



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 942 of 2007

REBMAN AMBALO MALALA.....1ST PLAINTIFF

HUMPHREY NGUBI KIMANI.....2ND PLAINTIFF

VERSUS

METRA INVESTMENTS LIMITED.....1ST DEFENDANT

MRS. RAHAB MUKIAMA.....2ND DEFENDANT

BENSON MACHARIA.....3RD DEFENDANT

JUDGMENT OF THE COURT

The Plaintiffs filed a Complaint dated 9/4/2002 seeking the following orders:

- a. An order of injunction restraining the Defendants jointly and severally, whether by themselves, their servants, agents and others claiming through them from alienating, selling, transferring, leasing, mortgaging, charging, encumbering, or otherwise interfering with the Plaintiffs' possession and occupation of the property known as Land Reference R. No. 330/315 Kilimani, Nairobi.
- b. An order for specific performance of the contract of sale between the 3rd Defendant and the 1st Defendant of the property known as Land Reference Number 330/315 situated in Kilimani Estate Nairobi.
- c. An order of specific performance of the contracts of sale between the 1st Defendant and the Plaintiffs for the sale by the 1st Defendant of their respective portions of land making up the title known as Land Reference Number 330/315 in sub-divided Portions or as a single Portion.
- d. In the alternative and without prejudice.
 - i. The 1st Defendant do refund to the Plaintiffs the sum of Kshs.8,274,230 paid towards the purchase price in their respective shares of contribution.
 - ii. The 1st, 2nd and 3rd Defendants do Refund Kshs.30,000,000/= to the Plaintiffs on account of Development expenses as in paragraph 12 above in their respective shares of contribution.
 - iii. Interest on (i) and (ii) above at Commercial Bank Rates or at the Courts discretion.

- e. A declaration that the Plaintiffs are entitled to a lien on the said property known as Land Reference Number 330/315 Kilimani Nairobi (hereinafter referred to as the suit property) on account of their deposits paid and financial costs of development undertaken on the property together with interest thereon and any damages and costs awarded in this action.
- f. Costs of this suit.
- g. Such further or alternative remedy as the Court may deem fit.

The Plaintiffs averred that that the 3rd Defendant and another, not a party to this suit (Kathleen Louise Macharia) are the joint registered owners of the suit property. That sometimes in October 2000 the 1st Defendant through the agency of the 2nd Defendant advertised properties for sale being portions of the suit property, to which the Plaintiffs expressed an interest to purchase the same. The Plaintiffs then entered into a contract with the 1st Defendant for the purchase of four plots (Plots A, B, C &D) in the suit property at a price of Kshs 7,300,000/= to be paid by the 1st Plaintiff, and the purchase of two plots (Plots E &F) in the said property for the price of Kshs 3,400,000/= to be paid by the 2nd Plaintiff. Subsequently, the 1st Plaintiff paid Ksh. 5,834,230/= and the 2nd Plaintiff paid Kshs. 2,440,000/= as consideration towards the purchase of the aforementioned plots.

The Plaintiffs claimed that on 30/4/2001 the 1st and 2nd Defendants gave them vacant possession of their respective plots, and allowed them to commence development pending the finalization of issuance of title in their respective names. The Plaintiffs further stated that they have been in possession of the said plots since April 2001 and as at the time of filing the Plaint they had expended funds in their development of Kshs. 30,000,000/= Further, that the parties executed formal agreements in regards to the purchase in July 2001.

The Plaintiffs thereafter learnt that the 1st Defendant's ownership of the suit property was based on an agreement of sale with the 3rd Defendant and a conveyance which was pending registration. The Plaintiffs aver that the 2nd Defendant assured them in this regard that the purchase price paid of Kshs. 8,274,230/- was paid to the 3rd Defendant. The delay in processing the Plaintiffs' titles triggered them to make inquiries, whereupon they learnt that the 3rd Defendant had only been paid Ksh. 800,000/- being 10% of the purchase price agreed with the 1st Defendant. It is in the context of this background that the Plaint herein was filed and the above-cited prayers sought by the Plaintiffs.

Summons were duly issued on 18th April 2002, and the 1st, 2nd and 3rd Defendants entered appearance on 10th May 2002. The 3rd Defendant filed a Defence dated 22nd May 2002 wherein he denied ever appointing the 1st and 2nd Defendants to act as his agents in the sale of the suit property, nor that they held any power of attorney or letter of appointment from him. Further, that if any advertisement was made for the sale of the suit property then the same was illegal and did not bind him, as his consent was not sought or obtained. The 3rd Defendant stated that he did enter into an agreement with the 1st Defendant on 5th December 2000 to sell the suit property at the price of Kshs 8,000,000/=: and the 1st Defendant paid a deposit of Kshs 800,000/= but did not pay the balance nor secure the rates clearance certificate which it undertook to obtain from the Nairobi City Council. Further, that the sale agreement was thereby frustrated and the suit property could not be transferred or registered to the 1st Defendant. The 3rd Defendant averred that the sale of the suit property to the Plaintiffs was therefore fraudulent and arose out of the negligence or collusion of the Plaintiffs, and he detailed the particulars thereof in his Defence.

The 1st and 2nd Defendants did not file a defence within the prescribed time, and upon an application dated 14th March 2003 for Request for Judgment by the Plaintiffs, interlocutory judgment was entered on 13th May 2003 for Kshs. 8,274,230/= as against the 1st Defendant; and Kshs. 30,000,000/= as against the 1st and 2nd Defendant jointly and severally and interest at court rates from the date of filing suit until

payment in full. The 1st and 2nd Defendants filed an application dated 9th October 2003 seeking to set aside the said *ex-parte* judgment which application was denied by this Court (Honourable Justice Kubo) in a ruling dated and delivered on 14th February 2006.

The hearing of the suit for purposes of formal proof was held on 19th July 2012, during which hearing the Plaintiffs stated that they were withdrawing their suit against the 3rd Defendant, and that most of the prayers in their Plaint had been overtaken by events. The Plaintiffs stated that they were only seeking the prayer of recovery of the money paid to the 1st Defendant of Kshs 8,274,230/= together with interest. The Plaintiffs gave evidence through Rebman Ambalo Malala, the 1st Plaintiff, who stated in his testimony that the 2nd Plaintiff, Humphrey Kimani, was his co-developer in the suit property and that he had authority to give evidence on his behalf. The 1st Plaintiff testified that he read an advertisement in the name of the 1st Defendant in the newspaper that the suit property was on sale. He then contacted the 2nd Defendant who is a director of the 1st Defendant and who was also the selling agent. It was the 1st Plaintiff's testimony that at the time of reading the advertisement he did not know the owner of the suit property, but that he later learnt that the same was registered in the name of the 3rd Defendant jointly with another, and he produced a Certificate of Official Search dated 3/11/2000 as the Plaintiffs' Exhibit 1.

The 1st Plaintiff further stated that the suit property was sub-divided into 6 plots and that he purchased plots A, B, C, D out of the 6 plots and that he was given letters of offer with respect to the said plots dated 1st and 9th November 2000, which letters he produced as the Plaintiffs' Exhibits 2(a) and 2(b). He also produced a letter of offer with respect to Plot F dated 23/11/2000 from the 1st Defendant signed by the 2nd Defendant addressed to Union Express Limited in which the 2nd Plaintiff is a director as the Plaintiffs' Exhibits 3. The 1st Plaintiff testified that pursuant to the letters of offer he made payments to the 1st Defendant and that receipts were issued to him which he produced as the Plaintiffs' Exhibit 4 (a) to 4(e). The 1st Plaintiff also produced receipts issued to the 2nd Plaintiff for payments made as the Plaintiffs' Exhibit 9 (a) to 9(i).

The 1st Plaintiff further testified that he executed a sale agreement with respect to Plots A,B,C, and D dated 20/7/2001 which was produced as the Plaintiffs' Exhibit 5, and in which the 1st Defendant acknowledged receipt of the part payment of Kshs 5, 834,230/= at paragraph 3 therein. He also produced a sale agreement dated 20/7/2001 as the Plaintiffs' Exhibit 10, executed by the 2nd Plaintiff with respect to Plots F and E wherein the part payment of Kshs 2,440,000/= was acknowledged by the 1st Defendant. The 1st Plaintiff stated that at the time of purchase of the plots in the suit property, the 2nd Defendant claimed that sub-division was ongoing but was incomplete, and that this position was backed by a letter from a Director of City Planning dated 14/6/2001 which was produced as Plaintiffs' Exhibit 6, wherein the said Director issued conditions to be met for the sub-divisions to be carried out. The 1st Plaintiff also produced as the Plaintiffs' Exhibit 8 a letter dated 30/4/2001 from the 1st Defendant allowing the 2nd Plaintiff to move into plots E & F in the suit property and proceed with the construction pending the sub-division process and issuance of titles.

The 1st Plaintiff explained that when he and the 2nd Plaintiff learnt that the 1st and 2nd Defendants did not have capacity to transfer the suit property, they entered into a separate arrangement with the registered owners, who included the 3rd Defendant, and purchased the suit property from them a price of Kshs. 9,000,000/=. Further, that he and the 2nd Plaintiff have constructed 26 apartments on the suit property which is now registered in the name of their company, namely Consummate Developers. The 1st Plaintiff confirmed that this is the reason why he and the 2nd Plaintiff wished to withdraw the claim against the 3rd Defendant, and the claim of Kshs. 30,000,000/= as against the 1st and 2nd Defendants. The 1st Plaintiff's stated that the Plaintiffs' prayer was for a refund of Kshs. 8,274,230/= paid to the 1st Defendant, and interest to be calculated from the time of payment at the rate of 22% per annum. He explained that the basis for the rate of interest was special condition 2 in the sale agreements they entered into with the 1st Defendant which were produced as exhibits 5 and 10.

After the close of the Plaintiff's case, the Counsel for the Plaintiffs Mr. Lubullelah, submitted that they had proved their case by producing evidence of the letters of offer, receipts for payments, sale agreements and other documentary evidence in support of their claim. He also referred to the sale agreements executed by both parties which expressly provided on the requested rate of the interest. Counsel prayed that judgment be entered as prayed by the 1st Plaintiff in his testimony together with costs.

The main issue before the court is whether the Plaintiffs are entitled to a refund of Kshs. 8,274,230/= from the 1st Defendant, and if so, what rate of interest is to be paid on the said amount. The Plaintiffs have brought evidence to show that they made payments of the said amount to the 1st Defendant, and also of the acknowledgement by the 1st Defendant of the said amounts. Evidence of payments made by the 1st Plaintiff was produced as follows:

1. Receipt No. 308 dated 26/6/2001 for Kshs. 2,300,000/= as the Plaintiffs' Exhibits 4a
2. Receipt No. 395 dated 2/4/2001 for Kshs. 394,230/= as the Plaintiffs' Exhibits 4b
3. Receipt No. 386 dated 16/2/2001 for Kshs. 782,000/= as the Plaintiffs' Exhibits 4c
4. Receipt No. 368 dated 2/11/2000 for Kshs. 1,558,200/- as the Plaintiffs' Exhibits 4d
5. Receipt No. 369 dated 9/11/2000 for Kshs. 800,000/- as the Plaintiffs' Exhibits 4e

The total payments made by the 1st Plaintiff according to the said receipts was Kshs. 5,834,430/=. The 1st Plaintiff also produced receipts issued to the 2nd Plaintiff for payments totaling to Kshs. 2,200,000/- he made pursuant to the letters of offer whose details were as follows:

1. Receipt No. 397 dated 11/4/2001 for Kshs. 200,000/- as the Plaintiffs' Exhibits 9a
2. Receipt No. 392 dated 9/3/2001 for Kshs. 100,000/- as the Plaintiffs' Exhibits 9b
3. Receipt No. 377 dated 15/12/2000 for Kshs. 500,000/- as the Plaintiffs' Exhibits 9c
4. Receipt No. 354 dated 28/7/2001 for Kshs. 250,000/- as the Plaintiffs' Exhibits 9d
5. Receipt No. 371 dated 24/11/2000 for Kshs. 500,000/- as the Plaintiffs' Exhibits 9e
6. Receipt No. 353 dated 2/7/2001 for Kshs. 150,000/- as the Plaintiffs' Exhibits 9f
7. Receipt No. 303 dated 8/2/2001 for Kshs. 200,000/- as the Plaintiffs' Exhibits 9g
8. Receipt No. 259 dated 23/5/2001 for Kshs. 100,000/- as the Plaintiffs' Exhibits 9h
9. Receipt No. 179 dated 6/5/2001 for Kshs. 200,000/- as the Plaintiffs' Exhibits 9i

The basis of the said payments were the executed sale agreements that the 1st and 2nd Plaintiff entered into with the 1st Defendant, which were produced as exhibits 5 and 10 respectively, and which were both dated 20th July 2001. The said agreements stated that the 1st and 2nd Plaintiffs were buying plots in the suit property and indicated the purchase price and the amount already paid to the vendor who was the 1st Defendant, which it acknowledged. According to the said agreements, the 1st Plaintiff purchased plots A, B, C, and D for Kshs 7,200,000/= and had already paid Kshs 5,834,230/= to the 1st Defendant at the time of signing of the agreement. The 2nd Plaintiff on the other hand purchased plots F and E for the price of Kshs 3,400,000/= and had by the date of the agreement paid the 1st Defendant Kshs 2,440,000/= which is acknowledged in the said agreement. I however note that while the 1st Plaintiff's receipts produced in

evidence correspond with the part-payment stated to have been made in his agreement, the receipts produced of the payments made by the 2nd Plaintiff his payments totaled Kshs 2,200,000/=. This fact notwithstanding, there is acknowledgement of payment of Kshs 2,440,000/= by the 1st Defendant in the sale agreement it signed with the 2nd Plaintiff dated 20th July 2001.

The Plaintiffs also brought evidence to show that at the material time the 1st Defendant was not the owner of the suit property, and could therefore not sell the same to them. The Certificate of Official Search dated 3/11/2000 produced as Exhibit 1 shows entry No. 23 to be a conveyance dated 20th February 1975 registered in favour of the 3rd Defendant and Kathleen Louise Macharia on 3/3/1975, and no other conveyance or lease had been registered since. This fact was corroborated by the statements made by the 3rd Defendant in his Defence. It is my finding that the Plaintiffs have on a balance of probabilities proved payment of a total of Kshs 8,274,230/= to the 1st Defendant for the purchase of plots in the suit property, which plots the 1st Defendant had no capacity to sell, and as a result was not able to complete the said sale agreements that were entered into. The Plaintiffs are therefore entitled to a refund of the said payments.

On the issue of the rate of interest, the special condition 2 in the sale agreements that was relied upon by the Plaintiffs stated that “in the event of any interest becoming due under this agreement, the rate of interest shall be 22% per annum” It is however my finding that the terms of the interlocutory judgment herein dated 13th May 2003 were *inter alia* that interest be paid at court rates. I cannot alter the said terms as it would have the effect of setting aside the said interlocutory judgment, with the consequence that this court would have to hear this suit *de novo*. In addition, as regards the effective date from which interest will be paid, the normal rule with respect to judgment for special damages is the date of filing of the suit, as also stated in the interlocutory judgment herein.

This court therefore enters judgment for the Plaintiffs and hereby orders the 1st Defendant to refund to the 1st Plaintiff the sum of Kshs 5,834,230/= and to the 2nd Plaintiff the sum Kshs 2,440,000/=: and both sums will be paid together with interest at court rates of 12% with effect from the date of filing of this suit until the date of payment in full. The 1st and 2nd Defendants shall pay the Plaintiffs the costs of the suit.

Dated, signed and delivered in open court at Nairobi this ____6th____ day of ____December____, 2012.

P. NYAMWEYA

JUDGE