



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

Civil Suit 1480 of 2005

MANAZ HABIB GHULAM FATHEL PLAINTIFF

VERSUS

ARSHAD UL-HAQ NIAZDEFENDANT

JUDGMENT

1: BACKGROUND

1. The parties herein are:- Manaz Habib Ghulam Fathel a proposed lessee of a proposed building to be constructed. (herein referred to as the plaintiff).

He is represented by M/s Vishnu Sharma & Co. Advocates

Arshad -Ul Haqq-Niaz

A proposed lessor of a proposed building to be constructed (herein referred to as the defendant)

and is represented by M/s Asiema & Co. Advocates.

2. The defendant proposed to construct a five story building. This premises was to be constructed on land parcel LR 36/VII/45 Eastleigh along the Athumani Kipaga/Captain Mungai Street, Eastleigh to be known and called "Al Haqq Plaza". The said building consisted of three floors was to be a dwelling apartment houses and the 5th floor was to be a mosque.

3. The plans were prepared and members of the public were offered space of the premises before the actual building was being built.

4. The plaintiff herein was one of those offered one of the said space. He entered into an agreement on 14 January 2004 called by the parties

Ref BR 786.002:-

"Reservation costing agreement payment"

Whereby the plaintiff agreed to pay the costing totaling to \$9000 to reserve space in the building. The first payment being \$4,500 to be paid on

14 January 04 the second payment being \$4,500 to be paid on 25 February 04. There was a clause to the agreement known as "Business reservation agreement" duly stamped and registered that the plaintiffs would be given shop No.9. That he would be entitled to occupy the space on completion of the building which was envisaged for August/September 2004. The reservation costs agreement was non refundable.

5. Later the plaintiff and defendant are said (according to the defence) to include a default clause that there will be refund of the sum paid if no premises is delivered and that this was on condition, no legal action would be brought against the defendant.

6. The said plaintiff being a Yemen national, left the country. On his return, he found that the space provided to him of 009 and later added of 027 was given out. The defendant refused to give him the space in the building now completed.

7. The plaintiff filed this suit on 9 December 2005 and sort this courts orders for specific performance. He later amended his plaint to include orders of injunctive nature to restrain the defendant from letting out the said premises. The High Court granted those orders (Njagi J 13 December 05) and (Aluoch J

5 December 06 on condition.)

8. The defendant filed defence and his main complaint was that the plaintiff was an aggressive person, as such, he was not inclined to have him as his tenant.

II: The trial

9. At the trial only the plaintiff gave evidence. The defendant did not attend to court. He need not attend where he has an advocate to represent him. I therefore have the evidence of the plaintiff, the pleadings for the plaintiff and the pleadings for the defendant.

10. It is therefore clear from the evidence before this court that the defendant owned the suit premises known as LR 36/VII/45 and called Al Haqq Plaza. It is the defendant who caused and produced architectural drawings to be prepared for the said building. I say so as the defendant had called no evidence to deny this.

11. I further found that the defendant did agree and in writing on the

14 January 2004 to reserve the space identified as shop No.009 ground floor as appearing on the drawing and pictures of the building called Al Haqq Plaza that he intended and did construct on the said land and was for occupation by the plaintiff on or about August/September 2004.

12. From the pleading and the exhibits produced, there was a business reservation agreement. The first not registered and the second contained a clause that there would be a reservation costing between the parties that was non-refundable. The same provided for a payment of \$9,000 which the defendant received and acknowledge receipt in installment on 14 January 04, 22 April 04 and 5 May 04.

13. From the evidence of the plaintiff, an oral agreement was entered into shop No.027 for \$5,000 which agreement was that the plaintiff to extend shop 009 to that adjacent of shop 027. It seems that there being no written agreements the plaintiffs may not be perusing to be given shop 0027.

14. A building of the said plaza was constructed and duly completed though belatedly in October 2005. The said building included the requisite plan 009 and 0027 space for shops.

15. The said premises were to be let out. This was done in absence of the plaintiff who was outside the country.

16. From the agreed issues the quantum arose as to whether the plaintiff be given the two shopping space? Should specific performance of the contract be enforced?

III. Findings

17. The plaintiff did not specifically plead performance for shop 0027. The agreement for this shop was oral. It was therefore contrary to the law of contract whereby all agreement relied on must be in writing.

18. As to shop 009 this agreement was in writing as best prepared by lay persons. It was registered in the lands department and duly stamped. The plaintiff had complied with all the conditions for the agreement. He is therefore entitled to shop 009 spaces only. I would accordingly allow this prayer. The Orders Aluoch J had been this shop 009 space was NOT to be leased out pending the determination of this suit on condition.

19. In the case law of Mumias Sugar Co. Ltd v Freight Foundations K Ltd. (2005) I E.A. 305 a court of appeal decision referred to by the plaintiff, a lease sub- let a shed to the appellant. The agreement between the parties broke down and the appellant returned the keys. The respondent/lessee sought specific performance. The trial the court held that specific performance be given. On appeal to the court of appeal, the court of appeal held there existed a contract but that contract was not a sub lease itself but a contract to sub lease. The said appellant proposed tenant had surrendered the lessee back to the landlord. It thus meant that the contract to lease could not be enforceable.

20. In this case herein the contract to lease was still in force and had not terminated. I would therefore agree that the plaintiff is entitled to specific performance on shop 009 as agreed to buy the parties.

21. I would comment on the prayer of quite possession and injunctions orders to protect the plaintiff under the “Landlords and Tenants Act” Cap.301 Laws of Kenya

s Act envisages a situation where a tenant is already in occupation. Here the tenant is a new tenant. He enters the premises under a lease, if the landlord so wishes of, 5 years and 3 months. If the landlord does not offer a written lease or occupation the plaintiff is a protected tenant under the Landlord Tenant (Shop Catering and Hotel Establishment) Act cap.301 Laws of Kenya.

22. The plaintiff is entitled to a quite possession of the premises. I go on the belief that the premises are vacant as ordered by the court earlier (Aluoch J) and the pleading para 15 that the shop is vacant.

23. The issue of damages to loss of bargain and repudiation of contract has not been demonstrated. A sum of ksh.147,000/- is prayed for. This sum must be specifically pleaded and particularized

24. I am aware the plaintiff has demonstrated he has paid a total of \$9,000 + \$2,000 = \$11,000 to the defended. This sum is specifically for 009 amounting to \$9,000/-. The sum of \$2,000/- for shop 027 should be refunded and or utilized as future rent towards shop 009 to be given.

25. I reject the defence on grounds that the refusal and or discontinuation of the agreement is used on the grounds that the plaintiff is of “violent nature”. There is no grounds of any breach of contract committed by the plaintiff.

26. The said suit for the plaintiff against the defendant be and is hereby allowed.

27. In summary

27.1 Contract

27.2 Specific Performance

Lease of shop premises 009 be and is hereby agreed and granted.

27.3. The plaintiff entitled to quite possession. An injunction duly

issued to restrain defendant from renting premises out to third parties

27.4. Condition of tenancy to be left to the defendant. If in writing, then for a period of 5 years 3 months. If not in writing the plaintiff would fall under the Landlord Tenant Business Premises Act Cap. 301 Laws of Kenya.

27.5. The costs of this suit are given to the plaintiff to be paid by he defendant.

Dated this 19th day of April 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Advocates:

C. Akhamala for Vishnu Sharma & Co. Advocate for the Plaintiff – Present

A.I. Onyango for Asiema & Co. Advocate for the Defendant – Present