



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 210 of 2009

DUNCAN KABUI..... PLAINTIFF

VERSUS

SAMUEL BEDE OGEMBO.....DEFENDANT

RULING

The Plaintiff brought a suit against the Defendants by way of a Plaint dated 27th January 2009 seeking the following reliefs against the Defendant:

- a) Specific performance.
- b) In the alternative to (a) above, rescission of the Agreement for Sale dated 10th April, 2008.
- c) A refund of the sum of Kshs.2,430,000.00.
- d) Damages for loss of bargain.
- e) Interest on c) and d) at 17% per annum from 10th April, 2008 until payment in full.

The Plaintiff's claim is that he entered into a sale agreement with the Defendant on 10th April 2008 for the purchase of a parcel of land known as L.R. No. 2259/141/4 at an agreed purchase price of Kshs 8,000,000/= . The Plaintiff alleges that he paid a deposit of Kshs 2,000,000/= and a further Kshs 430,000/= in legal fees and ancillary expenses arising from the agreement and investigation of title.

On 17th July 2009, the Plaintiff filed a chamber summon application dated 16th July 2009 brought under Order VI Rule 13(1), (b), (c) and (d) of the repealed Civil Procedure Rules (now Order 2 Rule 15 of the Civil Procedure Rules). The Plaintiff sought orders that the defence filed herein on 10th June 2009 be struck out and judgment entered in favour of the Plaintiff as prayed in the Plaint, or that in the alternative, paragraph 11 of the said Defence be struck out and judgment be entered in favour of the Plaintiff in terms of prayer (c) of the Plaint together with costs of the suit and interest.

The Defendant filed grounds of opposition to the application dated 23rd September 2009 and filed in court on 25th September 2009. The parties relied on the submissions filed during the hearing of the application on 2nd December 2009 and Sitati J. delivered a judgment dated 12th May 2009 allowing the Plaintiff's application.

The Plaintiff then set the suit for formal proof on 1st October 2012 for the prayer sought for damages for

loss of bargain. The Plaintiff called Mr. Robert Omoke Osiemo (PW1), to give evidence in this regard. His testimony given in court and from his written statement dated 5th June 2012 is that he is a valuer by profession who prepared the valuation report in the Plaintiff's documents filed on 26th March 2013 and produced as Plaintiff's Exhibit 1. PW1 stated that the property is valued at Kshs 30 million excluding the development. He also confirmed that the valuation report indicates that the Defendant is the lessee.

Parties filed written submissions, and the Plaintiff in submissions dated 16th October 2012 argued as a result of breach on the part of the Defendant, he suffered damages in the nature of loss of bargain. The Plaintiff argued that since the valuation report stated that the current value of a similar property is Kshs 30 million, the Plaintiff is entitled to the said sum which is a reflection of the actual loss suffered when the Plaintiff forego the opportunity to purchase the suit property.

Further, the Plaintiff submitted that in the event the court makes a determination that the loss suffered by the Plaintiff was the difference between the current value of a similar property and the value of the suit property at the time the sale agreement was entered into and therefore, that the Plaintiff is entitled to the sum of Kshs 22 million.

Counsel for the Plaintiff further relied on the case of **Timber Manufactures & Dealers Ltd -vs- Joseph Kiarie Mbugua & Another, Nairobi HCCC No.1048 of 1994** where the court held that the measure of damages awardable to the Plaintiff was the difference between the value as given in the valuation report and the price actually paid to the 1st Defendant. Reliance was also placed on the case of **Omega Enterprises(Kenya)Ltd -vs- Eldoret Sirikwa Hotel & 2 Others, Nairobi HCCC No. 50 of 1999** where the court accepted the Plaintiff's submission that the market value of the property was best evidenced by what was paid for it in a competitive public auction.

The Defendant's Counsel in submissions dated 1st November 2012 argued that the loss of bargain alleged by the Plaintiff is speculative and that no evidence was produced to substantiate the claim. While relying on the case of **Amos Kinuthia -vs- Unga Ltd, (2006)eKLR** where it was held that loss of business or bargain must be proved by either evidence of prospective contracts to potential customers to transact with the suit premises, counsel for the Defendant submitted that no receipts, agreements or proposals were produced by the Plaintiff to give effect to his assertions. Counsel also relied on the case of **Govas Co. Ltd -vs- Tom Mayani Omami & 2 Others, eKLR 2004** where the court only awarded special damages for breach of contract.

It was further submitted for the Defendant that an interest rate of 17% on the inflated value of Kshs.30 million as loss of bargain from the date of execution on the part of the Plaintiff was an unreasonable and overzealous attempt to unjustly enrich the plaintiff at the defendant's expense and the court was referred to the equity maxim "*who seeks equity must do equity*"

Counsel for the Defendant sought to distinguish the authority in the case of **Peter Karanja Mungai vs. Daniel Njoroge Kamau and 2 Others (supra)** cited by the Plaintiff in that unlike in the present suit, the plaintiff therein had already taken possession, had paid the purchase price and had already obtained Land Control Board consent. Similarly, the authority in the case of **Timber Manufactures Ltd -vs- Joseph Kiarie Mbugua & Consolidated Bank of Kenya Ltd (supra)** cited by the Plaintiff was distinguished on the basis that the purchase price had been paid in full and the 1st Defendant had allowed the Plaintiff to take possession and develop the suit property when property had been charged to consolidated bank.

I have carefully considered the pleadings filed herein, together with the judgement, evidence and submissions made herein. The issues that I must address are firstly, the effect of the decision delivered by Sitati J dated 12th May 2009. Secondly, whether the formal proof proceedings were properly before the court, and if so, if the Plaintiff is entitled to damages for loss of bargain.

One the first issue of the effect of the decision made by Sitati J., I note that the provisions for striking out pleadings and entering judgment thereof are a guillotine and draconian procedure, and this is the reason they are to be resorted to and utilized cautiously and sparingly. Any judgment once prayed for and

entered as a result of this procedure, can finally determine and conclusively decide the main issues or questions as between the parties without the court having the benefit of the parties' tested evidence and arguments. This court must therefore look to the nature and terms of the decision that was delivered by Sitati J. to determine its effect in this regard.

The decision given by Sitati J. dated 12th May 2009 was titled "judgment", and it allowed the Plaintiff's application in terms of the alternative prayer striking out paragraph 11 of the Defendant's Defence and entered judgment for the Plaintiff in the sum of Kshs. 2,000,000/= together with the costs of the suit and application. The Honourable Judge substantively addressed and made findings on the issues and raised by the Plaintiff and Defendant herein with respect to their respective cases in the said judgment, including that of breach of agreement. The Honourable Judge in this respect stated as follows at paragraph 43 of the said judgment:

"This case is therefore a proper case in which to make a finding that there was misrepresentation of facts by the Defendant for his own advantage. The Defendant was thus in breach of the agreement of sale dated 10/04/2008, and this being the case the Plaintiff was entitled to repudiate the Agreement"

No orders were made in the said judgment with regard to the other prayers sought by the Plaintiff in his Plaint dated 27th January 2009. The effect of the judgment in this regard is in my opinion to be interpreted in light of the explanation given in section 7 of the Civil Procedure Act, to the effect that any relief claimed in a suit which is not expressly granted shall be deemed to have been refused. In addition, the order awarding costs of the suit also points to a final determination of the dispute between the parties. It is therefore the finding of this court that the decision by Sitati J. was a judgment that conclusively determined the suit filed herein.

This finding leads to the second issue for determination, which is whether the formal proof proceedings are properly before this court. It is my opinion that such proceedings could only be brought in the circumstances of this case where a conclusive judgment had been delivered, if specific orders were given in the judgment that the prayer for damages proceeds for formal proof, or orders were given as to how the remainder of the Plaintiff's and Defendant's claims would be disposed of.

No such orders were given by Sitati J. in her judgment, and in the absence of such orders this Court can only interfere with the said judgment to the extent allowed under the provisions of section 99 of the Civil Procedure Act for corrections, or of Order 45 of the Civil Procedure Rules for review. The proceedings herein were not brought under the said provisions. The only other option available to the Plaintiff in the circumstances is to appeal the said judgment.

I therefore find that for these reasons the formal proof proceedings are not properly before this court. I will therefore not proceed to consider the issue of, and arguments made on the Plaintiff's claim for damages, which accordingly fails.

The Plaintiff shall meet the costs of the formal proof proceedings.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____13th____ day of ____March____, 2013.

P. NYAMWEYA
JUDGE