



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 2406 OF 1994

RIHAL INVESTMENTS LIMITED PLAINTIFF

VERSUS

ELMA LIMITED.....

DEFENDANT

JUDGMENT

The present action was initiated by plaint dated 05.07.94 and filed the same day. The last page of the plaint containing the prayers is tattered and parts of it torn away. However, the prayers are reflected at paragraph 7 of the plaintiff company's written submissions dated 15.05.08 and filed on 16.06.08. The said paragraph 7 states that the plaintiff filed this suit seeking the following orders:-

- A. Rescission of the (subject) contract of sale of the suit property effected by transfer dated 20.05.94 registered on the same day in the Land Registry at Nairobi as I.R. 8341/19.
- B. An order directing the defendant to reconvey the suit property herein to the plaintiff.
- C. An order directing the defendant to bear the costs, charges, stamp duties, taxes and incidentals arising from the said conveyance.
- D. Special damages in the sum of Kshs.5 million representing the difference between the actual value of the suit properties and the value (at which) the suit properties were sold at the time.
- E. General damages.
- F. Exemplary damages.
- G. Interest on (D) above from the date of registration of transfer to that of award.
- H. Costs of and incidental to the suit.

The defendant company put in a defence dated 19.08.94 and filed on 22.08.94 essentially denying the plaintiff's claims of wrongdoing on the defendant's part.

Hearing started before Khamoni, J on 13.03.2000. By 15.03.2000 two plaintiff's witnesses had

concluded their evidence. These are P.W.1, Surinder Singh Rihal, a director of the plaintiff company and P.W.2, Satpal Singh Jowhal, advocate for the plaintiff company. At the end of P.W.2's evidence, there was an application by both parties for adjournment. The Judge, who had initially allocated 13.03.2000 and 14.03.2000 only for hearing of this case but eventually agreed to continue with its hearing on 15.03.2000 in preference to other cases hoping to have concluded the hearing of the case by 15.03.2000 was not amused and he disqualified himself from any further dealings with the case.

Eventually the case was allocated to me on 17.05.05 for further hearing and I was to start hearing it from where Khamoni, J had left off. Learned counsel, Mr A. Wandabwa represented the plaintiff while learned counsel, Mr J. Orange held brief for learned counsel, Mr R. Hira for the defendant on 17.05.05. The two advocates agreed that day that a Valuation Report by Njihia Muoka Rashid Co. Ltd dated 05.11.04 which was MFI – 1 goes in by consent and the said Report was admitted in evidence as Plaintiff Exhibit 6.

Actual hearing before me started on 19.02.08 when the plaintiff was represented by learned counsel, Mr M. Nyaoga while the defendant was represented by learned counsel, Mr R. Hira.

The plaintiff company called P.W.3, Dominic Mulwa Muoka, a graduate Land Economist as well as a Registered Valuer and Estate Agent. He formally produced the Valuation Report dated 05.11.04 previously tendered in evidence by consent as Plaintiff Exhibit 6. At the conclusion of P.W.3's testimony, plaintiff's counsel announced that to be the close of the plaintiff's case.

The defendant company called two defence witnesses: D.W.1, Amritpal Singh Suri, a director and shareholder of the defendant company; and D.W.2, Jane Njage, an advocate who acted for the defendant company in the purchase of the suit property. Before D.W.1 completed his testimony, defendant's counsel applied and was allowed to interpose and take the evidence of Miss Jane Njage, the advocates who had acted for the defendant in this matter. D.W.2, Jane Njage produced as Defence Exhibit "A" her office of file containing correspondence with the plaintiff's advocates regarding the sale transaction involving the suit property which she said is L.R. No.209/3514, Butere Road, Nairobi. After D.W.2 concluded her testimony, D.W.1 resumed the witness stand to continue with his testimony. At the end of D.W.1's testimony, defendant's counsel informed this court that he had intended to call a Valuer to put in a Valuation Report for the suit property but that plaintiff's counsel had agreed that the Report could go in by consent. This was confirmed by plaintiff's counsel, so the Valuation Report by Daytons Valuation Ltd dated 23.11.05 was admitted in evidence as Defence Exhibit "B". After admission of Defence Exhibit "B", defendant's counsel announced that to be the close of the defendant's case.

The parties' advocates asked and were allowed to file written submissions. On 19.06.08 the parties' advocates indicated they intended to rely on the written submissions and sought a date for judgment.

I have given due consideration to the rival submissions of the parties and the evidence on which the submissions were based. Both the evidence and the submissions plus authorities cited therein are a matter of record. I shall, therefore, give such of their salient features as I consider necessary to give context to the conclusions I have arrived at in the dispute before me.

It is the plaintiff company's case that the plaintiff is the registered owner of the suit property, L.R. NO. 209/3514 situated along Butere Road in Nairobi's Industrial Area, together with improvements thereon. That in February, 1994, the plaintiff company through its director, Surinder Singh Rihal (P.W.1) entered into negotiations with the defendant company through Amritpal Singh Suri who is a son of one of the defendant company's shareholders and one Avtar Singh Suri who is a director of the defendant company with a view to the plaintiff company selling the suit property to the defendant company. That in the course of negotiations, the defendant company through Amritpal Singh Suri orally represented to the plaintiff that in consideration for the plaintiff as vendor selling the suit property to the defendant at a reduced price of Kshs.5 million, one Franklin Bett, who was represented as a director of the defendant company and then an influential person at State House, the real owner of the defendant company and a very close business friend of the Suris, would sell to the plaintiff two prime undeveloped 1 – acre plots along Mombasa Road in Nairobi at a price of Kshs.1 million each. That these representations were

repeated by Amritpal Singh Suri to the plaintiff's advocate, Mr S.S. Jowhal (P.W. 2) who 'insisted' that the representations be made part of the Sale Agreement but Amritpal Singh Suri refused, insisting that the plots belonged to Mr Franklin Bett and assured that he would not go back on his word. That relying on the representations, the plaintiff agreed to sell and did transfer the suit property to the defendant at a reduced sum of Kshs.5 million; that the plaintiff later realized that the representations were false since the said Franklin Bett was not a director of the defendant company and did not wish to sell the plots to the plaintiff; and that the representations were, therefore, made fraudulently and with intentions of depriving the plaintiff of the suit properties herein. The foregoing constituted the basis of the plaintiff's suit herein. Plaintiff's counsel advanced various arguments and cited authorities in support of those arguments.

As already intimated, the defendant company denied through its defence witnesses the accusations levelled against it. Like the plaintiff's counsel, the defendant's counsel also advanced various arguments and cited some authorities in support of those arguments.

Having considered the rival evidence and submissions of the parties, I make the following observations and draw the undermentioned conclusions: That the 'misrepresentation' to induce the plaintiff to sell the suit property at a reduced price of Kshs.5 million was an alleged offer by a person not a party to this suit to convey to the plaintiff two 1 – acre prime undeveloped plots a long Mombasa Road in Nairobi at Kshs.1 million each.

With regard to the suit property, there are two Valuation Reports:-

a) By Njihia Muoka Rashid Co. Ltd – Plaintiff Exhibit 6. It is dated 05.11.04 and gives the value of the land plus improvements thereon as Kshs.16 million as at 05.11.04. The valuer, Dominic Mulwa Muoka (P.W.3) told this court that he was told by the client, Surinder Singh Rihal (P.W.1) that the Report was required for advisory purposes; that he the valuer was not allowed to measure the building on the plot and could not access the first floor and that the said valuer relied on measurements taken previously by another valuer. During his cross-examination, P.W.3 conceded that he could not say what the value of the plot was in 1992 (*sic*). The reference to 1992 was a clear error on P.W.3's part as all other evidence on record shows that negotiations between the parties regarding the suit property started in February, 1994. As the valuation of Ksh.16 million does not address itself to the relevant year 1994, I find it to be of little assistance to the court.

b) By Dayton Valuers Ltd – Defence Exhibit "B". It is dated 23.11.05, states that the suit property was inspected for valuation on 24.11.05 and gives the value of the property as at 1994 for litigation purposes as Kshs.5.5 million. This Report was put in evidence by consent of the parties without the valuer in question giving evidence on it formally or being cross-examined on the valuation. The valuation of Kshs.5.5 million remains unchallenged and since it addresses itself to the relevant year 1994, I find it a better guide.

As regards the two 1 – acre plots said to have been situated along Mombasa Road in Nairobi, there is no Valuation Report thereon. The evidence of their value came out of P.W.1 during his cross-examination who said they were worth between Kshs. 2 – 2.5 million each. During the same cross-examination, P.W.1 gave the value of the suit property as being between Kshs. 10 – 12 million. I interpose here to observe that the plaintiff's Valuation Report gives the value of the suit property as Kshs.16 million as at 04.11.04.

On the issue of misrepresentation relating to the offer of two 1 – acre plots along Mombasa Road in Nairobi, P.W.2, S.S. Jowhal, Advocate told Khamoni, J that the said misrepresentation ascribed to Amritpal Singh Suri (D.W.1) was later repeated by the said D.W.1 before him, i.e. S.S. Jowhal, Advocate and that the said Jowhal agreed to see D.W.1

'... because of the offer to tie up the Mombasa Road plot sale with the Industrial Area Property to the plaintiff.'

In the above connection, the then section 3 (2) of the Law of Contract Act, Cap.23 provided as follows:

‘3. (3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

i. has in part performance of the contract taken possession of the property or any part thereof; or

ii. being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.’

None of the above requirements were fulfilled with regard to the two 1 – acre plots alluded to by the plaintiff such as to enable the said plots to be made part of the sale transaction on the suit property as required by law. S.S. Jowhal, Advocate (P.W.2) must have been aware of the above legal requirements and I surmise that that is why he said in his evidence that he ‘suggested that there be some sort of writing.’ Yet the told Khamoni, J:

‘But Mr A.S. Suri (D.W.1) replied that once in a while one should have confidence in a person’s word of mouth. So nothing was put in writing and we left it at that.’

The end result of the above omission was that the alleged offer of sale of the two 1 – acre plots along Mombasa Road in Nairobi did not in law become part of the sale transaction on the suit property.

Mr S.S. Jowhal (P.W.2) also told Khamoni, J that Mr Surinder Singh Rihal (P.W.1) and Mr Suri (D.W.1) went to his office towards the end of March, 2004, that D.W.1 said Mr Franklin Bett did not have title documents (for the subject Mombasa Road 1 – acre plots) but that D.W.1 assured P.W.1 that Mr. Bett was a man of his word and that P.W. 1 could rest assured that the two plots in question would be transferred to the plaintiff. Even if the representations relating to offer of the two 1 – acre plots along Mombasa Road in Nairobi were made orally as contended by the plaintiff company and its advocate, it was a major lapse on the part of the said company and/or its advocate not to have ensured such offer was reduced into writing.

P.W.2 also told Khamoni, J that Mr suri (D.W.1) had told him that Elma Limited, i.e. the defendant company, belonged to Mr Bett whose lawyer was J.M. Njage & Co. Advocates and that the agreement should be sent to that firm. P.W.2 added that the sale transaction was eventually finalized. There is no evidence that the plaintiff company and/or its advocate verified the claim that the defendant company belonged to Mr Bett through a search at the appropriate registry before finalizing the sale transaction.

Regarding the suit property, J.M. Njage of J.N. Njage & Co. Advocates, *inter alia*, had the following to say in her letter of 08.07.94 to the plaintiff company, contained in Defence Exhibit “A”:

‘Your letter dated 4th July 1994 has been passed on to us with instructions to deal.

We note that the Sale Agreement which was drawn by your lawyers M/s S.S. Jowhal & Company Advocates was explicit in its terms and conditions of sale and all such terms and conditions obtaining therein were fully performed by our client thereby facilitating registration and completion of the Conveyance. It is indeed amazing that you would raise the issue of misrepresentation long after registration of the Conveyance and receipt of the full purchase price.

Our instructions are that one of your Directors was interested in buying a property on Mombasa Road with the proceeds of the sale and one of our client’s Directions mentioned that he knew of a property that was going for Kshs. 1 million per acre owned by Mr. Kiptanui and would intervene and see if your Director would purchase the same.

As a matter of fact there was such a plot known as L.R. No.209/11393 our client had negotiated for the sum of Kshs. 1 million per acre with the owners M/s Metipso Limited and handled by this office but this was besides the point as it was mentioned in passing and was not a pre-condition to the sale or a condition of the sale whatsoever. These were merely discussions on how the sale proceeds would be invested and our client's Director was not doing your Director any favour in procuring a plot because the owners were actually selling the plot for Kshs.1 million per acre. If your Director was really interested in the sale of the said plot, he would have pursued this matter in February 1994 when the issue arose, which he did not ...'

Miss Njage who testified as D.W.2 before me reiterated the contents of the above letter, which she said never mentioned two 1-acre plots but one specific 1-acre plot. She also said she never received any response to her letter of 08.07.94 but agreed with plaintiff's counsel that there was no necessity for the plaintiff company to respond to the letter as the said company had filed the present suit on 05.07.94.

P.W.2, Satpal Singh Jowhal testified before Khamoni, J on 15.03.2000, that he, Jowhal said he had been an advocate of the High Court of Kenya for 34 years. Assuming, for the sake of argument, that the 'misrepresentation' by way of offer of the subject two 1-acre plots ascribed to Amritlal Singh Suri (D.W.1) was made to a director of the plaintiff company and later repeated to the plaintiff company's advocate, Satpal Singh Jowhal, would an advocate of so many years legal experience fail to appreciate the necessity for such offer to be reduced into writing and not only insist but also ensure that that was done in view of the mandatory requirements of the then section 3(2) of the Law of Contract Act instead of merely suggesting it and giving it up upon some alleged oral assurance by D.W.1? I highly doubt if P.W.2 would have been so naïve, but if he was, he made a risky error by engaging in such naivety. Section 3(2) of the Law of Contract Act mandatorily requires that for the alleged offer of the subject two 1-acre plots to have legally formed part of the sale transaction on the suit properly, such offer had to be in writing. I do not believe an oral offer was made in the terms said to have constituted 'misrepresentation' but even if it was, it amounted to nothing in law and could not legally have formed part of the deal in the suit property between the plaintiff and defendant.

The upshot is that I find the plaintiff company not to have proved its case against the defendant company on a balance of probability as required by law. In the premise, the plaintiff's suit is dismissed with costs.

Orders accordingly.

Delivered at Nairobi this 21st day of July, 2008.

B.P. KUBO

J U D G E