 the Plaintiff filed this present application by way of a notice of motion seeking for the striking out of the defendants pleading and further prayed for judgment.

It transpired that the plaintiff was able to prove that he paid the purchase price by way of a cheque which was duly received.

That the two directors of the defendant company wrote to him in an undated letter dated 11.9.96 that they acknowledge receipt of the purchase price. They also acknowledge that they had sold the Maisonette property that was in dispute to the defendant.

Occupation of the property was given to him on the 1.2.87.

Proof of transferring the property to the plaintiff was given. ...

The advocate for the applicant stated that the said suit was not time barred.

The reason being that though it claim under a simple contract is six years the claim for specific performance does not fall under this category.

`Limitation of action cap.22

> Section 4(1)(a) reads:-

'The following action may not be enough after the end of six years from the date on which the cause of action occurred ...

(a) actions founded on contract.

> (b) .....
>
> (c) .....
>
> (d) .....
>
> (e) .....'

The advocate instead referred me to the Halsburys Laws of England 2nd Edition whereby in discussing specific performance and the issue of lapse of time.

Para 467 that deals with the effect of statute of Limitation.

'... claims for specific performance do not come within the provision of the six years limitation period by the Limitation Act Cap. 1939.

Para 471 on when delay is no then to relief.

'Such delay as has been under consideration does not, however, been a claim to specific performance if the plaintiff has been in substantial possession of the benefits under the contract and is merely claiming the completion of the legal estate of the legal estate.'

In the case **of Clare v. Moore** 1884 Jo & ... 723.

Where it was held that a tenant who was in possession of a property under an agreement the delay of not accepting the lease was no bar to claiming specific performance of the agreement.

I find that in this case the plaintiff had purchased the said property paid for it in full and was not given his title upon transfer.".

In **Gupta v Continental Builders Ltd** [1978] KLR 83, this Court defined what must be satisfied before summary judgment is granted as follows:

"The first thing to say is that this was an application for summary judgment. If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.".

What is a triable issue is also defined in **C. A. Patel v E. A. Cargo Handling Service** [1974] E. A. 75 where Duffus P. made the following observation:

"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.".

The issue of summary judgment was comprehensively reviewed by this Court in the case of **Vishram Halai Lalji, Mulji Patel (trading as "Vakkep Building Contractors", a firm v Carousel Limited** Civil Appeal No. 11 of 1986 (unreported). In its judgment, this Court had the following to say:

"The importance of Order 35 was again recently reaffirmed by this Court in the case of **Baldev Raj Aggarwal v Kamel Kishore Aggarwal** (Nairobi Civil Appeal No. 48 of 1985) (unreported). The Court said:

'This Court will resist with as much fortitude as it can command any attempt to weaken the effect of Order 35. At the same time, we shall remain vigilant to ensure that no defendant with a reasonable or arguable defence who comes to Court is deprived of an opportunity to put it forward. It is in our view more unjust to shut out a defendant with a good defence than to require a plaintiff to wait a little longer and prove his claim against such a defendant on the merits'.

Summary judgment is a draconian measure and should be given in only the clearest of cases. And a trial must be ordered if a triable issue is found to exist or one which is fairly arguable. The Court should avoid the temptation to anticipate the ultimate result of the trial.".

It is clear from the affidavit evidence before the learned Judge that triable issues of fact and law had been raised in the application before her. The triable issues of facts have already been adverted to. With regard to the triable issue of law, the learned Judge failed altogether to consider the Limitation of Actions Act of Kenya and her casual and unintelligible consideration of the English Limitation Act, in granting the drastic orders sought from her, leaves a lot to be desired. One has the feeling when reading her certified incomprehensible ruling that she had not even bothered to read it before signing it. The grounds of appeal which summarised, is to the effect that the learned Judge did not give much regard to the affidavit evidence before her or to the applicable law with respect to the limitation of actions in Kenya, are indeed, justifiable. The learned Judge was clearly wrong in the exercise of her discretion in the matter before her and which resulted in a miscarriage of justice.

In the result, the appeal succeeds and the ruling appealed against is hereby set aside. The suit filed by the Plaintiff against the Defendant to be set down for hearing in the High Court before Ang'awa J. and for this purpose, the suit shall be set down for mention on 7th July, 2000, before her for the fixing of a hearing date. The Deputy Registrar of the Court shall ensure that the required steps are taken and also that Ang'awa J. is served with a copy of this judgment not later than 4th July, 2000. The Defendant will have its costs of this Appeal. It is so ordered.

Dated and delivered at Nairobi this 30th day of June, 2000.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.