



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 30 OF 2011

DAVID NJENGA KENYATTI NDORIA.....PLAINTIFF

VERSUS

JOHN KAMAU NJENGA KENYATTI.....1ST DEFENDANT

KENNETH NJOROGE KENYATTI.....2ND DEFENDANT

RULING

The 2nd defendant, hereinafter called “the applicant”, brought the notice of motion dated 29th March, 2012 praying that the court be pleased to strike out the suit herein. In the alternative, the applicant seeks the dismissal of the suit for want of prosecution.

The application is supported by the affidavit of the applicant and the grounds that the suit is vexatious; it discloses no reasonable cause of action against the applicant; that the suit is aimed at frustrating the enforcement of the sale agreement executed between the applicant and the respondent; and that it is based on misrepresentations and material non-disclosure. Further, that it is an abuse of the court process. The applicant also contends that the respondent (plaintiff) has not made any attempt to prosecute the suit since its filing.

The application, the applicant has, inter alia, deposed that pursuant to a power of attorney donated to him by the 1st defendant, and registered on 9/9/2010, he entered into a contract for sale of LR NO. 1556/134 (Original number 1506/18/45) at a consideration of Kshs.4, 400,000/=; that during the execution of the sale agreement the plaintiff was aware that he had the capacity to act on behalf of the 1st defendant; that it was an express term of the sale agreement that the plaintiff would pay a deposit of Kshs.1,000,000/= on execution of the agreement and that completion date was to be within sixty (60) days thereafter. It was also a term of the sale agreement that if the plaintiff failed to meet his part of the bargain on the completion date, the seller would serve him with 21 days completion notice; and that if the plaintiff failed to meet his contractual obligations within the 21 days, the plaintiff would forfeit 10% of the purchase price as liquidated damages.

In compliance with the sale agreement, the plaintiff paid Kshs.2, 590,000/= to his advocate, as a stakeholder, pending the completion date. However, the plaintiff failed to fulfil his part of the bargain within the sixty (60) days stipulated in the agreement. Consequently, the advocate issued him with the 21 days completion notice as provided for in the sale agreement. At the close of the 21 days, the plaintiff was yet again, unable to fulfil his obligations under the sale agreement.

In accordance with the terms of the sale agreement, the applicant informed the plaintiff that 10% of the purchase price will be forfeited in enforcement of the agreement. This notification prompted the plaintiff to moved to court claiming that the transaction was a nullity *ab initio*.

The applicant contends that by filing the suit, the plaintiff was trying to back track on his contractual obligations. Further that the suit has been overtaken by events because the 10% is already forfeited and that granting the orders would be tantamount to varying the terms of the contract.

In reply, the plaintiff swore the affidavit filed on 27.9. 2012, in which he admits that he entered into the impugned sale agreement with the applicant but contends that there was no evidence that the power of attorney that the applicant had had been registered; that he entered into the contract believing that the applicant had capacity to act for the 1st respondent; and that although the sale agreement provided that completion will be within 60 days of execution of the sale agreement, relying on the Law Society Conditions of sale which provide that the standard period for completion is 90 days, he applied for extension of time within which to meet his obligations.

The plaintiff has also admitted that he did not meet his contractual obligation within the time stipulated in the sale agreement; that he wrote to Kairu Mbuthia & Kiingati Advocates (who acted for himself and the applicant), seeking extension of completion date by a further 35 days; and that the applicant informed him of his intention to enforce the clause on forfeiture of 10% of the purchase price.

Admitting that the applicant was entitled to request for forfeiture of 10% of the purchase price, the plaintiff argues that he equally had a right to request for extension of the completion time under the Law Society Conditions of sale.

Concerning the contention that by instituting this suit, the plaintiff was trying to back track on his contractual obligations owing to his inability to pay, the plaintiff has denied that assertion and explained that he was exercising his legal right to request for extension of the time within which to complete the transaction.

Contrary to the defendant's contention that the suit has been overtaken by events, the plaintiff contends that the forfeiture cannot take place before the legal issues raised in the suit are addressed; that his advocates have engaged the applicant's advocates in which negotiations have resulted in a settlement in favour of the applicant.

On 16.10.2012 parties, with the concurrence of the court, agreed to have the application disposed of by way of written submissions which were to be highlighted. Consequently, the applicant filed submissions which I have read and considered. Despite the order for filing of submissions having been made in the presence of the respondent's counsel, the respondent's counsel did not file submissions within the time specified by the court and at all.

The issues for consideration are:-

1. Whether there was a valid sale agreement executed between the plaintiff.
2. Whether the suit discloses any reasonable cause of action against the defendant.
3. Alternatively, whether the plaintiff's suit should be dismissed for want of prosecution.

Whether there was a valid sale agreement executed between the plaintiff.

It is common ground that the parties herein voluntarily entered into the impugned sale agreement. It is also common ground that the parties negotiated and agreed on the terms of the agreement. The only bone of contention is whether the applicant had capacity to act for the 1st defendant in the impugned transaction.

I have read and considered the rival arguments by the parties, their respective submissions and their affidavits. My finding is that by the time the agreement was executed, the applicant held a power of attorney donated to him by the 1st defendant (FMVI). Although the applicant has not produced any certificate of registration of the said power of attorney there is evidence that he applied for its registration to the Land Department on 9/9/2010 (KWK II) as by law required. So, in the absence of any evidence to prove that the same was fraudulently obtained and/or was not presented for registration, I am persuaded

that the power of attorney was valid. Consequently, I find and hold that the sale agreement was valid.

I am bolstered in my finding by the decision of **Koome J.** In **Re Antony Muiruri Gachoka ex-parte Harendra Pal; Nairobi High Court Bankruptcy Cause No.1 of 2009**, where the court was faced with a similar issue the judge observed:-

“The petitioner is holding the power of attorney duly executed by the creditor. It was upto to the debtor to produce evidence to show the power of attorney was invalid.”

I am also persuaded by the decision of **Musinga J.**, (as he then was) in **Kulwant Singh Sihra v. Jagjeet Singh Sihra & another (2013) Nairobi ELC No.216 of 2013 (2013) eKLR** where he held:-

“...Equally the plaintiffs have not shown and/or demonstrated that the power of attorney donated to the 1st defendant by the 2nd defendant was not valid and/or was fraudulently obtained...”

Whether the suit discloses any reasonable cause of action against the defendant; As pointed out above, it is not in dispute that the parties herein voluntarily entered into the impugned sale agreement.

Having already determined that the 2nd defendant had capacity to enter into the contract; and that the contract was valid, the duty of this court, with regard to that contract, is to give effect to the clear intention of the parties and not to make or remake the contract for them. See **Jiwaji & others v. Jiwaji & another (1968)E.A 547** where **Clement De Lestang, V.P** observed:-

“The courts will not, of course, make contracts for the parties but they will give effect to their clear intention. In the present case parties made expression for the date of payment and the amount of first instalment should the certificate not materialise in time. They never intended that there should be a gap of more than one year between each instalment. They did not make similar provision for a second or subsequent instalments because they never contemplated it would take so long to produce the certificate. I have no doubt, however, that if any one had raised that point at the time of the agreement the answer of the parties would have been “but the certificate will be issued and if it is not, the provisional instalments will continue until the accountants produce their certificate.” For these reasons I agree with the learned trial judge that the defendants were in default.”

In the instant dispute the agreement, inter alia, provided as follows:-

“B. The vendor has agreed to sell to the purchaser and the purchaser has agreed to buy the above- described parcel of land on terms and conditions hereinafter appearing.

IT IS AGREED as follows;

1. Definitions and Interpretation

1. In this agreement;

0. “Completion Date” means Sixty (60) days from the date of execution of this agreement.....

2. Agreement for sale

2. The sale is subject to the Law Society Conditions of sale (1989) in so far as they are not inconsistent with the conditions contained in this agreement or specifically hereby excluded.....

6. Completion

6. **The completion of this transaction shall take place on or before completion date....**

7. **Default**

7. **Should the sale fail to be completed for any reason whatsoever attributed to the purchaser, the vendor shall be entitled to serve upon the purchaser a twenty one (21) days completion notice and should the purchaser fail to complete the transaction before the expiry of the completion notice then vendor shall be entitled but not obligated to rescind the transaction where upon the purchaser shall forfeit 10% of the purchase price paid to the vendor as liquidated damages and the purchasers advocates shall upon demand by the vendor, return all the completion documents in their possession to the vendor in the same good condition they were when they were received in their offices and should registration of any document or instrument against title be already done, the purchasers advocates shall procure the cancellation of the registration of the said documents such that the vendor's title reverts to the original position it was in when it was received in vendors advocates offices.**

9. **Miscellaneous**

0. **Time shall be of essence for purposes of this agreement.”**

From the above extract of the sale agreement, it is clear that only those provisions of the Law Society Conditions of Sale (1989 edition) which are not inconsistent with the agreement or which are not specifically excluded in the agreement, would apply in the agreement.

In the instant case, the parties had expressly excluded the clause on completion taking place within 90 days after the execution of the agreement. Clause 1.1.1 as read with 9.5 in the agreement clearly shows that the parties intended to exclude the 90 day window provided for in the Law Society Conditions of Sale.

The default clause:

I also find that the parties had provided for what would happen in the event either of them was in breach. See clause 7.1 and 7.2 of the agreement.

Through clause 7.1 the parties had, inter alia, agreed that the **plaintiff (purchaser) would forfeit 10% of the purchase price paid to vendor as liquidated damages...**

It is common ground that the plaintiff did not meet his contractual obligations at the completion time and after issuance of the 21 days completion notice. It is also common ground that the vendor (defendant), issued the plaintiff with a notice of forfeiture of 10% of the purchase price.

Although the plaintiff contends that the agreement allowed him to extend the completion period, I find no clause in the agreement to that effect. However, I note that the defendant purported to forfeit 10% of the purchase price, when the agreement allowed him to **forfeit 10% of the purchase price paid.** In my considered view, I find and hold that the applicant was only entitled to 10% of the portion of the purchase price paid to the purchaser's advocate. (see clause 7.1), **“where upon the purchaser shall forfeit 10% of the purchase price paid to the vendor as liquidated damages....”**

For the foregoing reason(s) the second limb of the plaintiff case fails too. The upshot of the foregoing is that the motion herein has merit and the suit is struck out with costs, as prayed.

DATED and DELIVERED this 30th day of May, 2014

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Koima holding brief for Mr. Karanja for the plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

Kennedy – Court Assistant