



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 692 of 1993

ABDULHAMISI A. SALYANI & OTHERS.....PLAINTIFFS

VERSUS

RUKIYABHAI M. SALEH.....DEFENDANT

JUDGMENT

The plaintiffs' claim against the defendant as stated in their plaint dated 12th October 1993 is that the defendant by two agreements dated 25th October 1990 and 21st December 1989, sold to them parts "A" and "B" of the parcel of land known as plot No. 70/XXV Mombasa together with buildings thereon (hereinafter the suit properties) at the total consideration of Kshs. 1,365,000 which they paid in full but the defendant in breach of the said agreements has failed, refused and or neglected to transfer or execute transfers in their favour.

The plaintiffs therefore seek the following primary reliefs:

- a) An order that the defendant do transfer or do execute transfer(s) in favour of the plaintiffs of all that parcel of land on plot number 70/XXV/Mombasa and the two buildings thereon and on her failure to do so the Registrar of this court be empowered to sign the said transfer(s).
- b) Without prejudice to (B now (a)) above an order for the refund of Kshs. 1,365,000.00 together with interest thereon at the rate of 26% p.a. from the date of payment until payment in full.

The defendant delivered her 1st defence on 26th January 1994. She amended the same twice with the leave of the court. The last of her amended defence also contained a set off and a counterclaim and was filed on 17th August 2007. She denies the plaintiffs' claim and specifically denies that the plaintiffs bought from her the entire suit properties as alleged. She further denies receiving the purchase price of Kshs. 1,365,000.00. She however, admits orally agreeing to sell her two houses on the suit property to the 3rd plaintiff alone for the said sum out of which she received only an amount between Kshs. 525,000.00 and Kshs. 533,000.00 from the 3rd plaintiff. She then realized that the 3rd plaintiff wanted to defraud her and therefore backed out of the agreement after she had signed an agreement dated 21st December 1989. She denies executing the agreement dated 25th October 1990 and describes it as forgery particulars whereof she has given.

In the premises, the defendant denies liability to the plaintiffs as alleged by the plaintiffs or at all and has set up a set off on the ground that the 3rd plaintiff has been receiving rent from a tenant from one of the said houses which house would have earned her Kshs. 2,856,600.00 in rent. She claims this sum and Kshs. 21,000.00 per month until possession is delivered up. She further claims a set-off upto a maximum of Kshs. 533,000.00. The defendant further prays for the removal of a caution registered against the suit

properties by the 3rd plaintiff and his eviction from the suit premises.

Briefly the facts leading to this case are as follows: The defendant is a widow with 9 adult children. Her husband died 28 years ago leaving her to look after the 9 children who were then young and depended on her. He also left various debts which the defendant had to pay. Some of those debts were secured by the suit title. In those circumstances, she decided to sell two of the houses standing on the said title. The 3rd plaintiff accepted to purchase them and the defendant offered them to him at Kshs. 1,365,000.00. From that point there is no agreement on the facts. The plaintiffs testified that the transaction involved two agreements prepared by Mr. Chudasama Advocate. The first of the agreements was executed on 21st December 1989 and involved house "B" which was sold to them at Kshs. 550,000/= . The said agreement was executed on 25th October 1990 and involved house "A" which was sold to them at Kshs. 815,000.00. The plaintiffs testified that the purchase price for the two houses was paid fully to the defendant and to her nominees. Yet the defendant refuses to execute transfers in their favor prompting the 3rd plaintiff to lodge a caution against the title and then filing this suit.

The defendant on her part testified that she made an oral agreement, not with all the plaintiffs, but with only the 3rd plaintiff to sell to him two of her houses on the suit title at the consideration of Kshs. 1,365,000.00. She then executed the agreement of 21st December 1989 and to date has received between Kshs. 525,000.00 and Kshs. 533,000.00 of the said price of Kshs. 1,365,000.00. In those circumstances, the 3rd plaintiff is in breach of the agreement of sale which is now not enforceable as the plaintiffs designed to defraud her of her property.

The plaintiffs' testimony was given through PW1 Ayub Ahmed Salyani the 3rd plaintiff, his brother Suleiman Ahmed Salyani who was PW2, PW4 N. J. Chudasama the Advocate and Firdous Mohamed Ali who was PW3 and a tenant in one of the houses. The defendant testified in her own behalf and called her son Abdulkarim Mohamed Saleh who testified as DW1, her daughter in law Abiba Ahmed Mohamed who testified as DW3 and her daughter Halima Mohamed Salim who testified as DW4.

On the conclusion of the evidence, counsel agreed to submit in writing and by 25th June 2008 the written submissions were in place. I have considered the pleadings, the evidence adduced by both sides and the submissions of counsel. From the outset, I must confess that it is not always easy to write a Judgment where part of the evidence is taken before a different judge. In this case, the entire plaintiffs' case and the 1st defendant's witness evidence was taken before Hon. Maraga J. The parties then agreed that the hearing proceeds from where the Learned Judge had reached. I therefore took the evidence of the defendant and two of her witnesses. I will however do my best nevertheless.

The record does not show that the parties framed issues for determination at the close of pleadings. The issues that have been disclosed by the pleadings and evidence may be dealt with as follows:-

- (1) Whether the defendant agreed to sell to the plaintiffs or any of them Plot No. 70/XXV Mombasa with one building thereon on 21st December 1989 and if so what was the consideration?
- (2) Whether the defendant agreed to sell to the plaintiff or any of them Plot No. 70/XXV Mombasa with another building thereon on 25th October 1990 and if so at what consideration.
- (3) Were the agreements oral or in writing?
- (4) What were the terms of the agreement if any?
- (5) Whether the sum of Kshs. 1,365,000/= was paid by the plaintiffs or any of the defendant.
- (6) Whether the plaintiffs are entitled to an order of specific performance of the said agreements of sale.

- (7) Has the defendant suffered loss and damage by way of unpaid rent from 1st February 1990 to the date possession is delivered up? If so what is the amount of such rent?
- (8) Whether the defendant gave possession of any house to the plaintiffs or any of them.
- (9) Whether the plaintiffs should be evicted from the bungalow on Plot No. Mombasa/Block XXV/70.
- (10) Should the caution registered against Plot No. Mombasa/Block XXV/70 Mombasa Island be removed?
- (11) Is the defendant entitled to punitive or aggravated damages and if so how much?
- (12) What should be the order on the costs of the plaintiff's claim, the defence set-off and counter claim?

On whether the defendant agreed to sell to the plaintiff or any of them Plot No. 70/XXV Mombasa with one building thereon on 21st December 1989, the following facts have been established. Both sides acknowledge that the defendant is currently the registered proprietor of Plot No. Mombasa/Block XXV/70. There is also no dispute that the development on the said plot comprises more than two houses or buildings. It is also not disputed that at no time did the defendant ever offer to sell the entire title to the plaintiffs or any one of them.

It is therefore clear that the plaintiffs' averments in paragraphs 3 and 7 of the plaint are misleading since the said averments suggest that the agreements stated therein involved the entire title. That defect is extended to prayer (a) of the plaint. The 1st answer to the first issue is therefore that the defendant did not agree to sell the entire title to the plaintiff's or any of them.

There is however the admission of the defendant that her intention to sell was in respect of two houses on the said plot and that intention was expressed to only the 3rd plaintiff who gave evidence as PW1. Indeed the evidence adduced clearly shows that the other plaintiffs did not accompany the 1st plaintiff when the agreement of sale was made. The 3rd plaintiff may have agreed with his brothers to purchase the houses but to the defendant, she only knew and dealt with the 3rd plaintiff. Infact when the defendant went to PW4's office when, it is stated she signed one of the agreements, only the 3rd plaintiff attended. PW4 indeed confirmed that the agreement was executed at different times at his office.

On the issue of consideration, the defendant did not really dispute the purchase price of Kshs. 1,350,000/=. Her testimony was that that sum was never paid by either the 3rd plaintiff or any of the plaintiffs and has not been paid to date. An agreement as the term suggests is not the mere signing of a paper. It involves negotiations on the price, the size of the property, the development thereon, how the consideration will be paid and when and so forth. There is no evidence that a part from the 3rd plaintiff any of his brothers Abdulhamis Ahmed Salyani, Abdulmajid Ahmed Salyani, Suleiman Ahmed Salyani and Abdulhalim Ahmed Salyani ever agreed with the defendant on anything. PW1 the 3rd plaintiff is the witness through whom most of the plaintiffs' evidence was given. The only time he testified of the defendant meeting one of his brothers was when one of the acknowledgements (PEX 2) was allegedly executed at Mr. Chudasama's office. PW1 did not even give the name of the brother. PW4, the said Chudasama denied being present when that acknowledgment was executed and with respect to the first acknowledgment PEX 1, PW4 testified that the rest of the plaintiffs signed the same later when the defendant and the 3rd plaintiffs had already signed the document. Infact the 4th defendant Suleiman Ahmed Salyani who is one of the two brothers who testified told the court that when he executed EX 1, the defendant was not present. In view of the evidence on record the defendant's testimony that she did not enter into any agreement with the rest of PW 3's brothers can be believed.

The term agreement, fits such a description if the parties thereto are of one mind. From the evidence

produced by both sides, it is difficult to conclude that the parties to the agreements produced by the plaintiffs were acting with the same thing in their minds. There should be no conflict on what the consideration is and when it should be paid. There should also be no conflict on who is paid and how much has been paid. Yet that conflict is evident in this case. PW1, the 3rd plaintiff, testified as follows on that fundamental term of the agreement.

“I first paid her Kshs. 100,000 and the balance in bits which I recorded in a notebook which she signed whenever she took payment.....

I also paid her Kshs. 5,000.00 for the year 1990 but I do not have the receipt. The payment is included in the acknowledgement.”

On cross examination PW1 testified as follows in part:

“We paid her Kshs. 100,000.00 on that day. I do not have the receipt for the balance of Kshs. 17,000.00.....

I paid to the defendant and her children and to creditors who she owned money including S. H. Allarakhiya, to my brother Yusuf Kshs. 5,000/= to Kshs. 10,000.00.....Due to the relationship between us I did not demand any written documents.

I paid the auditors Kshs. 34,000.00. I see this letter dated 21st July 1997 from the auditors. It is true it denies payment by us to them of any money on behalf of the defendant.....

Except for the Petty Cash Voucher from Allarakhiya I have no independent voucher for Kshs. 70,000.00 paid to the defendant in cash.....

In respect of the 1st agreement, I do not have a receipt for part of the deposit Kshs. 17,000.00 but I have for Kshs. 83,000.00. All payments made to 3rd parties on her behalf were made by cheque except those made to her family members, my brother Yusuf and Mr. Allarakhiya.....

All the payments referred to in paragraph 4 (e) have no vouchers but the defendant acknowledged them in an acknowledgement..... Some money was paid to her children who said they had been sent by her. They did not sign the acknowledging receipt.”

The question which arises in view of the PW1’s testimony is whether indeed the entire purchase price was paid. The plaintiffs did not produce any authority from the defendant allowing them to pay the purchase price to any other person. Some of those alleged to have witnessed the defendant being paid have denied witnessing the payments being made to the defendant. For instance, the initial Kshs. 100,000/= was alleged to have been paid in the presence of PW4 Chudasama, an Advocate. He denied witnessing such payment. Other payments were alleged to have been made to the defendant’s children without naming them and those named denied taking money from the plaintiffs on behalf of the defendant. DW1, DW3 and DW4, all denied the plaintiffs’ allegations that they either received money on behalf of the defendant or that they witnessed any payments being made to the defendant. Performance of a contract is a crucial element of the transaction hence a party who performs his/her part in accordance with its terms is thereby discharged from his/her obligations under the contract. Where performance is to be by a third party, the party to the contract must give his/her authority for such performance. The plaintiffs did not exhibit any document to show that the defendant authorized other persons to receive payment of the purchase price on her behalf. Even if she had done so, the persons who are alleged to have received portions of the purchase price have denied receipt of those payments.

The plaintiffs contended that the defendant acknowledged receipt of the entire purchase price before Chudasama the advocate. The defendant has given evidence which discredits those acknowledgments. I believe the defendant’s testimony that she is illiterate and is not conversant with English and Gujarati.

She understands only Kiswahili and her mother tongue Cutchi. The acknowledgements contained in PEX's 1, 2 and 3 are all in English. Besides the documents being in English the evidence supporting the PEX 1, 2, and 3 as already observed are themselves of doubtful value.

On how the agreements and acknowledgements were explained to the defendant, PW1, the 3rd plaintiff in his evidence stated that PEX's 1 and 2 (the acknowledgement and the agreement in respect of the first house) were explained to her in Gujarati by PW4 Chudasama the advocate and her daughter. PW4 in his testimony stated that when PEX1 was executed by PW3 and the defendant, they were together and alone. PW4 spoke to the defendant in Gujarati. PW4's testimony is therefore in conflict with that of PW1. His evidence that the exhibits were explained to the defendant by her daughter cannot be true more so in view of the denial of PW4 that PEX 2 was signed in his presence.

Given the conflict in the evidence and the fact that the defendant only understood Kiswahili and Cutchi, it cannot be said that the plaintiffs' testimony that the agreements were explained to the defendant is believable. PEX 2 is the final acknowledgement of purchase price for the houses. The inconsistency in the evidence on that exhibit in my view casts doubt on its authenticity. So, the acknowledgements relied upon by the plaintiffs as putting the issue of payment of purchase price beyond dispute are discredited on reasonable grounds. With that document in such discredit the flaws in the alleged acknowledgments prior to the final acknowledgment assume decisive significance. There is the sum of Kshs. 33,400.00 allegedly paid to the defendant's auditor Mr. H. S. Allarakhia. The auditor denied receiving such payment from the plaintiffs. There is the very first acknowledgement of Kshs. 100,000/= in PEX 1. Initially PW1 had alleged that the defendant executed the acknowledgment on receipt of the said sum. However, Mr. Chudasama, PW4 testified that although the document was signed before him, no cash was paid by the defendant then. The documentary evidence produced indicated that only Kshs. 83,000.00 had been received by the defendant. Upto the close of the entire case, no documentary evidence was produced to confirm payment of Kshs. 17,000.00.

There are then the payments allegedly made to third parties, the defendant's children, one of the plaintiffs' brothers and others indicated in PEX4 - the note book. That exhibit is written in the English language and the payments were allegedly effected on various dates without acknowledgements on those dates. Only one acknowledgement is indicated on an independent page on an entirely different date. No satisfactory evidence was adduced to show how the exhibit was explained to the defendant. I believe the defendant that she signed documents she did not understand. Those documents included PEX 4.

The defendant admits receiving Kshs. 530,000.00 from the 3rd plaintiff. That sum did not even cover the purchase price for the first property. I find and hold that that is the only sum which the defendant received from the 3rd plaintiff towards the purchase price for the two houses she had agreed to sell to him. Having so found, the issue of whether the sum of Kshs. 1,365,000.00 was paid by the plaintiffs or one of them to the defendant is answered in the negative.

On whether the agreements in respect of the sale of the two houses were oral or in writing, I have found that initially the 3rd plaintiff and the defendant orally agreed to the transaction involving the sale of the two houses at the price of Kshs. 1,365,000.00. The oral agreement was reduced to writing by the 3rd plaintiff and PW4. The terms thereof were however not explained to the defendant or the explanation offered was not understood by the defendant.

The above findings have answered the issue as to whether the plaintiffs are entitled to an order of specific performance of the agreement in the negative. An order for specific performance will not be granted to a purchaser who has not performed his part of the bargain or has failed to show that he has at all times been ready and willing to do so. As the plaintiffs failed to perform the obligation to pay the purchase price as agreed, they cannot obtain the relief of specific performance.

On whether the defendant has suffered loss and damage by way of unpaid rent from 1st February 1990 to the date possession is delivered up, I have come to the conclusion that the issue of rent cannot arise when the sale transaction was current. One cannot be paying rent and paying purchase price at the same

time unless the agreement of sale expressly says so.

On whether the defendant gave possession of any house to the plaintiffs or any of them, I have come to the conclusion that the defendant may have initially done so at least with respect to one of the houses. However, on whether the plaintiffs should now be evicted from the house, I find and hold that with respect to that one house, the plaintiffs reasonable believed that they were entitled to the same as of right. The evidence adduced however, is that the possession is not by the plaintiffs but by a party who is not joined to these proceedings. To grant the order of eviction would offend against the well known maxim of Natural Justice that a party should not be condemned unheard.

On whether the caution registered against the suit property should be ordered removed, I have found that the 3rd plaintiff no longer enjoys a purchaser's interest in the said title. There is therefore, no justification for maintaining the caution. The same should therefore be removed.

On whether the defendant is entitled to punitive, aggravated or any damages, I have found as follows. Although the plaintiffs did not pay the purchase price in full, the defendant is not entirely innocent. The title in question is still charged to Zeus Finance Company Limited to secure a sum of Kshs. 360,000.00. The charge was registered against the title on 8th December 1986. The status of that charge is not known. The defendant could not therefore pass an absolute title to the plaintiffs without discharging the charge in favor of Zeus Finance Company Limited. She was therefore not in a position, even at the time of the agreement, to pass a free title to the plaintiffs even if they had paid the entire purchase price.

That being my view of the defendant's claim for damages, I find and hold that the same cannot be granted. So only the relief for the removal of the caution lodged by the 3rd plaintiff against the suit title has succeeded.

Turning back to the plaintiffs claim, whereas the primary reliefs sought by the plaintiffs cannot be granted, I find and hold that there is no reason why the sum of Kshs. 530,000/= admitted by the defendant should not be refunded to them. The plaintiffs have without prejudice claimed refund of Kshs. 1,365,000.00 together with interest thereon at the rate of Kshs. 26% p.a. from the date of payment until payment in full. I have found that they did not pay that sum to the defendant. They are therefore not entitled to that sum. They are however entitled to the sum of Kshs. 530,000/= which sum has been admitted by the defendant as having been paid. How about interest? The same is at the discretion of the court. The plaintiffs are losing what they may have believed was theirs although wrongfully. Despite my views on what I think of their actions, I will award interest on the said sum at court rates from 1st February 1991 until payment in full.

As each side has partially succeeded, each party shall bear his/her own costs of both the suit and the set off and counter-claim.

In summary, these are the orders of the court:-

- 1) The plaintiffs' claim for specific performance is dismissed.
- 2) Judgment is entered for the plaintiffs against the defendant for Kshs. 530,000.00 together with interest thereon at court rates from 11th February 1991 until payment in full.
- 3) The defendants set off and counter-claim for Kshs. 2,856,620.00 is dismissed.
- 4) The defendant's claim for eviction of the plaintiffs is dismissed.
- 5) The defendant's claim for punitive and aggravated damages is dismissed.
- 6) The defendant's claim for the removal of the caution lodged against the suit property by the 3rd plaintiff is allowed and an order is issued directed to the District Land Registrar to remove the said

caution.

7) Each party to bear his/her own costs.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JULY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Kinyua for the Defendant and Mutubia holding brief for Ngeno for the Plaintiffs.

F. AZANGALALA

JUDGE

16TH JULY 2008