



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 575 OF 2005

MEMBLEY HOUSING.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

J U D G M E N T

1. The Plaintiff claimed from the Defendant a balance of purchase price in the sum of KShs 1,953,864/70, interest of KShs 4,110,689/70 (as at 13th May 2005 and further accruing interest), a reimbursement of KShs 18,350/00, and general damages, all in respect to sale by the Plaintiff to the Defendant of a 40 metre wide wayleave trace (regardless of its actual acreage) for the Defendant's electricity transmission line, delineated from the Plaintiff's parcel of land L.R. Number 10901/46 (I.R. No.57473/1). The sale was as per a sale agreement dated 3rd April 2003, and the sale price was KShs 7,020,000/00. That is the Plaintiff's case in brief as set out in its plaint dated and filed on 13th May 2005.
2. In its statement of defence dated and filed on 23/05/2005 the Defendant pleaded that what it required from the Plaintiff was a 40 metre wide wayleave for its transmission line, but that the Plaintiff insisted on its purchase outright of 4.462 acres for KShs 7,020,000/00 to accommodate the transmission line, and that that was what the Defendant purchased from the Plaintiff as per the sale agreement.
3. The Defendant further pleaded that instead of transferring the entire 4.462 acres purchased, the Plaintiff transferred only 3.3112 acres, and that therefore the Defendant paid fully and *pro rata* for the 3.3112 acres. The Defendant therefore denied that it owed any balance of purchase price, or any interest thereon.
4. The Defendant also denied that it owed to the Plaintiff a reimbursement of KShs 18,350/00 as it never declined to meet any statutory land levies, and that if the Plaintiff paid any such for the Defendant after the date of transfer of the property sold, the payment was not solicited. A demand for reimbursement therefor does not bind the Defendant. The Defendant thus sought dismissal of the Plaintiff's suit with costs.
5. In a reply to defence dated and filed on 30/05/2005 the Plaintiff in effect joined issues with the Defendant upon its statement of defence.
6. On 27/06/2007 the learned counsels for the parties agreed that the following were the issues to be tried in this suit –

(i) Was the agreement for sale between the parties in respect of a plot of land of specified acreage, or was it a 40-meter wide wayleave trace (of whatever acreage) for an overhead electricity transmission line across the Plaintiff's property L.R. No 10901/46?

(ii) Regarding the portion that was the subject-matter of the sale –

(a) Was the actual acreage to be ascertained by survey subsequent to the sale agreement?

(b) As between the Plaintiff and the Defendant, who represented the area of the 40 meter-wide wayleave trace across L.R. No.10901/46 as variously measuring 4.642 or 4.462 acres?

(c) Did the portion excised out of L.R. No 10901/46 upon survey correspond with the 40 meter wayleave trace already previously marked and occupied by the Defendant?

(iii) Is the Defendant entitled to raise any objections about the identity or measurement of the subject property, or to claim compensation after the completion date?

(iv) Was the payment of the agreed purchase price of KShs 7,020,000/00 or any balance thereof dependent upon the acreage of the 40-meter wide wayleave trace across L.R. No.10901/46, and was such payment to be pro rata? And if so, in reference to what?

(v) Did the Defendant oppose the draft transfer of the subject property with a copy of the Deed Plan No 250525 for L.R. No 10901/46/1, or was it indolent in that regard?

(vi) Were the Transfer and Deed Plan approved by the Defendant prior to registration, and if so, did such approval override the pertinent contents of the Agreement for Sale?

(vii) Was the transfer in breach of the Agreement for sale?

(viii) Was the Defendant entitled to elect to either terminate the Agreement for sale or make a prorated payment should the court hold that the Plaintiff was in breach?

(ix) From what date, or upon the occurrence of what event, was the interest of 25% per annum payable?

(x) Which of the prayers made is the Plaintiff entitled to?

7. Learned counsels also agreed that the joint **List and Bundle of Documents dated 25th June 2007** be admitted in evidence. The same was so admitted and marked as **Exhibit A**.

8. Trial of the case commenced on 27/06/2007. The Plaintiff closed its case on 25/11/2009. On 13/05/2015 the court declined to grant any further adjournment, closed the case and reserved judgment. The case was later re-opened upon application by the Defendant, and by consent of the parties. On 03/11/2015 the Defendant presented its case.

9. Three witnesses testified for the Plaintiff while one testified for the Defendant. I have considered those testimonies. Learned counsels filed written submissions. The Plaintiff's submissions were filed on 26/06/2015 while those for the Defendant were filed on 30/06/2015. That was after the case was initially closed and before it was reopened. The parties filed further submissions on 02/12/2015. I have considered all the submissions.

10. Hearing of the case took so long because of a variety of reasons: the trial judge's transfer from Nairobi to Machakos and back to Nairobi again; and then to Murang'a; and the parties' own proclivities to adjournment! I will now examine and determine the issues as framed by the parties.

Issue No.1

Was the agreement for sale between the parties in respect of a plot of land of specified acreage, or was it a 40-meter wide wayleave trace (of whatever acreage) for an overhead

electricity transmission line across the Plaintiff's property L.R. No 10901/46?

11. The agreement for sale executed by the parties is at pages 24 to 29 of *Exhibit A*. Clause 1.4 of the agreement for sale provides –

“This agreement constitutes the entire agreement of the parties with regard to its subject matter and supersedes and cancels all previous negotiations and agreements.”

This clause is important in that it imposes a restriction in interpretation of the agreement for sale to the agreement itself. Previous talks, negotiations and agreements over the subject matter may not be resorted to in interpreting the agreement. There was a lot of evidence given by the parties, both oral and written, in regard to the talks and negotiations leading to the executed agreement for sale. The parties in their written submissions also addressed this evidence at length. The court is bound by the above clause of the agreement for sale to ignore all that evidence where the words of the agreement clearly convey the intentions of the parties.

12. The introductory part of the agreement for sale states as follows at clauses B, C and D -

“B. The Purchaser is in the process of erecting a 220 KV Olkaria- Dandora electricity transmission line whose wayleave trace traverses across part of the vendors' said piece of land.

C. The said wayleave trace measures approximately forty (40) meters and covers an area approximately 4.6642 acres of the vendors' said land (which area or ground is hereinafter referred to as “the subject property”).

D. The Purchaser is desirous of acquiring for its said use the subject property and the Vendors are willing to sell the same to the Purchaser at the price and upon the terms and conditions hereinafter set forth.”

The **subject property** is defined as follows in definitions and interpretations section of the agreement for sale -

“Subject property” means the portion of L.R. No. 10901/46 measuring approximately forty (40) metres wide covered by the wayleave trace of the 220 KV Olkaria-Dandora Electricity Transmission Line comprising 4.642 acres or thereabouts excluding any road or roads of access passing through or across the same.”

The agreed purchase price for the subject property is provided for in clause 3 of the agreement for sale, and the same is KShs 7,020,000/00.

13. The property the subject of the agreement for sale was therefore the wayleave trace of approximately 40 metres in width across part of the Plaintiff's parcel of land L.R. No.10901/46 (I.R. 43610/9). Initially the parties thought that the wayleave trace would measure approximately 4.642 acres but it subsequently turned out to be of less acreage. The important thing to note is that the subject property being sold and purchased was not a piece of land of definite acreage but rather a swathe of wayleave trace measuring 40 metres wide across part of the Plaintiff's parcel of land, whatever its acreage might turn out to be. The purchase price for the subject property, as already seen, was KShs 7,020,000/00. This price would not be affected by the actual acreage of the wayleave trace once it was surveyed and measured for purposes of issuance of title thereto to the Defendant. All this is clear from the wording of the clauses of the sale agreements quoted above.

14. **Issue No. 2** is in three parts. **Was the actual acreage to be ascertained subsequent to the sale agreement?** Yes indeed as provided for in clause 2.3 –

“The Vendors hereby agree and undertake to cause L.R. No.10901/46 to be re-surveyed and

sub-divided to the intent that the subject property will be exercised therefrom and have a separate and distinct deed plan and land reference Number.”

This clause taken in conjunction with the other clauses already quoted (and indeed the entire agreement for sale) shows that the survey and excise of the wayleave trace of 40 metres in width sold and purchased was for purposes of transfer of the same to the Defendant and issuance of title to it. The testimony of PW3, the surveyor who did the survey, is important in this regard. He surveyed the 40 metre swath of land across the Plaintiff's land whose centre-line had already been marked out by the Defendant. That exercise must needs entail ascertainment of the acreage of the portion so excised. However, ascertainment of the acreage was not for purposes of the purchase price. The subject property sold and purchased was the 40-metre wide wayleave trace across a portion of the Plaintiff's land. That was what would cost Kshs. 7,020,000/00; that price would not be affected by whatever actual acreage turned out to be after survey and measurement for purposes of transfer to the Defendant and issuance of title to it.

15. The **second part of issue No. 2** does not need to be determined. The various representations by the parties as to what the actual acreage of the subject property was or might turn out to be were of no consequence, given the findings above. As for the **third part of issue No. 2**, the Defendant has not complained that its wayleave trace across a portion of land, and for which it ultimately got title, was any less than 40 metres wide.

Issue No. 3

Is the Defendant entitled to raise any objections about the identity or measurement of the subject property, or to claim compensation after the completion date?

16. In light of the findings already made elsewhere above, and there being no allegation by the Defendant that its wayleave trace across part of the Plaintiff's land, and for which it ultimately got title, was less than 40 metres wide, there is no cause for it to raise any objections about the identity or actual acreage of the subject property, or to claim compensation for any perceived shortfall in the acreage.

Issue No. 4

17. I have already held that the purchase price of KShs 7,020,000/00 was not dependent upon the actual acreage the 40 metre wide wayleave trace turned out to be after survey and measurement for purposes of issuance and transfer of title. That purchase price was for the wayleave trace.

18. **Issue Nos. 5, 6, 7 and 8** need not be answered in view of the findings in Issues Nos 1, 2, 3 and 4.

Issue No. 9

From what date, or upon the occurrence of what event, was the interest of 25% per annum payable?

19. The provisions for payment of purchase price and penalties for non-payment of part thereof are to be found in clauses 4.1, 5.3 and 5.4 of the agreement for sale. Under clause 4.1 a deposit of 10% of the purchase price (KShs 702,000/00) was to be paid on or before execution of the agreement for sale. This payment was duly made.

20. Under clause 5.3 the balance of the purchase price was to be paid within five days of successful registration of transfer to the Defendant of the subject property. Evidence discloses that the transfer was registered sometime in October 2004. More importantly, that registration was facilitated by the Plaintiff. The Plaintiff informed the Defendant of the transfer by a letter dated 29/10/2004. By the same letter the Plaintiff demanded payment of the balance of the purchase price. The Defendant declined to pay the full balance of the purchase price and elected to pay *pro rata* for the actual acreage of the parcel transferred. As already held, that parcel constituted the 40 metre wide wayleave trace across the Plaintiff's parcel of land that the Defendant required for its transmission line. Again as already held, it mattered not what

actual acreage this wayleave trace might turn out to be after survey and measurement for purposes of issuance of title.

21. The Defendant was therefore not entitled to pay *pro rata* for the actual acreage of the parcel transferred. The purchase price was KShs 7,020,000/00 for the 40 metre wide wayleave trace purchased.

22. Under clause 5.3 of the agreement for sale the balance of the purchase price was to be paid within five days of successful registration of the transfer to the Defendant of the subject property. The Defendant played no role in the registration exercise. It learnt of the registration of the transfer by the Plaintiff's letter dated 29/10/2004 (page 45 of Exhibit A). That letter gave a five-day notice for payment of the balance of the purchase price. This was in line with clause 5.3 of the agreement for sale. The balance of the purchase price was therefore payable on or before 03/11/2004. That balance was KShs 6,318,000/00. On or about 26/01/2005 the Defendant paid to the Plaintiff KShs 4,364,135/30 (page 58 of Exhibit A) leaving a balance of KShs 1,953,864/70.

23. Clause 5.4 of the sale agreement provides as follows –

“If for any cause whatsoever (other than non-completion caused by default of the Vendors) the balance of the purchase price shall not have been paid as stipulated in Clause 5.4, and without prejudice to the Vendors' rights as stated in Clause 5.5., then the Purchaser shall pay to the Vendor interest on the balance of purchase price at the rate of 25% per annum calculated from the date when payment was due as provided in Clause 5.3 until payment of the purchase price in full, both days inclusive.”

Under this clause the Plaintiff is entitled to interest upon the sum of KShs 6,318,000/00 at 25% per annum from 03/11/2004 to 26/01/2005. The Plaintiff is also entitled to further interest at the same rate on KShs 1,953,864/70 from 26/01/2005 to the date of payment in full. This of course is in addition to the balance itself of KShs 1,953,864/70.

24. The Plaintiff also claimed reimbursement of KShs 18,350/00 for rates, land rents and other outgoings. I do not consider this claim as proved. There was no demand up front from the Plaintiff calling upon the Defendant to pay; and there was no request by the Defendant to the Plaintiff to pay the same on its behalf. It is also not clear in what circumstances this sum was paid: was it before or after the transfer? I reject this claim. I also reject the claim for general damages. No foundation for it has been laid.

25. Having examined the evidence placed before the court, particularly the agreement of sale executed by the parties, and having considered their respective submissions, I am satisfied that the Plaintiff has proved its case on a balance of probabilities in respect to its claim for payment of the balance of the purchase price in the sum of KShs 1,953,864/70. I will give it judgment for that sum. The Plaintiff has also proved its case for interest at 25% per annum on KShs 6,318,000/00 from 03/11/2004 to 26/01/2005, and further interest at the same rate on KShs 1,953,864/70 from 26/01/2005 to the date of payment. It will have judgment for those interests. The actual amounts of the interests awarded shall be calculated by the Deputy Registrar of the court at the time of issuance of the decree. It is so ordered. The Plaintiff shall also have costs of the suit. That will be the judgment of the court.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 16TH DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE