



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
Environmental & Land Case 641 of 2009

SUKDEV SINGLALY.....PLAINTIFF

V

SAMMY LOUIS KARANJA..... 1STDEFENDANT

HIGHRISE ELEVATORS LIMITED..... 2NDDEFENDANT

JUDGMENT

The Plaintiff filed suit vide a plaint dated 16th December 2009 in which he sought that judgment be entered against the Defendants jointly and severally for:-

- a) The orders for specific performance do issue compelling the 2nd Defendant whether by itself or its agents, servants to perform and complete the sale contracts entered into on the 29th day of November 2006 for the sale of L. R. No. 209/8000/136 Original No. 209/8000/41/1 (hereinafter referred to as the "Suit Property") and to provide all the necessary completion documents to facilitate conveyance of the said property to the Plaintiff.
- b) Alternatively the Defendants do pay the Plaintiff by way of refund the sum of Ksh. 24 million being monies had and received on account of transaction that has clearly failed and further on account of renovations and improvements done by the Plaintiff on the Suit Property.
- c) Costs of this Suit.
- d) Interest on (b) hereinabove at the rate of 15% per annum from 10th August 2007 until payment in full and interest on (c) hereinabove at court rates.
- e) Such other or further relief as the court may deem just and expedient

FACTS

The Plaintiff entered into a Sale Agreement dated 29/11/06 with the Defendants in which the Plaintiff agreed to buy the Suit Property from the Defendants at a consideration of Ksh.11 million. This sum was later increased to Ksh. 19 million. In addition, the 1stDefendant gave the Plaintiff a Director's Guarantee

in which he bound himself to repay the consideration of Ksh. 19 million to the Plaintiff in the event that the 2nd Defendant fails to honour its obligation to transfer the suit property to the Plaintiff. In compliance with the Sale Agreement, the Plaintiff paid the 2nd Defendant the sum of Ksh. 19 million as follows:-

- 1) On 29/11/06 - An Electronic Funds Transfer of Ksh. 7 million through Housing Finance Company of Kenya Limited.
- 2) On 14/8/07 - An Electronic Funds Transfer of Ksh. 5 million through the Plaintiff's account at Barclays Bank.
- 3) On 1/6/07 - A payment of Ksh. 4 million.
- 4) In 2005 - A payment of Ksh. 3,050,000/- paid for Another property which was not obtained and now applied towards purchase of the Suit Property.

The Suit Property thereafter got burnt and the Plaintiff utilized a sum of Ksh. 5 million to renovate it.

In breach of the Sale Agreement, the Defendants failed to avail to the Plaintiff the completion documents in respect of the Suit Property. Despite demand having been made by the Plaintiff to the Defendants to honour their obligations under the Sale Agreement, the Defendants failed to comply leading the Plaintiff to file this suit.

The Defendants having been served with summons to enter appearance and having entered appearance on 13/1/12 and having failed to file their defence within the prescribed period, Interlocutory Judgment was entered against them and the matter proceeded for formal proof.

LAW

Section 36 of the Land Registration Act provides as follows:-

- 1) A lease, charge of interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.
- 2) Noting in this section shall be construed as preventing any unregistered instrument from operating as a contract.

ANALYSIS

In this particular case, the Plaintiff did not receive the completion documents to enable him to transfer the Suit Property into his name. However, the Sale agreement entered into between the Plaintiff and the Defendants acts as a contract as stipulated in Section 36(2) of the Land Registration Act cited above. The Defendants therefore can be held to account in respect of the obligation undertaken by them in the Sale Agreement and the Director's Guarantee.

The Purchase price of the Suit Property indicated in the Sale Agreement was Ksh. 11 million. The Defendants acknowledged receipt of this sum in the same Sale Agreement. In the Directors' Guarantee the 1st Defendant agreed to pay the Plaintiff Ksh. 19 million in the event the 2nd Defendant failed to honour its obligation under the Sale Agreement. The Plaintiff produced sufficient evidence to convince this court that he did in fact remit a total of Ksh.19 million to the Defendants in consideration of the Suit Property.

In addition, the Plaintiff made a further claim of Ksh. 5 million he spent in renovating the Suit Property after it burned down. While proof of payment of that sum has been availed, no evidence was adduced to show that the Plaintiff incurred these expenses on the basis of an agreement to be refunded the amount by

the Defendants. There is no evidence showing that the Defendants agreed to refund the Plaintiff this amount. Accordingly, as far as I can tell, this amount was incurred by the Plaintiff on its own behalf and no claim of the same may be made against the Defendants.

In respect to the prayer for an order of specific performance, this court declines to issue the same for the simple reason that such an order is likely to be impossible to enforce owing to the fact that none of the Defendants are proprietors of the Suit Property. The court will therefore not issue such an order in vain.

CONCLUSION

In light of the foregoing this court enters judgment against the Defendants jointly and severally for:-

- 1) That the Defendants do pay the Plaintiff the sum of Ksh. 19 million.
- 2) Costs of this Suit are awarded to the Plaintiff.
- 3) Interest on the sum stated in (1) above at court rates from 10th August 2007 until payment in full is awarded to the Plaintiff.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI ON THE 31ST DAY OF MAY 2013

MARY M. GITUMBI

JUDGE