



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT NO.414 OF 2007

RICCARDO LIZIER.....PLAINTIFF

VERSUS

MICHAEL MWANGI WANDIA.....1ST DEFENDANT
MARGARET WAMBUI NDAMBIRI.....2ND DEFENDANT

J U D G M E N T

1. Riccardo Lizier (hereinafter referred to as the plaintiff), filed this suit against Michael Mwangi Wandia and Margaret Wambui Ndambiri (hereinafter referred to as the 1st and 2nd defendants). In the suit the plaintiff is seeking judgment for:

- (a) A declaration that the defendants are in breach of the sale agreement dated 20th September, 2002.
- (b) An eviction order against the defendants to vacate the suit premises.
- (c) Costs of the suit.

2. The plaintiff claimed that he entered into a sale agreement with the defendants on 20th September, 2002. The agreement was for the plaintiff to sell his land to the defendants, being LR No.15314/17 (hereinafter referred to as the suit property), at a consideration of Kshs.5 million. The suit property was a sub-division of original plot No.9953/2. The defendants paid a sum of Kshs.2 million leaving a balance of Kshs.3 million. The defendants have refused, neglected and or ignored to pay the balance. Prior to the sale agreement, the defendants had taken possession of the suit property pursuant to a lease dated 1st February, 2000. The defendants continued being in possession of the suit property after the execution of the sale agreement, but have not been paying any rent. The plaintiff contends that the defendants are in breach of the sale agreement and therefore they should be ordered to pay the balance of the purchase price or be evicted from the suit premises.

3. The defendants filed a defence to the plaintiff's claim in which they admitted having entered into an agreement of sale in regard to the suit property. The defendants maintained that they paid the entire purchase price and therefore do not owe the plaintiff any money. The defendants further stated that they have no existing lease and or tenancy agreement with the plaintiff. They therefore denied owing the plaintiff any rent or being in breach of any sale agreement. They urged the court to dismiss the plaintiff's

suit.

4. The defendants have further raised a counterclaim contending that in addition to the agreement for transfer of the suit property to the defendants at a consideration of Kshs.5 million, the defendants entered into another agreement with the plaintiff that the defendants shall pay the plaintiff a sum of Kshs.4 million as consideration towards the developments which the plaintiff had made on the suit property. Despite the defendants having paid the full purchase price and the agreed amount in respect of the compensation, the plaintiff has refused, failed and or neglected to transfer the suit property to the defendants. The defendants who had taken possession of the suit property upon the execution of the sale agreement, had with the plaintiff's knowledge and consent, substantially developed the property by putting up a school and a college. The defendants therefore maintained that by reason of the failure by the plaintiff to complete the sale transaction, the defendants stand to suffer loss and damage.

5. The defendants therefore prayed for judgment in their favour against the plaintiff for:

- An order of declaration that the defendants are entitled to the suit property.
- An order of specific performance directing the plaintiff to transfer the suit property.
- An order that the plaintiff do execute all such necessary documents so as to transfer the legal beneficial title to the suit property to the defendants, and or in default the deputy registrar of the court to execute all necessary documents to effect registration of the suit property in the name of the defendants.
- Damages
- Costs and interest.

6. The plaintiff filed a reply to the defence and defence to the counterclaim, in which the plaintiff denied the defendants' allegation and contended that the counterclaim is incompetent, fatally defective, misconceived and otherwise an abuse of the court process. The plaintiff maintained that if an agreement was entered into for compensation as alleged, then the same was not honoured due to non-payment of the agreed amount. The plaintiff further contended that if there were any developments done by the defendants on the suit property, the said developments were illegal as the defendants were not the owners of the suit property. They could not therefore obtain the development plans in respect of the suit property. The plaintiff therefore urged the court to dismiss the counterclaim and enter judgment in his favour in the plaint.

7. During the trial, the plaintiff testified in support of his case. He reiterated that he was the owner of the suit property and that he sold the suit property to the defendants. The agreement was that the defendants were to pay for the land and then pay for the developments on the suit property which were valued at Kshs.11,389,373. The plaintiff maintained that the defendants did not complete the sale transaction as they did not pay him for what was on the land. The plaintiff therefore prayed for judgment for Kshs.11,389,373 being the value of what was on the land. In the alternative the plaintiffs prayed that the defendants be evicted from the suit property.

8. Under cross-examination the plaintiff conceded that he allowed the defendants to be on the suit property as early as 1994. He maintained that the developments on the suit property were his. He conceded having signed two agreements with the defendants, one for payment of Kshs.5 million as consideration for the purchase of the suit property and another for payment of Kshs.4 million as compensation for the improvements on the suit property. He further conceded having been paid slightly more than Kshs.9 million, but maintained that the defendants still owed him Kshs.10 million excluding interest.

9. The 1st defendant was the one who testified in support of the defence. He explained that he first approached the plaintiff in the year 1994 to buy land for purposes of running a school. The plaintiff declined to sell his land but allowed the defendants to run a school on his property. The plaintiff applied

for change of user of the suit property from agricultural land to a school. He also allowed the defendants to build classrooms, and signed appropriate consent enabling the defendants to apply for appropriate licence for running the school. Initially the plaintiff did not charge the defendants anything, but on 1st February, 2000 the plaintiff and the defendants signed a lease agreement for 10 years. The 1st defendant explained that on 20th September, 2002 they entered into a contract with defendants for sale of the suit property including land and buildings at a consideration of Kshs.5 million. Another agreement was also signed for payment of Kshs.4 million to the plaintiff as compensation for his contribution towards the developments.

10. The 1st defendant explained that a valuation of the developments on the suit property was carried out, and the defendants' contribution valued at Kshs.7 million whilst the plaintiff's contribution was valued at Kshs.4 million. He reiterated that they paid the plaintiff the sum of Kshs.9 million, but plaintiff has not transferred the suit property to them. He produced a bundle of documents in support of his evidence. Under cross-examination the 1st defendant conceded that he had not served any completion notice on the 1st defendant.

11. At the close of the evidence for the defence, an application was made by the plaintiff's counsel for amendment of the plaint for paragraph 5 of the plaint to read "that the defendant has paid a sum of Kshs.9 million leaving a balance of Kshs.10 million the cost of construction and improvement on the aforesaid premises", and that wherever the word "balance of the purchase price" appeared should be substituted with "balance of the cost of improvement".

12. I rejected this application for amendment and reserved my reasons. I now give my reasons for rejecting the application. Although the court has powers to amend pleadings at any stage of the proceedings, the application for amendment in this case was ill timed as the application was made after the parties had closed their case. It appears to have been tailored to contradict the defence evidence. Therefore granting the amendment at that late stage was going to be prejudicial to the defendants. This was particularly so because the amendment was going to change the plaintiff's claim, which was all along that the defendant was in breach of the sale agreement dated 20th September, 2002. Indeed, in the statement of agreed issues, there is no issue raised concerning the balance of costs of construction and improvement on the suit property. Further, no good reason was given as to why the application for amendment was not made earlier. For these reasons I did not find it fair nor just to allow the application for amendment.

13. As concerns the plaintiff's claim, the main issues were: whether there was an agreement for sale of the suit property, if so, what were the terms of the agreement of sale, and whether the defendants are in breach of that agreement. There is also an issue as to whether there is any existing lease or tenancy agreement between the plaintiff and the defendants, and finally, whether the plaintiff is entitled to a declaration that defendant is in breach of the sale agreement and an order for eviction of the defendants.

14. From the evidence of the plaintiff and the 1st defendant, it was common ground that the parties entered into an agreement for sale of the suit property at a consideration of Kshs.5 million. The terms of the sale agreement are evident from the agreement signed by the parties which agreement was admitted in evidence by consent of both parties. The salient terms of the agreement included *inter alia*: payment of a consideration of Kshs.5 Million through an initial deposit of Kshs.50,000/= upon execution of the agreement, and the balance by six equal installments payable once every 4 months with effect from 31st January, 2004; transfer of title to the suit property to the purchaser upon payment of the first installment; and a completion date of 30th September, 2005.

15. Thus, the terms of the sale agreement were clear. Although in his plaint the plaintiff denied having received the full purchase price from the defendants, the plaintiff did admit in his evidence before this court having received the consideration of Kshs.5 million from the defendants. The plaintiff's main dispute appeared to be in connection with the costs of improvement and developments on the suit property, which the plaintiff alleged were never paid to him. The agreement signed between the plaintiff and the defendant was clear that the plaintiff was selling the suit property together with permanent

buildings and improvements thereon. Therefore, the plaintiff's contention that there was breach of the agreement of sale because he was not paid for the costs of improvement and developments on the suit property cannot hold.

16. As regards the issue of nonpayment of rent, it was not denied that the defendants entered into the suit property with the authority of the plaintiff sometime in 1994. A lease agreement was signed between the plaintiff and the defendants on 1st February, 2000, in which it was agreed that the plaintiff was to lease the suit property to the defendants for a term of 10 years. When the parties entered into the agreement for sale of the suit property to the defendants on 20th September, 2002, the issue of possession was not addressed. This is hardly surprising because the defendants' leasehold interest was to be subsumed in the agreement for sale whereby the defendants were to acquire proprietorship interest. Indeed, the sale agreement provided that the plaintiff was to transfer the property to the defendants upon payment of the 1st installment. The defendants could not be expected to pay rent once the 1st installment was made.

17. The plaintiff admitted in cross-examination that by July, 2004, he had been paid by the defendants a sum of Kshs.7,588,209/=. It is evident that the payments were made before the completion date. It was alleged that the defendants were in breach of the contract of sale as the payment of the consideration was not made through the plaintiff's advocate. This issue is neither here nor there. The plaintiff has admitted having received the money. He cannot turn round and blame the defendants for paying him directly. The issue of payment of rent cannot arise as the plaintiff ought to have transferred the suit property to the defendants. The plaintiff appears to have confused the agreement for sale of the suit property with the parallel agreement for compensation which was signed by the parties. The two agreements were separate agreements. The agreement for sale cannot fail because of breach arising from the agreement for compensation.

18. Be that as it may, the agreement for compensation which was signed by both parties indicates that the agreed compensation which was to be paid by the defendants to the plaintiff in respect to the improvements and developments on the suit property was only Kshs.4 million. Although the plaintiff disputed this figure and claimed that he was entitled to the full value of the improvements and developments on the suit property as per the valuation report dated 13th September, 2002, the plaintiff was unable to establish that this is what the parties agreed.

19. The defendants on the other hand, have explained that they did carry out certain developments on the suit property. Their evidence is supported by letters written by the plaintiff to the City Council and the Ministry of Education. The defendants' explanation appears plausible because the defendants were running the school on the suit property for almost 6 years before they started paying the plaintiff any rent for the premises. If indeed the plaintiff had substantial developments on the suit property, he would have demanded rent immediately the defendants went into possession of the suit property.

20. I believe and accept the defendants' evidence that the valuation of the suit property done on 13th September, 2002 was to assist the parties establish the value of the developments done by the defendants and the plaintiff, with a view to agreeing on the compensation. The agreement for compensation having been signed after the valuation, it is evident that the agreed valuation took into account the defendants' contribution to the improvements and developments of the suit property. Thus, the plaintiff's evidence that he was entitled to a further payment of Kshs.10 million has not been established.

21. I find that the plaintiff has failed to establish any breach by the defendants of the sale agreement dated 20th September, 2002. Nor has the plaintiff proved that he is entitled to an order of vacant possession in regard to the suit premises. Thus, the plaintiff suit must fail.

22. As regards the defendants' counterclaim, an issue was raised regarding the competence of the claim as the defence and counterclaim were not accompanied with a verifying affidavit. Order 7 Rule 5(a) of the Civil Procedure Rules 2010, requires that a defence and counterclaim "shall be accompanied by an affidavit under Order 4 Rule 1(2) where there is a counterclaim." This means that contrary to the defence counsel's submissions there is no distinction between the requirement for a verifying affidavit in the case

of a plaint or a counterclaim. Both must be accompanied with a verifying affidavit. Thus, the defendants' defence and counterclaim not having been accompanied with a verifying affidavit, the pleadings are defective. The question is whether that defect is fatal.

23. Article 159(I)(d) of the Constitution requires that in the exercise of judicial authority the courts and tribunals shall be guided by several principles amongst which is the principle that "justice shall be administered without undue regard to procedural technicalities." In this case, the requirement for a verifying affidavit is a procedural requirement intended to ensure that the parties take responsibility for the averments contained in the pleadings. This is particularly important where the parties aver to the existence or nonexistence of previous proceedings, so as to avoid multiplicity of suits by the same parties over the same cause of action. In this case, the plaintiff could have raised the objection as a preliminary issue. However, the plaintiff did not do so until the last minute after the suit was fully heard. In my considered view, the suit having been fully heard, and the plaintiff's suit determined, this is a case in which the court should not be tied down by procedural technicalities. Indeed, to do so would not only go against the principles enshrined in the Constitution, but would also go against the overriding objective of the Civil Procedure Act and Rules as provided under Section 1A and 1B of the Civil Procedure Act. In order to facilitate the just and expeditious determination of this dispute, it is only fair that this court ignores the procedural technicalities and addresses all the issues arising between the parties including the counterclaim. Thus, I do overrule the objection relating to the defect on the counterclaim and proceed to consider and determine the counterclaim.

24. From the foregoing, the issues relating to the two agreements between the plaintiff and the defendants have been addressed and findings made. It is apparent that the plaintiff was paid the agreed consideration in respect to the agreement for sale of the suit property. In accordance with the agreement, the plaintiff ought to have transferred the suit property to the defendant after receiving the first installment. The plaintiff has no excuse for failing to comply with the terms of the agreement of sale. Even assuming that the defendants were in breach of the agreement for compensation, the plaintiff's only redress was to sue for the agreed compensation as the two contracts were separate. I find that the plaintiff is in breach of the agreement for sale as he has failed or neglected to transfer the suit property to the defendants as agreed. I am therefore satisfied that the defendants have proved their counterclaim to the required standards. Accordingly, I give judgment in favour of the defendants and issue orders as prayed in (i), (ii), (iii), (iv) and (vi). Those shall be the orders of this court.

Dated and delivered this 26th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiff absent
Kimathi H/B for Kahonge for the defendants
B. Kosgei - Court clerk