



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 381 OF 2013

JACKSON RUITARI MUNENE.....PLAINTIFF

- VERSUS -

ANNE MUKUHI WACHIRA.....1ST DEFENDANT

MOSES MWANGI MUGUMI.....2ND DEFENDANT

DAVID GOLDSMITH.....3RD DEFENDANT

JUDGMENT

1. Jackson Ruitari Munene, the plaintiff, seeks judgment against **Anne Mukuhi Wachira**, the 1st defendant and **David Goldsmith**, the 2nd defendant as follows:

“(a) The defendants be compelled by an order of this honourable court to fully comply with the terms of the said mutual agreement and/or contract or an order of specific performance of the contract entered between the plaintiff and the defendants as regards the process of acquiring the Title documents and sale of house sitting on the parcel of Land Title number NAIROBI /BLOCK 105/1265.

(b) General damages

(c) Costs of and incidental to this suit at court rates.”

Interlocutory judgment in default of appearance and defence was entered in favour of the plaintiff by the deputy registrar of this court on 19th May 2014. The case came before me for formal proof.

2. The plaintiff’s case is that he was engaged by the 1st and 3rd defendants to obtain title documents in relation to property **NAIROBI BLOCK 105/1265** (hereinafter the suit property). The suit property although owned by **Moses Mwangi Mugumi** (Moses) it did not have a title. Rather Moses held a share certificate No. 12107 issued by Embakasi Ranching Limited. Moses is the son of the 1st and 3rd defendants. Moses swore an affidavit to the effect that he wished to transfer his interest in the suit property to his mother, **Anne Mukuhi Wachira**, the 1st defendant because it was her who had paid the purchase price.

3. The plaintiff’s evidence is that he was engaged by the 1st and 3rd defendants to obtain title documents of the suit property and thereafter to seek a buyer of it.

4. The plaintiff stated that in order to undertake that task of obtaining a title, which he said was very complicated because he was dealing with the Embakasi Ranching Limited, he had to resign from his employment with a firm known as Wahesco Interparcel Services where he was earning Ksh 48,000 per month. He stated he was engaged in the process of getting the title document for 41 months. The plaintiff provided evidence before court that indeed a title document of the suit property was issued in the name of Moses. He also proved by documents before court that the said suit property was purchased by a person known as Peter Mwangi Njuguna. The plaintiff therefore stated that he fulfilled his task as requested by the 1st and 3rd defendant.

5. The plaintiff’s claim, as pleaded in the plaint, is that there was a mutuals agreement between him and the 1st defendant and Moses, on the

other part, whereby it was agreed that the 1st and 3rd defendants would purchase a house in the joint names of the 1st defendant and the plaintiff as a consideration of the plaintiff processing the title document of the suit property.

ANALYSIS AND DETERMINATION

6. The plaintiff relied on an email dated 15th September 2010 by the 1st and 3rd defendant to claim that this court do compel those defendants to comply with the terms of the agreement. That email is reproduced, in part, as follows:

“In recognition of Jack’s help in selling utwala and doing other things for us possible reward for him would be to purchase a home in the joint names of Anne and Jack (presumably in Mombasa) for Jack’s use. Jack could either choose to live there (paying his own water, gas and electricity bills) or stay elsewhere at his own expense and rent this joint property to a third party and keep the rental income for his own use.... what does Jack think of this proposal? Perhaps he has other suggestions? This is open for discussion and mutual agreement.”

7. On that email, which obviously is typed, is a hand written note to the following effect.

“OK for me in the event for sale to share the proceeds as equal partners (sic) or get the equivalent in cash of actual buying value

Signed

16/10/2010.”

8. Looking at that email and the hand written note it becomes very obvious that what the plaintiff refers to as an agreement is lacking in the essential ingredients of a contract. It is obvious that both of the defendants made one offer which offer was met by the plaintiff’s counter offer. It follows there was no meeting of the minds of the parties. Even as I consider this judgment I am unable to confirm whether the parties agreement was that there would be a property purchased in Mombasa jointly registered in the 1st defendant’s name and the plaintiff’s name; or whether the agreement was as per the hand written note, that parties would share equally the proceeds of the sale of the suit property. The plaintiff’s claim fails on that score. There was no agreement that this court can enforce. In that regard I find it useful to refer to a Canadian case **Pitcher v Downer 2013 CanLII 43387 (NL SC)** as follows:

“.....the case of *Gunvaldsen-Klaassen v. Bulpitt*, 2009 NSSC 66 (CanLII), where the Nova Scotia Supreme Court referred to *G.H.L. Fridman in The Law of Contract (Fifth ed., 2006)* and stated as follows, at paragraph 32:

32. The determination of a valid agreement is discussed by Fidman (sic) in *The Law of Contract (Fifth Ed.; 2006)* at p. 15:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*: the parties will be found to have reached a meeting of the minds, in other words be ad idem, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.”

9. I am afraid to say that I cannot find, in the documents before me that the parties intended to contract.

10. The plaintiff’s case is without merit and it is hereby dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th** day of **April, 2020**.

MARY KASANGO

JUDGE