



REPUBLIC OF KENYA
IN HE HIGH COURT OF KENYA AT NAIROBI

ELC NO. 339 OF 2012

CAPTAIN WILFRED P KEHARA

[P.M KAMAARA & ASS.ADVOCATES].....PLAINTIFF

=VERSUS=

NDERITU GACHAGUA

GRAVITY EXPORTERS LIMITED.....DEFENDANTS

JUDGEMENT.

The Plaintiff herein, **Captain Wilfred Peter Kehara**, has brought this suit against the two Defendants herein, **Nderitu Gachagua** and **Gravity Exporters Ltd.** The Plaintiff claim is for :-

(a) An order of specific performance that the Defendants do transfer all that property known as Apartment No.6 erected on LR No. 209/7148/2 and registered in the Registry of documents at Nairobi in Volume D1 folio 646/5844 in file DXXVI to the Plaintiff free of all encumbrances .

(b) The Defendants do pay all the tax liabilities subject of the notification of change by the Commissioner of Domestic taxes of 26th September, 2005 registered against the title No. LR No. 209/7148 /2.

(c) An order of specific performance that the Defendants do cause the transfer of the Reversionary ...interest in LR No. 209/7148/2 to Lower Hill Apartments Ltd.

(d) Damages plus interest thereon, per month at commercial rates from 5th October, 2005 for compensation for the period that the Plaintiff has been deprived of the use of the Title to the said Apartment 60.

(e) A declaration that the Plaintiff is the owner of one (c) share of Lower Hill Apartments Ltd.

(f) Costs of the suit together with interest thereon at such rate and for such period of time as the Honourable Court may deem fit to grant.

(g) Duly other or further relief as the Court may .

It was the plaintiff's case that at all material times to this action, both the Defendants were shareholders and directors of the company known as **Lower Hill Apartments Ltd** and were owners of **LR No. 209/7148/2** in the city of Nairobi measuring **0.6849 Hectares** . On 28/1/2005, the Plaintiff as a purchaser entered into an agreement with the Defendants who were to sell to the plaintiff an Apartment No. 60 elected on the piece of land known as **LR No. 209/7148/2**. The purchase price was **Kshs.3,700,000/=**. In pursuit of the sale agreement, the Plaintiff deposited a sum of **Kshs.370,000/=** in the vendor's advocates office – **Kembi Gitura & Co. Advocates** to hold as stakeholders pending completion. The balance of the purchase price amounting to **Ksh.3,330,000/-** would be paid to the vendors within **seven (7) days** of registered of the leasehold title in favour of the purchaser.

It was also the responsibility of the vendors to produce and obtain title document to the said land, the requisite contents to transfer valid land rates, clearance certificates and valid land Rent clearance certificates and to pay for any levy for the procurement of the consent to transfer the said property unto the name of the purchaser in that regard, the completion date would be on or before the 14th day April, 2005 or such earlier date as the parties agreed in writing.

Further, the vendor was at by own cost and expertise to obtain all documents necessary to effect the transfer in favour of the purchaser. The purchaser was on the other land to bear the cost of stamp duty and registration fees on the transfer of the lease. The vendor was also to execute a transfer of one share in the company known as lower title Apartments ltd in favour of the purchaser.

Pursuant to the terms and conditions of the Sale Agreement, the Plaintiff duly paid to the Defendants, the total purchase price of **Kshs.3,700.000/=**. However when the Plaintiff presented a stamped sub-lease and the completion documents for registration at the office, the land Registrar could not effect the registration due to a notification change of the Commissioner of Domestic taxes registered against the title on 26th September, 2005.

The defendants have failed to furnish the Plaintiff with the said title documents free from encumbrances despite written and verbal requests by the Plaintiff.

The Defendants are therefore, in breach of the said agreement. The Plaintiff has therefore brought this suit against the Defendant.

The Defendants though served with Summons to enter Appearance did not do so. The Defendant also failed to file their Defence. Interlocutory Judgement was entered against them.

The matter proceeded for formal proof on 11/4/2013 the Plaintiff herein relied entirely on his written statements. Thereafter the Plaintiff put in written submission.

The Plaintiff also attached various decided case to bottles his case.

From the available evidence and the documents on record, there is no doubt that the Plaintiff herein and the Defendants entered into a Sale Agreement and the property was sold free from any encumbrances.

There is also no doubt that Plaintiff paid all the purchase price of **Kshs.370, 000/=** as per the Sale Agreement.

However, the defendants did not transfer the Title to the Plaintiff.

From the Certificate of Title (Documents No. 28 in the list of documents) the Registrar of Title issued a notification of Change by Commissioner of Domestic Tax for **Kshs. 50,000,000** on 26/09/2005. It is evident that the applicant paid for the stamp of **Kshs.148,010/=** as evidenced by document number 54.

There is evidence that, the Plaintiff has sent several demands to the Defendants to no avail.

The Defendants did not avail the purchased Apartment 60 free from encumbrances. The same has not been transferred to the plaintiff. The Defendants are therefore in breach of the agreement.

I have considered **Clause 3** of the Sale Agreement. The same provides that if the sale does not go through due to default on the part of the vendors, all sums paid under **Clause 3** hereof shall be refunded in full to the purchaser without **“any prejudice to any right of the purchaser against the vendor”**.

The purchaser herein has therefore exercised his other right and brought this suit against the defendants. The Plaintiff’s evidence was not controverted by the Defendants.

The Defendants were supposed to have cleared all the outgoings that were accrued before the sale took place.

That was the findings in the case of **Savings and Loan Kenya Ltd Vs Mayfair holdings Ltd (2012) Eklr, (annexed by the Plaintiff)**. It was therefore the obligation of the Defendants to clean all the outgoings and deliver a good and valid Title to the purchaser which they did not do so. The Defendants herein, have not bothered to defend their position.

The Court having considered the available evidence and the submissions filed in Court and the attached authorities finds that the plaintiff has proved his case on a balance of probability for the above reasons.

The Court finds that the Defendants are in *breach of the contract entered between them and the Plaintiff*.

The Defendants have not come to Court to defend their position. The Court therefore, entered Judgement for the Plaintiff against the Defendants in terms of **Prayer No. a,b,c,e and f**, there was no evidence that the Plaintiff has not taken possession of the Apartment No. 60 in question .

As for prayer No. F, interest accrued to be calculated at the Court’s rate.

The cost and interest to run from the date of filing this suit.

On any other relief, the Plaintiff is awarded damages of 200,000/- .

- It is so ordered.
- 28 days Right of Appeal.

Dated, Signed and delivered this 21st day of June, 2013.

L.N. GACHERU

NVI.

In the Presence of:-

..... For the Plaintiff

.....For the Defendants

Anne : Court Clerk

L.N. GACHERU

NVI.

