



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 605 of 2007**

**RAINALD SCHUMACHER .....PLAINTIFF**

**VERSUS**

**AUBREY GARTH MOUSELY .....DEFENDANT**

**RULING**

The plaintiff has filed a plaint dated 19th November 2007 and in the said plaint he states that at all material times, the defendant is registered as the proprietor of all that piece of land situate in the City of Nairobi area known as L.R. No.11892/5, the suit property herein. By a tenancy agreement made between the plaintiff and defendant on 6<sup>th</sup> August, 2001, the plaintiff in consideration of the rent reserved therein, leased the suit premises for a term of 3 years from 15<sup>th</sup> August 2001 to 14<sup>th</sup> August, 2004. Upon expiry of the lease, the plaintiff continued as per the earlier terms of the expired lease.

The plaintiff contends that the defendant intimated to him that at the expiry of the term of the tenancy agreement on 14<sup>th</sup> August 2004 the defendant would sell the suit property to him for a sum of Kshs.15 million. It is the position of the plaintiff that the representations were made so as to induce the plaintiff to cause to be erected upon the property improvements thereon. And by reason of the matters aforesaid;

(a) the plaintiff caused a company known as **Red Rock Properties** to be duly incorporated so as to be the transferee upon the transfer of the property from the defendant,

(b) The plaintiff caused a draft agreement for sale dated 4<sup>th</sup> August, 2007 in respect of the property to be prepared by **A. F. Gross** Advocate confirming to the defendant that his offer to sell the property for Kshs.15 million had been accepted by Red Rock Properties Limited subject to contract by way of a formal sale agreement.

(c) On 17<sup>th</sup> August 2007 **A. F. Gross** Advocate informed the defendant that the accepted offer of Kshs.15 million was open for a period of 30 days from 17<sup>th</sup> August, 2007.

(d) The defendant sent to **A. F. Gross** Advocate the original Grant No. 25907 in respect of the property.

And in paragraph 10, the plaintiff states;

**“The plaintiff shall aver that the representation made by the defendant to sell the property to him**

or to his nominee was false and untrue, in particular;

- (a) On 10/10/2007 the plaintiff withdrew the offer to sell the property to the plaintiff for Kshs. 15 million.
- (b) On 15/10/2007 the defendant informed the plaintiff that;
  - (i) The defendant has issued to the plaintiff a 3 months notice to vacate the property expiring on or about 15<sup>th</sup> January 2008.
  - (ii) In the event that the plaintiff intended to exercise the option to purchase the property the plaintiff had to match other offers for the same that stood at Kshs.25 million.

The plaintiff further contends that upon representations from the defendant, he caused improvements to be erected upon the suit property in the expectation that the defendant would sell and transfer the property to him and as a result he improved the value of the property to the tune of Kshs.19 million. The plaintiff also avers that the defendant as the registered proprietor of the property stands to be unjustly enriched in the sum of Kshs.19 million.

On the strength of the above allegations, the plaintiff filed a chamber summons dated 19<sup>th</sup> November 2007 seeking several injunctive reliefs, mainly to restrain the defendant from selling, transferring or otherwise disposing the suit property pending the hearing and determination of the suit. The plaintiff also seeks an order restraining the defendant from either evicting, ejecting him from the suit property or otherwise taking possession of the same pending the hearing and determination of the suit.

At the interparties hearing of the application, the defendant filed grounds of objection and notice of preliminary objection. And the gist of the object is that;

- (a) **The plaintiff's entire claim is predicated upon the disposition of an interest in land which required to be in writing and signed by the party against whom the suit has been brought against and further attested by a witness.**
- (b) **There is no such agreement in writing herein and the application herein together with the suit are fatally defective and ought to be struck out.**

**Dr. Kiplagat** for the defendant argued the preliminary objection by submitting that the entire suit and application for injunction is predicated on an interest in land. The transaction has to be in writing for it to be justiciable under section 3 of the law of Contract Act.

According to **Dr. Kiplagat**, the plaintiff admits that there is no agreement in writing. The plaintiff further admits that the tenancy herein is in respect of a residential property. The Plaintiff also admits no developments or improvements can be undertaken without express consent of the defendant. The title documents restrict the user to one residential dwelling. And there has been no change of user, changing the user of the property from residential to commercial. On those admissions the law of contract prescribes that no suit may be brought in respect of such interest in land unless there is an agreement in writing and witnessed by a 3<sup>rd</sup> party.

**Dr. Kiplagat** learned counsel for the defendant, submitted that in the absence of writing, there is no proper suit before court hence the application and suit ought to be struck out.

**Mr. Nyaencha** leaned counsel for the plaintiff submitted that the plaintiff's claim is that pursuant to misrepresentation from the defendant that after the tenancy which had been entered between the parties expiring on 14<sup>th</sup> August, 2004, the plaintiff would be entitled to purchase the suit property at an agreed price of Kshs.15 million. The period of tenancy lapsed and the plaintiff was allowed to stay in the premises until the dispute arose. In between, the defendant by way of word of mouth, telephone, short

messages and by way of draft sale agreement and the defendant seeking to change the use of the premises from residential to commercial, shows the defendant was willing to sell the suit property to the plaintiff.

**Mr. Nyaencha** Advocate submitted that in anticipation of the sale agreement and with full knowledge and assurances from the defendant, the plaintiff undertook certain developments on the piece of land amounting to over 19 million. He therefore contended that the plaintiff's claim is not the same as the one foreseeable under the situation envisaged under section 3(3) of the Law of Contract.

I have considered the submissions of both sides and the issue that comes out is that the plaintiff's claim is based on an equitable estoppel, in that he is entitled to protection from misrepresentation cause by the defendant. But **Dr. Kiplagat** asserted that there can be no misrepresentation as to law and that you cannot rely on misrepresentation of the law. If the law requires that all transactions in land has to be in writing, you cannot plead that a representation in regards to a particular transaction was not in writing. Neither can you plead that you undertook developments which are required to be authorized and approved by law on the basis of a misrepresentation by another party.

Section 3(3) of Cap 23 states;

- (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 parties thereto 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"**

There is no dispute that the defendant is the registered proprietor of the suit property. And there is no dispute that the parties herein entered into a tenancy agreement on 6<sup>th</sup> August 2001 for a period of 3 years which expired on 14<sup>th</sup> August, 2004. The plaintiff claims that the defendant represented to him that at the expiry of the term of the tenancy agreement on 14<sup>th</sup> August, 2004, he would convey and/or sell the suit property for a sum of Kshs.15 million. And by means of the said representations and acting on the faith and in the belief that the representation was true, he was induced to make developments and/or improvements upon the suit property worth kshs.19,050,000/=.

The plaintiff also contends that unless the defendant is restrained, he stands to lose the value of the improvements done on the suit property.

It is clear from the tenancy agreement dated 6<sup>th</sup> August, 2001 that the user of the property was residential and the rent payable was Kshs.40,000/=. And according to the lease agreement, for the plaintiff to undertake any improvements, he was required to obtain the written consent of the owner and present the necessary documents to Nairobi City Council to give an appropriate approval and permission. It was also necessary to effect change of user from residential to commercial to enable the plaintiff to undertake commercial improvements.

The improvements allegedly done by the plaintiff were geared for the improvement of his business. He did not obtain the requisite approvals from the necessary authority. And equally he did not present any building plans or improvements to the council to allow him, do the improvements. It is my humble view that ignorance of the law cannot be a defence and cannot constitute a misrepresentation. The whole case of the plaintiff is based on an equitable estoppel but such a principle cannot apply when express provisions of the law dictate otherwise. I am in agreement with **Dr. Kiplagat** that there can be no estoppel against a statute.

It is the defendant's case that there being no agreement in writing, there being no express permission to enable the plaintiff to undertake any improvements on the subject land, there being no change of user from residential to commercial, there being no authorization from the planning authorities i.e. Nairobi City Council and Commissioner of Lands to effect any improvements on the land, the cause of action of the plaintiff in this suit relies on illegal pleadings in respect of improvements which are not authorized and which are expressly forbidden by law. And by reason of the law of contract Act, the suit must fail, I think that is the correct interpretation of section 3(3) of the Law of Contract Act Cap 23.

It is therefore, my decision that the plaintiff's cause of action offends and is in contravention of the clear provisions of Section 3(3) of the Law of contract. I am in agreement with **Dr. Kiplagat** that the power of equity cannot override the express statutory provisions of law, hence you cannot rely and/or plead equity over section 3(3) of the Law of Contract.

**In the premises the preliminary objection is sustained and the application and the case of the plaintiff must fail. It is hereby struck out with costs to the defendant.**

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of February, 2008.

**M. A. WARSAME**

**JUDGE**