



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 247 OF 2014

EDWARD KIMONDOLA KINYUTU.....PLAINTIFF

=VERSUS=

BANK OF BARODA (KENYA) LTD.....DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendant on 5th March, 2014 by way of plaint dated 3rd March, 2014. The plaintiff averred that on or about the 25th January, 2001, he purchased from the defendant all that parcel of land known as L.R No. 15007/6 situated in Rabai Road Estate, Nairobi (hereinafter referred to as the "suit property"). The plaintiff averred that the defendant sold the suit property by public auction in exercise of its power of sale as a chargee under the Transfer of Property Act, 1882 (now repealed). The plaintiff averred that he paid the full purchase price for the suit property and was given vacant possession by the defendant.

The plaintiff averred that he executed all the documents necessary for the transfer the suit property to his name and forwarded the same to the defendant's advocates to effect the transfer. The plaintiff averred that he had pursued the issue of the transfer of the suit property with the defendant since 2001. The plaintiff averred that the defendant had failed to transfer the suit property to him or to release the necessary documents to enable him effect the transfer. The plaintiff averred that the defendant was in breach of its contractual obligations under the sale agreement between the parties by failing to transfer the suit property to him.

The plaintiff averred that he had developed the suit property by erecting modern apartments thereon. The plaintiff averred that failure by the defendant to transfer the suit property to him had denied him an opportunity to use the suit property as a collateral to access credit facilities. The plaintiff averred that the continued failure by the defendant to transfer the suit property to him had exposed him to great risk of losing the property. The plaintiff sought judgment against the defendant for;

- a) An order against the defendant to transfer all that parcel of land known as L.R No. 15007/6 situated in Rabai Road Estate, Nairobi to the Plaintiff.

AND IN THE ALTERNATIVE;

- i. An order against the defendant to release to the plaintiff the title documents relating to L.R No. 15007/6 situated in Rabai Road Estate, Nairobi together with the signed instrument of transfer.
- ii. An order against the defendant to pay for any cost to be incurred in the processing of the transfer and the issuance of the lease.

- b) The cost of the suit with interest.

The defendant filed a statement of defence on 7th April, 2014. The defendant averred that the plaintiff's alleged cause of action arose more than 6 years before the commencement of the suit and as such the suit was time barred by virtue of section 4 of the Limitation of Actions Act Chapter 22 Laws of Kenya. Without prejudice to the defence of limitation, the defendant admitted that it sold the suit property to the plaintiff in exercise of its statutory power of sale and that the plaintiff paid the purchase price in full. The defendant averred that it executed all the documents necessary for the transfer of the suit property to the plaintiff and forwarded the same to its advocates so that they could effect the transfer the property in favour of the plaintiff.

The defendant averred that the title document for the suit property was stolen while in the custody of its advocates and that in the absence of the said title, the transfer of the suit property in favour of the plaintiff could not be registered. The defendant averred that it had instructed its advocates to make an application for a provisional title. The defendant averred further that, once a provisional title is issued, it will proceed with the registration of the transfer of the suit property in favour of the plaintiff in accordance with the conditions set out in the sale agreement between them. The defendant urged the court to dismiss the plaintiff's suit against it with cost.

The plaintiff filed a reply to defence on 21st May, 2014 in which he joined issue with the defendant in its statement of defence. On the issue of time bar, the plaintiff averred that the defendant was estopped from raising limitation of action as a defence since the defendant had failed to issue a title deed to the plaintiff. With regard to the alleged loss of the title document, the plaintiff averred that even if the title for the suit property was lost, the defendant should have taken steps to apply for a provisional title before the suit herein was filed.

The suit was fixed for hearing on 17th September, 2019 in court in the presence of the plaintiff's advocate who was directed to serve a hearing notice upon the defendant's advocates. When the matter came up on 17th September, 2019 for hearing, the defendant and its advocates did not appear in court. After satisfying myself that the defendant's advocates were duly served with a hearing notice, I allowed the hearing to proceed in the absence of the defendant and its advocates notwithstanding. The plaintiff adopted his witness statement dated 3rd March, 2014 as part of his evidence in chief. The plaintiff testified as follows. He purchased the suit property from the defendant at a public auction in 2001 and paid the purchase price in full. The firm of Hamilton Harrison & Mathews (HHM) which was acting for the defendant wrote to the advocates who were acting for him in the transaction, George N. Kimani & Co. Advocates on 2nd October, 2011 requesting for payment of some fees relating to the transaction.

The defendant changed advocates and instructed the firm of Kittony Maina & Karanja Advocates to handle the transaction on its behalf. The said firm wrote to his advocates on record on 31st August, 2010 requesting for a duly executed transfer and a deed plan for the suit property that was in the possession of his previous advocates, George N. Kimani & Co. Advocates. His advocates on record forwarded the said documents to the firm of Kittony Maina & Karanja Advocates under cover of a letter dated 11th January, 2011. He thereafter paid rent and rates for the suit property and forwarded the receipts to the defendant's said advocates under the cover of his advocates' letter dated 28th January, 2011. The defendant's said advocates thereafter forwarded to him an invoice in the sum of Kshs. 79,700/= dated 24th May, 2011 for legal fees and disbursements which he settled in full under cover of his advocates' letter dated 26th May, 2011. The defendant's said advocates subsequently demanded a sum of Kshs. 48,180/- for stamp duty payable on the instrument of transfer which he again settled in full under cover of his advocates' letter dated 4th October, 2011. His advocates on record thereafter wrote several letters to the defendant's said advocates and to the defendant directly on the progress of the transfer of the suit property to him which letters did not elicit any positive response even after the defendant yet again appointed a new firm of advocates to represent it in the transaction. He decided to come to court when the defendant made no attempt to transfer the suit property to him.

The plaintiff stated that he was in possession of the suit property and had developed the same extensively. He estimated the value of the suit property to be between Kshs. 100,000,000/- to Kshs. 150,000,000/-. He urged the court grant the reliefs sought in the plaint. He produced in evidence as exhibits, the correspondence his advocates exchanged with the defendant and its advocates, the invoice dated 24th June, 2011 for Kshs. 79,700/- and a receipt for Kshs. 79,700/- dated 26th May, 2011 issued by the firm of Kittony Maina & Karanja Advocates.

After the conclusion of the plaintiff's testimony, the plaintiff's advocate closed the plaintiff's case and informed the court that the plaintiff wished to rely entirely on the evidence of record. He urged the court to enter judgment for the plaintiff as prayed in the plaint. I have considered the pleadings and the evidence on record. The parties did not agree on the issues for determination by the court. From the pleadings, the following in my view are the issues that arise for determination in this suit;

- (1) Whether the plaintiff's suit is time barred under section 4 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
- (2) Whether the defendant is in breach of the agreement for sale between the defendant and the plaintiff.
- (3) Whether the plaintiff is entitled to the reliefs sought in the plaint.

From the pleadings and the evidence adduced by the plaintiff, the plaintiff purchased the suit property at a public auction that was held by Baseline Auctioneers on behalf of the defendant on 25th January, 2001. The agreement for sale between the plaintiff and the defendant was therefore made on 25th January, 2001. This suit was filed on 5th March, 2014; that is, 13 years after the agreement between the parties. Under section 4 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, suits relating to causes of action based on contract cannot be brought after the expiry of 6 years. In response to the defendant's contention that the suit was time barred, the plaintiff contended that the defendant was estopped from raising such defence because it had not performed its part of the contract. I find merit in the plaintiff's estoppel argument. Under section 39 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, an equitable or promissory estoppel can be raised to a defence of limitation. From the evidence adduced by the plaintiff, it is clear that the defendant had made the plaintiff to believe that the transfer of the suit property to the plaintiff was a done deal. There was in fact no dispute between the parties on the issue. The plaintiff had made all the payments required and taken possession of the suit property which he has since developed extensively on the basis of representations by the defendant that the suit property was going to be transferred to him.

The plaintiff came to court when the numerous promises made by the defendant did not yield a title in his favour. I am of the view that in the circumstances of this case, it would be inequitable to allow the defendant to raise the defence of time bar. I am of the opinion that as long as the defendant's assurances to the plaintiff that it would transfer the suit property to the plaintiff remained open, the limitation period could not run against the plaintiff by virtue of section 39(1)(b) of the Limitation of Actions Act. Due to the foregoing, it is my finding that the plaintiff's suit is not time barred.

On whether the defendant breached the agreement for sale between the parties, the plaintiff led evidence that he entered into an agreement for sale with the defendant to purchase the suit property at a consideration of Kshs. 400,000/- which he paid in full. The defendant admitted in its defence that the plaintiff had fulfilled his obligations under the sale agreement. It was not disputed that as at the time when the plaintiff filed this suit on 5th March, 2014; 13 years after the date of the agreement for sale, the defendant had not transferred the suit property to the plaintiff. The defendant had contended in his defence that it was unable to transfer the suit property to the plaintiff due to the loss of the title for the suit property and that it had instructed its advocates to apply for a provisional title. The defendant did not give evidence in its defence. In the circumstances, its defence remained just a defence. If indeed the title for the suit property got lost in 2006 in the hands of the defendant's advocates, I am of the view that the defendant had adequate time to apply for a provisional title. It was unreasonable in my view

for the defendant to take over 7 years after the alleged loss of the title to apply for a provisional title. From the material placed on record by the defendant, a proper application for a provisional title was not made until 28th March, 2014 after the filing of this suit. It is my finding that the defendant breached the sale agreement that the defendant entered into with the plaintiff in respect of the suit property by failing to transfer the property to the plaintiff.

From the foregoing findings, I am satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. The plaintiff is therefore entitled to the reliefs sought in the plaint. The plaintiff had sought main and alternative reliefs in the event that the court was not inclined to grant the main relief. The defendant neither pleaded nor led evidence that there exists any hindrance to the transfer of the suit property to the plaintiff save for the loss of the title deed for the property in respect of which the defendant had already applied for a provisional title. The plaintiff is in the circumstances entitled to the main relief sought in the plaint.

In conclusion, I hereby enter judgment for the plaintiff against the defendant in terms of prayer (a) in the plaint dated 3rd March, 2014. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 27th Day of February 2020

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Odawa h/b for Mr. Muoki for the plaintiff

N/A for Defendant

Ms. C. Nyokabi-Court Assistant