



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.1201 OF 2007

CHARLES KEISA BUTICHI.....PLAINTIFF

VERSUS

ALBERT ADAMS YUGI.....DEFENDANT

J U D G M E N T

1. Charles Keisa Butichi (herein after referred to as the plaintiff) has brought this suit against Albert Adams Yugi (hereinafter referred to as the defendant). The plaintiff was the registered owner of property known as Ngong/Ngong/13136 (hereinafter referred to as the suit property). The plaintiff claims that he entered into an agreement with the defendant for the defendant to purchase the suit property at a consideration of Kshs.1.6 million. The defendant paid through his employer a sum of Kshs.750,000/=. Despite demands by the plaintiff for payment of the balance, the defendant failed to pay.

2. On or around 7th February, 2003, the defendant without the plaintiff's authority took possession of the suit property and forcefully broke into the residential house which was on the suit property. The defendant remained on the premises until 7th December, 2007, when Kenya Commercial Bank to whom the plaintiff had mortgaged the suit property sold the suit property pursuant to its statutory powers of sale. The plaintiff contends that he was unable to repay the mortgage on the suit property because of the defendant's failure to pay the balance of the purchase price. The plaintiff further claims to have suffered loss and damage as a result of the defendant's unlawful occupation of the suit property. The plaintiff therefore seeks judgment for the market value of the suit property, *mesne* profits, general damages for trespass and costs of the suit.

3. The defendant conceded that he entered into an agreement with the plaintiff for purchase of the suit property, but contended that the agreed consideration was Kshs.1.5 million. The defendant explained that having been paid a sum of Kshs.750,000/= as part consideration, the plaintiff on his own volition allowed the defendant to move into the suit property. The defendant maintained that the plaintiff failed to comply with the terms of the agreement of sale as he failed to sign all necessary documents for obtaining consent from relevant authorities, including the mandatory Land Control Board Consent. Furthermore, contrary to the agreed term that the suit property would be sold to the defendant free from any encumbrances, the plaintiff failed to obtain the discharge of the Charge registered against the suit property so as to free the title from any encumbrances.

4. The defendant asserted that the contract for which the plaintiff obtained a consideration of Kshs.750,000/= completely failed. The plaintiff could not therefore purport to repudiate the agreement or forfeit or retain the sum of Kshs.750,000/= paid to him by the defendant's employer on the defendant's account. The defendant has filed a suit in the Magistrate's Court at Milimani for recovery of the sum of Kshs.750,000/=. This court was therefore urged to dismiss the plaintiff's suit.
5. During the hearing of the suit the plaintiff testified reiterating that the agreed consideration was Kshs.1.6 million. He explained that the letter of offer indicated the price as Kshs.1.5 million because the defendant was to obtain a loan for that amount from his employer. It was agreed that the defendant would obtain the balance of Kshs.100,000/= from his cooperative society. The plaintiff maintained that the defendant was aware that the suit property was under a mortgage and that the plaintiff was selling the suit property to pay off the mortgage. The plaintiff further explained that he was willing and able to release the necessary documents to the defendant subject to the balance of the purchase price being deposited with the plaintiff's advocate. The plaintiff stated that as a result of the defendant's failure to pay the balance of the purchase price, the plaintiff was unable to pay off the loan and the interest accrued leading to the property being sold by the bank.
6. As a result of the defendant's conduct the plaintiff treated the contract as repudiated and the sum of Kshs.750,000/= paid by the defendant forfeited. The plaintiff also maintained that the defendant unlawfully took possession of the suit premises, broke into and occupied the residential dwelling which was on the premises. The defendant remained in the premises up to the year 2007 when he was evicted, after the bank sold the suit premises in exercise of its statutory power of sale. The plaintiff claimed that the defendant also took his household goods which were in the premises. He gave a list of the items and their total value as Kshs.717,000/=. The plaintiff urged the court to give him judgment for the value of the goods as well as judgment for the market value of the house which he placed at Kshs.2.5 million. In addition, the plaintiff urged the court to award him *mesne* profits for the suit premises at the rate of Kshs.17,000/= per month with effect from February, 2003, when the defendant occupied the premises to December, 2007, when the defendant was evicted from the premises.
7. Although the defendant indicated he will call two witnesses, he was the only witnesses who testified in support of his defence. In a nutshell, his evidence was that he entered into an agreement with the plaintiff for the plaintiff to sell to him the suit premises at an agreed price of Kshs.1.5 million. The parties signed a sale agreement in the presence of Bernard Kimaiyo and Clement Agunda. The defendant applied for a loan of Kshs.1.5 million from his employer Kenya College of Communications Technology. The loan was approved. Later the defendant learnt that a sum of Kshs.750,000/= had been released to the plaintiff without the defendant's knowledge and that the plaintiff's lawyer had written to the director requesting for the balance of the purchase price. The plaintiff was paid Kshs.750,000/=. However he did not forward any documentation to the defendant or his employer. On 8th February, 2002, the defendant obtained a search from Lands office. It showed that the suit property was charged to Kenya Commercial Bank Ltd for two loans. The defendant had no knowledge of the two loans, nor was the defendant aware that the suit property was charged to Kenya Commercial Bank. The defendant confronted the plaintiff, but the plaintiff assured him that he would sort out the matter with KCB. The defendant reported the matter to his employer who wrote to the plaintiff indicating they would only release the balance of the purchase price if appropriate documentation for the transfer of the suit premises was forwarded. The plaintiff did not however forward any document. The defendant explained that he moved into the suit property, at the request of the plaintiff as the plaintiff wanted to demonstrate his goodwill to the defendant's employer so that the employer could pay him the balance.
8. The defendant maintained that the house on the suit property was empty when he moved in. He thereof denied having taken any property belonging to the plaintiff. The defendant continued living on the suit property until he was evicted from the suit property after the premises was sold by auctioneers. The defendant asserted that the plaintiff could not be paid any more money after the payment of Kshs.750,000/= because the plaintiff failed to transfer the property into the defendant's name.
9. After the plaintiff was evicted from the suit property he instructed an advocate who file a suit against the plaintiff for refund of Kshs.750,000/= which the defendant had paid the plaintiff and for which there

was no consideration. The defendant maintained that it was the plaintiff who failed to conclude the contract. The defendant further stated that he was present during the auction sale of the suit property, and that the property was sold at a price of Kshs.1.2 million only. He therefore urged the court to dismiss the plaintiff's suit.

10. Counsel for each party filed written submissions, each urging the court to find in favour of his client.

11. I have carefully considered the submissions and the authorities cited. Although I have not found it necessary to restate the submissions, I have nonetheless taken the submissions into account. As per the statement of agreed issues filed by the parties, the issues for determination are as follows:

- (i) Whether there was an agreement between the plaintiff and the defendant for the sale of Land Parcel No.Ngong/Ngong/13136
- (ii) If yes, was the agreement for sale in writing or oral?
- (iii) Whether the consideration of the sale was Kshs.1,600,000/= or Kshs.1,500,000/=
- (iv) What were the other terms of the agreement for sale?
- (v) Who between the plaintiff and the defendant was in breach of the terms of the agreement for sale?
- (vi) Could the defendant, in the circumstances, forfeit the sum of Kshs.750,000/= earlier paid to the plaintiff as deposit for the purchase of the suit property?
- (vii) Did the defendant forcibly break into the suit property or occupy the same illegally as alleged in paragraph 5 and 6A of the amended plaint?
- (viii) Is the plaintiff entitled to the reliefs sought in this suit? If so, what is the quantum?
- (ix) Who should pay the costs of the suit?

12. It is not disputed that there was an agreement between the plaintiff and the defendant for the sale of the suit property. Both the plaintiff and the defendant testified to this fact. What the parties appear not to agree on is the terms of the agreement and whether the agreement was in writing or oral. Section 3(3) of the Law of Contract Act, Cap.23 Laws of Kenya as amended by Act No.21 of 1990 states as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) The contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(iii) incorporates all the terms which the parties have expressly agreed in one document; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

13. In my understanding, the above provisions requires that for a contract for the disposition of an interest in land to be enforceable in court, the contract must be evidenced by a document containing all the agreed terms, and the document must be signed by both parties to the contract and signatures attested by a witness. In this case, the plaintiff maintained that the agreement was oral. The only document which the plaintiff produced in support of the contract was the letter of offer, which was only signed by the

plaintiff whose signature was not attested by any witness. Thus, going by the plaintiff's evidence, the contract between the plaintiff and the defendant did not meet the threshold set out under Section 3(3) of the Law of Contract Act.

14. Although the defendant produced a sale agreement which he claimed was signed by both parties, the plaintiff denied having signed the document. Moreover, the document produced by the defendant contains some alterations regarding the attesting of the signatures. The signature of the plaintiff does not appear to have been attested. Therefore, this document cannot be relied upon. What this means is that the contract between the plaintiff and the defendant cannot sustain the plaintiff's suit.

15. Furthermore, in his letter of offer the plaintiff has clearly indicated the agreed consideration as Kshs.1.5 million. In his evidence, the plaintiff stated that the price was actually Kshs.1.6 million. There is nothing however to support the plaintiff's allegation that the defendant was to pay an additional sum of Kshs.100,000/= or that the letter of offer was specifically for the purpose of the defendant obtaining a loan from his employer. Nor is there anything to substantiate the plaintiff's allegation that the defendant was made aware that the plaintiff was selling the suit property to pay off a mortgage. The defendant maintained that the plaintiff failed to provide the necessary documents to facilitate the transaction. The plaintiff did not offer any evidence to contradict this.

16. Furthermore, Section 6(6) of the Land Control Act Cap 302, provides that the sale or transfer or other disposal of or dealing with any land in a control area, is void for all purposes unless the Land Control Board for the land control area in which the land is situated has given its consent in respect to that transaction. Section 8(1) of the Land Control Act requires an application for such consent to be made to the Land Control Board within 6 months of the making of the agreement for the control transaction. In this case, there is no evidence that the plaintiff applied for any consent from the Land Control Board. Therefore, even assuming that there was an agreement for sale of the suit property, the agreement if any, became void after six months for want of the Land Control Board Consent.

17. It is not disputed that the defendant had paid the plaintiff a sum of Kshs.750,000/=. This money was not paid as a deposit to be held by a stakeholder but was part payment of the consideration. Section 7 of the Land Control Act provides that any money or other valuable consideration paid in the cause of a controlled transaction which becomes void under the Act, is recoverable as a debt by the person who paid it from the person to whom it was paid. The defendant has indicated that he filed a suit in the Magistrate's Court at Milimani for recovery of Kshs.750,000/=. Therefore, I need not say more.

18. The plaintiff claimed judgment for the value of the suit property. This was because he blamed the defendant for his inability to pay off the mortgage because the defendant did not pay the balance of the purchase price. As already observed above, the plaintiff did not establish that there was any condition or term placing any obligation upon the defendant for the payment of the mortgage. Further, the plaintiff has not shown that he was in a position to transfer the suit property to the defendant. Moreover, no evidence was laid before this court to show the amount of the mortgage which was outstanding. I find that the mortgage transaction was completely independent from the agreement for sale of the suit property. Further, even assuming that the court was to award damages, there is no evidence before this court to establish the value of the suit property. Therefore, there would be no basis upon which the court would base such an award.

19. As regards the claim for general damages for trespass, it is not disputed that the defendant was in possession of the suit property from February, 2003 to 31st December, 2007 when he was evicted. The plaintiff claims that the defendant occupied the premises without his permission, however, the parties had an intention of the property being transferred to the defendant. I find that it was on that understanding that the defendant occupied the premises as he awaited the transaction to go through. Since the transaction did not go through, the defendant is liable to pay *mesne* profits for the period that he was in the premises. No further damages arise as this was not a case of trespass. In the same vein, the plaintiff's claim in respect to the value of the furniture and other household goods which he claims the defendant took from the premises, has not been substantiated. The claim in respect of the furniture and household goods was clearly a case for special damages which ought to have been specifically pleaded and strictly proved. The

value of the goods was not specifically claimed in the plaint nor was evidence adduced in proof of the value of the specific items. Thus, the claim cannot succeed.

20. The upshot of the above is that I dismiss the plaintiff's claim in respect of prayer (b), and (d) of the amended plaint. I allow the claim for *mesne* profit and order that the defendant shall pay the plaintiff *mesne* profits at the rate of Kshs.10,000/= from 7th February, 2003 to 31st December, 2007, when the defendant was evicted from the suit property. The defendant shall pay interest on the *mesne* profits at court rates from the date of filing suit until payment in full. The plaintiff having only succeeded in respect of one part of his claim, I order each party to bear their own costs.

Orders accordingly.

Dated and delivered this 11th day of April, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Aswani for the plaintiff
Omuga for the defendant
Kajuju - Court clerk