



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 514 OF 2011

BETHY MUMBI NJENGA.....PLAINTIFF

VERSUS

MICHAEL HASELWANTER.....DEFENDANT

JUDGEMENT

1. At the heart of this dispute is the validity of the Deed of Understanding dated 17th November 2010 entered between the parties herein.
2. In happier times, Bethy Mumbi Njenga (Bethy or the Plaintiff) and Michael Haselwanter (Michael or the Defendant) were intimate friends. In the course of their friendship they had L.R No. 195/28 and 195/31 jointly registered in their names as proprietors through an indenture of conveyance dated 2nd December 2002 (P. Exhibit Page 5 to 7). This conveyance followed the purchase of that property from Kuregia Investment Company Ltd. which was reduced into an agreement for sale dated 19th August 2002 (P. Exhibit Pages 1 to 3).
3. In that Agreement, Bethy and Michael are named as the purchasers. However, there is now a dispute as to who contributed the money that constituted the purchase price and that used to later develop the property. Although the parties led evidence as to what they allege to be their respective contributions to the purchase and development of the property, a discussion of that evidence may prove unnecessary in resolving the complaint of Bethy.
4. In a Complaint dated 17th November 2011 and presented to Court on the same date, Bethy avers that she and Michael agreed to sell the said property to Home Scope Properties Limited at a price of Kshs.210,000,000/=. It is common ground that at the time of selling the property it was charged to secure a facility from Eco Bank Limited and the sum of Kshs.20,000,00/= was owing. Another sum of Kshs.3,000,000/= would be in respect to legal fees and a commission of Kshs.7,000,000/= was to be paid to the agent who secured the buyer. The total debt therefore at the time of sale was Kshs.30,000,000/=.
5. Bethy asserts that before entering the sale agreement she and Michael had agreed to equally share the net sums of the sale price after the deduction of the debt. She alleges that Kshs.90,000,000/= was due to her. Her complaint is that after entering the sale agreement, the two entered into the impugned deed of settlement. She alleges that she was to receive the sum of Kshs.60,000,000/= and that the Defendant was to continue living with her and supporting her financially. It is her averment that she was forced to sign the said agreement on that understanding.
6. She contends that after the sale, the Defendant moved out of the house and stopped supporting her. She was therefore forced to incur medical expenses in respect to her son's treatment in Nairobi Hospital and Aga Khan Hospital. She argues that after failing to fulfill his obligation, Michael is liable to pay her the sum of Kshs.30,000,000/=. She also asks for interest on this amount at Court rates until payment in full. As would be usual she also asks for costs.
7. In resisting the claim Michael filed a Statement of Defence dated 24th February 2012. He cites the Deed of Understanding as providing the mode of distribution of the purchase price. This is set out in Paragraph 10 of the Statement of Defence.

[10] By a deed of understanding dated 16th November 2010 the Plaintiff and the Defendant agreed to have the suit properties sold in the sum of Kshs.210,000,000/=. The parties also agreed on the mode of distribution of the proceeds of sale as follows:-

- a. The Plaintiff would receive the sum of Kshs.25,000,000/= from the purchase price in full and final settlement of her claim.
- b. The Plaintiff will further receive a sum of Kshs.35,000,000/= from the purchase price for purposes of purchasing a family home. The said home would be registered in the Plaintiff's name as held by her in trust for her behalf and her three children and would not be disposed of without the Defendant's written consent.
- c. The sum of Kshs.20,000,000/= or thereabout would be paid directly by the Plaintiff and the Defendant to offset the loan with Eco Bank.
- d. The sum of Kshs.3,000,000/= would cater for legal fees and Kshs.7,000,000/= would be paid out as commission to the selling agents.
- e. The entire net balance of the purchase price would be paid to the Defendant in full and final settlement of his claim.

8. He denies that the Deed was signed after the parties had entered into the sale agreement. There is further denial that there was an agreement for him to continue staying with, and supporting Bethy financially. As to the circumstances in which the agreement was signed he denies that the Plaintiff was forced into signing the agreement and states that it was voluntarily signed by both parties.

9. Other than the two disputants, one Veronica Wambui Mbugua Waweru(Veronica) testified. She is an advocate of the High Court of Kenya and was the one who drew the Deed of Understanding and witnessed the signing by the parties. The relevant portions of the evidence of the witnesses are highlighted and discussed in resolving the issues that present themselves. The parties herein identified 13 issues for determination. They are:-

1. Who purchased the properties known as L. R No. 195/28 and L.R No. 195/31 ("the suit properties").
2. Whether the Plaintiff and the Defendant agreed to develop the said properties.
3. Whether the Plaintiff applied for a loan facility from Akiba Bank in the period between the year 2003 and 2005.
4. If so, whether the Plaintiff utilized the loan facility from Akiba Bank to develop the suit property.
5. Whether the loan facility for Kshs.5 Million from East Africa Building Society (Now Eco Bank Limited) of May 2007 was applied for jointly by the Plaintiff and the Defendant or by the Plaintiff alone.
6. Whether the Plaintiff and the Defendant agreed, after paying off all debts, to share the proceeds of the sale of the suit properties equally.
7. Whether the Plaintiff and the Defendant executed a deed of understanding dated 16th November 2010, in respect of the proceeds of the sale of the suit properties.
8. If so,
 - i. Whether the Plaintiff executed the Deed voluntarily.
 - ii. What were the terms of the Deed?
 - iii. Whether the terms of the Deed were observed by the Defendant.
9. Whether there was an agreement to the effect that the Defendant would stay and support the Plaintiff financially.
10. Whether the Defendant is under any obligation to support the Plaintiff.
11. Whether the Plaintiff is entitled to the claim for Kshs.30 Million.
12. Costs.
13. Interest.

10. Yet in my estimation the substantial issue is whether the Deed of Understanding was voluntarily signed and if so, whether the Defendant defaulted on the terms.

11. For its' importance to this dispute the short Deed of Understanding is hereby reproduced in its' entirety:-

DEED OF UNDERSTANDING

THIS DEED IS MADE this 16th November 2010 between MICHAEL HASELWANTER and BETHY MUMBI NJENGA both of P.O. Box 66621-00800 Nairobi.

WHEREAS both parties are joint owners of ALL THAT property known as L.R No. 195/28 AND 195/31 and have sold the said property for Kshs.210,000,000/= and the deal is in the process.

AND WHEREAS the parties have agreed to discuss beforehand the distribution of the said funds;

NOW THIS AGREEMENT WITNESSTH AS FOLLOWS:

1. That Beth will receive the sum of Kshs.25 Million in full and final settlement of her claim from the purchase price.
2. That Beth will further receive a sum of Kshs.35 Million for purposes of purchasing the family home. The said home to be registered in her name as held by her in trust for herself and her 3 children and not to be disposed of by Beth without Michael's written consent.
3. That the sum of Kshs.20 Million or thereabouts will be paid directly by the Purchasers to offset the loan owed by Eco Bank.
4. That a further sum of Kshs.3 Million will cater for legal fees and Kshs.7 Million will be paid as commission to the selling agents.
5. That the entire net balance of the purchase price will be paid to Michael in full and final settlement of his claim on the purchase price.
6. That the Advocate Mbugua V. W acting in this matter undertakes to have Michael's share of the purchase price transferred to his account directly by the Purchasers as he shall advise.
7. That the balance will be paid in line with the terms of the purchase price.
8. That hereinafter no party will have a claim against the other on the purchase price or on the issues covered by this agreement and more particularly the issue of the house.

IN WITNESS WHEREOF the parties hereunto have set their hands the day and year hereinabove written.

SIGNED, SEALED AND DELIVERED

BY MICHAEL HASELWANTER

In the presence of VERONICA MBUGUA

SIGNED, SEALED AND DELIVERED BY

BETHY MUMBI NJENGA

DRAWN BY:

MBUGUA V. W. & CO. ADVOCATES,

12. It was the evidence of Bethy that three days after signing the sale agreement she was called to the advocate's office where he met Michael. She was shown the Deed and told to sign it. She stated that Michael told her that she had to sign the Deed otherwise he would return to Sweden with his girlfriend and with the money. She further testified that she had no option but to sign it even though it was backdated. This testimony was in her written statement of 23rd April 2017 which was adopted as evidence in chief.

13. In cross-examination she gave a somewhat different version of events. She stated that she signed the Deed at the home of Veronica, the advocate, after she had called on her offices only to find that she had left. As to how Michael issued the threats to her she stated that he went to the school of their children and told them to tell "their mother to sign a letter at the lawyers office and if she did not you will not see me again".

14. As for the advocate, her testimony was that both Bethy and Michael appeared before her in the presence of Michael's mother and there was a lengthy discussion after which an understanding was reached. She reduced the understanding into the Deed and both parties signed it in her presence. Her evidence was that there was a lot of acrimony about many issues but what was eventual agreed was reduced into the Deed. As to the date when Deed of Understanding was made, this was her evidence;

"I cannot confirm that this was prepared before the sale agreement but the date of the deed is prior to the agreement for sale. The transaction took a while later passing back and forth so the dating might not in itself be an indication as to when the actual of minds

happened”

15. Michael’s re-collection is that Bethy signed the Deed of Understanding voluntarily after some discussions and Veronica put to paper what they had agreed. He remarked;

“There was no fight we discussed and agreed”.

As to the date the Deed was signed it was his evidence that it was a day before the sale agreement.

16. Before setting out to analyse this evidence, I observe that the allegation by Bethy is that she entered the Deed of Understanding under undue influence or in the very least upon misrepresentation. The law would then have required her to give particulars of these two allegations. This is the requirement of Order 2 Rule 10 (1) which reads:-

(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

17. Looking at her pleadings, Bethy does not go into any detail as to the particulars of force ,undue influence or misrepresentation. She avers as follows:

“[11] That after entering to the sale agreement aforesaid Plaintiff entered into Deed of Understanding with the Defendant whereby after paying the debt of Kshs.30,000,000/= the Plaintiff was to be given the sum of Kshs.60,000,000/= and the Defendant was to continue staying and supporting the Plaintiff financially and the Plaintiff was forced to sign the said agreement on that understanding”.

18. This averment appears to fall short of the expectations of particulars that needed to be pleaded. Although she was more elaborate in her testimony by ,for instance ,alleging that Michael had visited the children in school and had threatened to leave unless she signed the agreement, that would not help to remedy the deficiency in the pleadings. The law requires that particulars of misrepresentation, fraud, breach of trust, willful deceit and undue influence be given because they are accusations of a serious nature and the party against whom they are made needs to be aware of the particulars and specifics of his/her alleged conduct so as to have a fair chance to rebut them.

19. If this Court were to find that Michael exerted undue pressure on Bethy then it will have found that he was involved in quasi criminal conduct. The seriousness of the allegation becomes clear because if true, then he would have unlawfully prevailed on Bethy to take a smaller portion of the net proceeds of sale than she would have been entitled as a registered joint and equal proprietor of the property. For this reason, Bethy was always under an obligation to provide cogent proof of the undue influence or misrepresentation.

20. Emerging from the evidence however is that the Deed of Understanding was prepared by Veronica in whose presence the parties signed. Veronica was a friend to both Bethy and Michael. It was her testimony that not only were they her clients but also “very good friends and they still are”. Bethy herself had told Court that she had known Veronica for over ten years and was well known to both herself and Michael. Veronica, in her testimony, testified of some acrimonious discussions before the two reached an agreement. It was however her testimony that once matters were agreed,then they were reduced into the Deed and not revisited. It was the advocate’s testimony just as Michael’s that Bethy signed the agreement voluntarily.

21. On the question as to whether she was forced to execute the sale agreement, Bethy stood alone. There is no evidence that soon after the signing, she protested the circumstances of the Deed. Her evidence was not sufficient to debunk that of Michael and Veronica as to the voluntary nature of the agreement. As to whether the Deed of Understanding was backdated, there was competing evidence between Michael and Bethy. On her part, Veronica stated that she could not confirm whether it preceded the sale agreement but she assumed that because of the dating, it came later. What is clear however, is that in the recital to the Deed there is an acknowledgment that a sale was in the process. This is what it reads;-

“WHEREAS both parties are joint owners of ALL THAT property known as L.R No. 195/28 AND 195/31 and have sold the said property for Kshs.210,000,000/= and the deal is in the process.

AND WHEREAS the parties have agreed to discuss beforehand the distribution of the said funds”.

22. That recital may support the contention of Bethy that the Deed of Understanding may have been entered after the sale agreement. What however remains critical is whether Michael obtained her execution of the Deed by wielding undue influence. On this, the Court has found that the Plaintiff’s case was insufficient both in pleading and as to quality of evidence.

23. In the final submissions Counsel for Bethy urged this Court that the Plaintiff lacked independent legal capacity to sign the Deed. This argument would not be available to the Plaintiff because it was not pleaded and was first taken up at submissions.

24. The Court further observes that while attacking the validity of the Deed, the Plaintiff has neither sought to rescind it or to have it declared vitiated. So whichever way this Court looks at the matter, the Deed of Understanding remains unscathed.

25. Being of that opinion, the function of this Court is to enforce and give effect to the intention of Bethy and Michael as expressed in the

said Deed. Looking at the terms of the Deed, Bethy was to receive a sum of Kshs.60,000,000/= from the proceeds of sale. Of this amount Kshs.35,000,000/= was to be used by her for purposes of purchasing a family home. The home was to be registered in her name to be held in trust for herself and her three children and not to be disposed of without Michael's written consent. Bethy does not say that she was not paid the Kshs.60,000,000/=. As to the alleged promise by Michael to continue staying and supporting Bethy financially, none of the provisions of the Deed enjoins him to do so. In the circumstances, I do not find any default on the part of Michael.

26. The outcome is that the Plaintiff's suit is without merit and is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 13th Day of March 2020

F. TUIYOTT

JUDGE

PRESENT:

Macheru (MM) for Plaintiff

Ochieng for Defendant

Court assistant: Nixon