



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 144 OF 2010

LACTON MURIITHI NJOKAAPPLICANT/PLAINTIFF

VERSUS

TRUSTEES,NATIONAL SOCIAL SECURITY FUND.....RESPONDENT/DEFENDANT

14/5/2010

Coram: Mwera J.

Njoroge/Kajuju – Clerk

Kwengu for plaintiff

Mrs Mbabu for defendant

RULING

Invoking the powers donated by Sections 3A, 63(e) of the Civil Procedure Act and Order 39 rules 1,2,3 of the Civil Procedure Rules the plaintiff prays:

i) that the defendant body be restrained from disposing or alienating the house on LR No. NAIROBI/BLOCK 146/40 Hazina Estate, Nairobi.

The reasons given were that while the applicant was ready and willing to pay the purchase price of the suit property, the defendant had not supplied the requisite documents.

It had refused/neglected to supply them even after requests. If the sought order is not granted, the plaintiff stood to suffer irreparable loss and damage.

The plaintiff swore a supporting affidavit to the effect that he bought the subject house in a tenant-purchase scheme, the price being paid by installments. Through his employer, the defendant respondent was asked to make available the documents of title so that the said employer could charge the property for a loan it could give the plaintiff.

That employer, merely called a bank, by its lawyer's letter dated 15/2/06 to Ms Musyoka & Wambua Advocate's, gave a professional undertaking to pay Ksh4,361,359/- in the deal in 14 days on receipt of the registered transfer and charge in favour of the purchaser and the bank respectively. M/s Musyoka & Wambua Advocates on 17/2/06 wrote a letter to the defendant giving it its professional undertaking that it could pay over the said KSH4.3m on being supplied with some five vital documents in the deal. On 2/3/06 the defendant appointed M/s Kiplagat & Co. Advocates to act for it and M/s Musyoka & Wambua Advocates were duly informed. From then, much as the plaintiff had always been ready to complete the transaction, the defendant has not supplied the requisite documents. Then on 10/3/2010 the defendant served a demand notice on the plaintiff to settle the balance of the loan or the subject house be repossessed- a move the plaintiff saw as unjustified. That should not be allowed and the plaintiff should be let to redeem the property.

On 8/4/2010 one Aggrey Nyandong, the Acting Assistant manager of the defendant, swore a replying affidavit that the loan repayment instalments were Ksh62982/-. The plaintiff defaulted in repayment right from the beginning and therefore never signed a sale agreement. This failure was brought to his attention in seven letters between 4/7/03 and 5/7/05 (exhibited). On 11/7/03 the plaintiff signed a consent form with the defendant acknowledging indebtedness, to be cleared by monthly installments. In default a distress could issue. Even with the letters from Musyoka & Wambua Advocates which the defendant received, he was told that despite the understaking the rent arrears could still continue to accumulate and so he should continue paying monthly rents. When M/s Musyoka & Wambua were told by the defendant to give their professional undertaking to M/s Kiplagat & Co. Advocates by 2/3/06, that was not done until 15/11/06. The plaintiff remained in possession since 2001 without paying hence the notice for distress. The plaintiff had no title to the property, nor an agreement of sale with the defendants, yet he remains in occupation without paying. He had come to court with unclean hands. He had no case against the defendant. Without an agreement the defendant cannot release any documents to the plaintiff's lawyer.

The plaintiff swore a further affidavit to respond to the replying affidavit that the defendant had never asked him to sign any agreement, but he had the impression that he signed one, because the defendant has given him other documents which he signed. He admitted that he had difficulties initially to meet his repayments and that is why he went to source funds from his employer. Also he admitted that the defendant advised him that even with the professional undertaking, he could still have rent accumulating. On approaching the defendant, it agreed to freeze interest payable on the balance of Ksh4,348,802/- on 10/11/06. The defendant's lawyers then asked M/s Musyoka & Wambua Advocates for a professional undertaking for this sum and it was given. In the circumstances the plaintiff felt that all this has come by because the defendant has not released the documents that would lead to the release of the sums herein. Then it was time for submissions.

The plaintiff argued that when the parties agreed to freeze interest due on the sum of Sh4,348,802/- and an undertaking issued from his lawyers on 15/11/06 of the same sum, had the defendant supplied due documents to enable the applicant to make payment, all could be over.

There has been no other demand notice since 15/11/06. There must have been a sale agreement because some of the defendant's letters referred to a tenant purchase agreement. And in all the correspondences herein, the issue was the property documents being supplied and payment issuing from the plaintiff's side. The respondent's side promised this on several occasions but did not do the needful.

The defendant held on its view that the plaintiff's claim here is seemingly based on a sale agreement which he did not produce/exhibit. He defaulted in payment of instalments right from the beginning. He had been in the house since 2001 without paying, yet he wants to have the house. The defendant has a right to repossess it in the circumstances. The plaintiff did not make any effort to sign a sale agreement. He cannot get the relief sought.

In this matter and at this point, the plaintiff gets the order sought. The conduct by exchange of correspondences, and many were exhibited by either side, are preponderant that the outstanding aspect in the whole deal was the defendant to supply the documents necessary for the release of the money involved. There is nothing about the plaintiff refusing or neglecting to sign a sale agreement. True, the

plaintiff did not exhibit such but if the court may ask, on what basis did the two come together? The plaintiff to occupy the house and the defendant to demand rents, which fell in arrears? There must have been a basis and this is contained in the letter of 5/1/05 from the defendant to the plaintiff which read in part:

**“ RE: NSSF TENANT PURCHASE SCHEME ARREARS – HAZINA ESTATE HOUSE
NO. M-4 FOR KSH402,768.00**

Reference is made to Clause 9(b) and 2(b) of the Tenant Purchase Agreement signed between yourself and the Board of Trustees.”

That was after the defendant’s letter dated 12/8/04 requiring the plaintiff to sign and return the tenant purchase agreement and others for execution.

In sum the parties had signed agreement(s) between them to put them in the tenant/purchaser – seller relationship. The defendant should therefore not be challenging the plaintiff on this. Both should check their records or parties execute another agreement in the circumstances. Well, if it may be repeated, the parties were never in correspondence on this aspect. It was all about the professional undertaking to pay over and the requisite documents to be supplied by the defendant which has all the time been in the process of doing. For example on 29/5/09 M/s Kiplagat & Co., whom the defendant appointed to act for it in this transaction, told M/s Musyoka, Wambua & Katiku Advocates, for the plaintiffs, in the pertinent part of the letter that:

“Our client is working to obtain the completion documents. Kindly indulge us as we await to receive them and forward them to you upon receipt thereof.”

The other point is that the plaintiff defaulted in the repayments. He admits that adding that that is precisely why he sought financing from his employer, the subject of the undertakings referred to above. Also that he approached the defendant and it agreed to freeze interest on the sum on 10/11/06, and on 15/11/06, the plaintiff’s lawyer gave the professional undertaking. All is fair so far.

What this court can say is that the plaintiff has been in the house without paying since 2001 to date. That sounds unfair as against the defendant. But all does not appear the fault of the plaintiff. He sourced for money and it is there to be paid upon provision of the requisite documents by the defendant. From what this court gathers from those proceedings, the defendant could have its money within a reasonable time on availing these documents. In fact that could possibly even end these proceedings. But let that be as it may.

Ruling delivered, orders granted with costs on 20/5/2010.

J.W. MWERA

JUDGE