



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

Civil Case 7 of 2003

ACHAL SUKHBINDER SINGH1ST PLAINTIFF

KAVITA ACHAL2ND PLAINTIFF

NILAN SHAH3RD PLAINTIFF

VERSUS

CHANDRAKANT GOR1ST DEFENDANT

BHUPINDER SINGH CHANA2ND DEFENDANT

JUDGEMENT

The Plaintiffs have brought this action against the defendants which is based on an agreement dated 4th February, 1994 between the Plaintiffs and the Defendants. By that agreement the defendants with the consent of the plaintiffs agreed to be co-purchasers of the whole parcel of land LR NO.209/4877/2 at a consideration of Kshs.4,750,000/= . It was a term of that agreement that the Defendants would hold the shares of the Plaintiffs in the said suit land in trust pending the issuance of a Deed Plan for sub Plot A and B by the Director of Survey or the relevant authorities. It was also a term of that agreement that the Defendants would transfer the respective shares to the Plaintiffs within a period of 15 days of issuance of Deed Plans for sub Plots A and B by the Director of Survey or the relevant authorities. The Plaintiffs stated in the Complaint that per the agreement the Defendant was entitled to the whole of the sub Plot B with the main house whilst four other purchasers were entitled to the remainder. That prior to the aforesaid agreement the Plaintiffs paid on 14th April, 1994 Kshs.712,500/= to buy Flat No.4 . That by Clause ‘e’ of the said agreement the 1st and 2nd Plaintiffs were to acquire 1/12 of the sub-division. It was pleaded in the Complaint that the Defendants did submit the sub-division scheme to the relevant authorities which received approval that the defendants subsequently refused, ignored or neglected to facilitate its implementation to enable the plaintiffs process their individual title deed . That by that refusal the Defendants had failed to perform their part of the contract. On their part the Plaintiffs pleaded that they were at all time willing to perform their obligations under that contract. That despite demands that have been made to the Defendants, the Defendants have failed to perform the contract. The Plaintiffs finally prayed for an order of specific performance of the said contract. In their defence the Defendants admitted part of the Plaintiff’s claim and further admitted that they submitted the sub-division scheme to the Nairobi City Council for approval which scheme was approved but they added that approval was unlawful and was therefore a nullity. That as a consequence of it being unlawful the Defendants could not implement the said approval by implementing the same and the agreement between the parties for the

purpose of issuance of individual title deeds. The Defendants further pleaded in defence that the sub-division boundary between sub Plot A and B on the suit property ran through a wall of an existing building and consequently that the approval and the implementation of that approval could only be made under Sectional Properties Act. The Defendants further stated that they have on several occasions requested the Plaintiffs to present themselves for the purpose of executing documents in order to facilitate implementation of the sub-division scheme under the Sectional Properties Act. That the Plaintiffs have failed or neglected to heed the said request. The Defendants therefore denied failure to perform the contract and further denied that the Plaintiffs are entitled to an order of specific performance.

PW1 was the 1st Plaintiff who described himself as a teacher and a businessman. He said that he purchased Flat No. 4 on the suit property in May, 1999 from Nadjima Mohamed Shabir Mohamed Kassam. That the said Nadjima purchased flat No.4 from the Defendants in this case. PW1 said that by an agreement dated 4th February, 1994 it was agreed that the title deed to the aforesaid Flat would be released within 15 days of approval by the relevant authorities of the subdivision. PW1 said that the first agreement in regard to Flat No.4 was between the Defendants and Nadjima. He described himself as the 2nd purchaser. He said that the sub-division of sub Plot A and B was done in October, 1995. That approval of Nairobi City Council and the Ministry of Lands was obtained by the Defendants. He produced letters showing such approval as exhibits in this case. He further stated that a transfer was executed in his favour together with 2nd Plaintiff. He was categorical that the sub-division leading to issuance of individual title deeds was to be undertaken by the defendants but up to the date he gave evidence in court he said that the Defendants had failed to do the same. He said that he had paid Kshs.42,780/= for the sub-division. He said that the rates and clearance costs payable on the suit property in accordance with the agreement were payable by the Defendants. PW1 said that demand has been sent on his behalf to the Defendants to perform the contract but the Defendant have failed to perform the contract hence why the present action was filed. He said that it has been 10 years since the approval was granted and it was wrong for the defendant after those many years to now claim that sub-division was a nullity. He said that prior to this action they had not been told of such nullity. He finally stated in chief that the Defendants are still holding the original title documents together with all the related documents. PW1 was cross examined on behalf of the Defendants and he reiterated that he does not hold a title in respect of flat No.4 even though a transfer had been prepared and executed in that regard. He said that he had paid to the advocate the stamp duty for the transfer even though he did not have before court a receipt for the same. He responded to a question regarding what agreement was subject to his claim by saying that the main agreement was the one dated 4th February, 1994 and this related to Flat No.4 which was on sub Plot A on the suit property. He further stated that that Flat had not been transferred to the former owner that is Nadjima. He did accept that he was not a party to the original agreement.

PW2 was the 3rd Plaintiff who described herself as a manager of Midco Textiles East Africa Limited. She said that the 2nd Plaintiff and her son were her former neighbours on 3rd floor of the suit property. She further stated that she had transferred her right over Flat No.3 to the said Plaintiffs. That was by virtue of the agreement dated 4th February, 1994. That agreement gave 2nd Plaintiff and her son and a right to a share of the Flat No.3 on the suit property. But before she purchased the flat from the defendants the property consisted of a bungalow and a building consisting of four Flats. That it was agreed with the Defendants that that property was to be sub-divided so that the bungalow and the Flats would have separate titles. PW2 said that the obligation to subdivide was upon the Defendants. That by the time she sold her Flat as aforesaid that sub-division had not been undertaken. On being cross examined on behalf of the Defendants, the 3rd Plaintiff denied that she is a plaintiff in this action. That she had only presented herself before court as a witness. That she has no complaint which can be a subject of judgement in this court. That she does not seek from the Defendants an order for specific performance. The basis of giving that information she said was because she had transferred her right of Flat No. 3 to 2nd Plaintiff and her son. PW2 said she never paid any money for the sub-division and she was unaware if any other party had paid such money in respect of Flat No.3.

PW3 was the 2nd Plaintiff who described herself as a housewife. She said that the 1st Plaintiff was her husband. She confirmed that she and the 1st Plaintiff bought Flat No.4 on third floor of the suit property.

She confirmed the evidence of the 1st plaintiff that the purchase of that plot was from Nadjima. She said that in purchasing the same flat they relied on original agreement made in 1994 between Nadjima and the Defendants. She confirmed that the suit property is divided into two portions that is subdivision A and B. She confirmed that Flat No.4 is on sub-division A. She however confirmed that it was her husband who was handling the transaction since she had to travel often out of the country for medical attention. She did confirm that the purchase of the property took place 10 years ago and since then she and the 1st Plaintiff had not received their individual title documents. On being cross examined particularly in regard to the sub-division diagrams she stated that sub-division A and B do not share a wall. She said that the building housing the Flat they purchased was built much later than the property on sub-division B that is the bungalow. She said although it may seem the property on sub-division A is joined to the property on sub-division B she however, said each property had its own wall. She admitted she is not an architect and insisted that the properties had separate walls.

The Plaintiffs closed their case and DW1 was the 1st Defendant. He described himself as an educationist and said he runs schools. He denied that he entered into an agreement with the Plaintiffs in this case over the suit property. He admitted that he is in possession of the title documents in regard to the suit property. He produced a copy of title documents as exhibit in court. He denied that he was holding any share of the suit property on behalf of the plaintiffs but accepted that the suit property is sub-divided into A and B. He stated that the building on sub-division A shared a common wall with the building on sub-division B. To support it he produced architectural plan which showed a highlighted wall which he said was the common wall. He also gave evidence and said the horizontal beams of the two buildings were common. He also said the site plan also show that the buildings share a common wall. He denied that he refused to subdivide the suit property. He said that he had not objected to subdivision but that the problem in carrying out such subdivision is that the two buildings shared a common wall and a common beam. He was therefore of the view that subdivision cannot be undertaken. He said in this regard he relied on The Sectional Titles Act. He said that when he informed the plaintiffs that subdivision could only be undertaken under The Sectional Titles Act the Plaintiffs reacted by coming to court with this present action. On being cross examined by the plaintiffs' advocate DW1 accepted that he had submitted the scheme of subdivision to the Nairobi City council for approval. He also confirmed that the Nairobi City council gave that approval. He however said that it was his advocate who brought experts on the property and that those experts determined that such approval given by the Nairobi City Council was illegal. He did however accept that he did not return to Nairobi City Council to confirm what the expert had said that the subdivision approval was illegal. He confirmed that the expert he relied upon in the opinion that subdivision was illegal was a private land surveyor.

DW2 was Peter Ndirangu who described himself as a surveyor in land. He said that he had a BSc. in Lands Survey and a Masters in Lands Planning. He said he has been in profession for the last 20 years. He confirmed that he visited the suit property and he had seen the subdivision scheme plan but the said subdivision showed that there was a building all across the plot. He referred to the site plan and said that the building plans had been submitted for extension for approval on 6th September, 1982. He also confirmed that the yellow line on the subdivision scheme indicated that the subdivision A and B shared a boundary. He said that when he inspected the boundary he confirmed that the two portions of land shared a common wall. That the two buildings were actually one building because they had a wall running across them. That if subdivision was to be effected it would indeed cut across the stone. He confirmed that the first floor and its door was on subsection A and the doors for subsection B were also on subsection A. He therefore, concluded that it was not feasible to have subdivision of the suit property. He said that he was the one who suggested to the defendants to use sectional titles so that both the Plaintiffs and the Defendants can share the same title. He was cross-examined by the plaintiffs' counsel and confirmed that the building plans were approved by the Nairobi City Council in 1982. That is the building on subdivision A and the building on subdivision B. He said that what Nairobi City Council approved under the subdivision scheme was wrong.

The Defendant's evidence was at variance with their pleadings. The Defendants admitted in their defence paragraphs 4, 5, 6, 7 and 8 of the Plaint. Those paragraphs were in the following terms:-

4. By an agreement in writing made between the plaintiffs and the defendants dated 4th February 1994, the defendants with the consent of the plaintiffs agreed to be co-purchasers and accepted the transfer of the whole parcel of land known as land reference number 209/4877/2 at a consideration of Kshs.4,750,000.00.

5. The defendants were to hold the shares of the plaintiffs in trust pending the issuance of deed plans for subplot A and B by the director of survey or the relevant authorities being the subdivisions of land reference number 209/4877/2.

6. The defendants were to transfer the respective shares to the plaintiffs within a period of fifteen days of the issuance of the deed plans for subplot A and B by the director of survey and/or the relevant authorities.

7. The defendants as per the agreement were the first purchasers amongst other 4 purchasers entitled only to the whole of subplot B with the main house, at a consideration of Kshs.1,900,000.00.

8. Prior to the signing of the agreement the 1st and the second plaintiffs agreed to pay Kshs.712,500.00 to buy flat number 4 while the third plaintiff agreed to pay Kshs.712,500.00 to buy flat number 1 all of which was paid on or before the 15th day of April, 1994.

The Defendants having so admitted the Plaintiffs' pleadings, the court finds that the only issues that arise from the pleadings as follows:-

1. Was the approval obtained by the defendants over subdivision scheme?
2. Have the Defendants refused, ignored and/or neglected to facilitate the implementation of that approval?
3. Are the Plaintiffs entitled to an order of specific performance?

In respect of the first issue the Plaintiff has successfully proved on a balance of probability and by documentary evidence that on the 16th June, 1994, the Director of City Planning and Architecture on behalf of Nairobi City Council Clerk issued a subdivision certificate signifying the approval of the subdivision scheme over the suit property. The said subdivision scheme divided the suit property in two subplots of A and B. The Plaintiff also proved that the necessary approval was given by a letter dated 18th October, 1995 where the Ministry of Lands and Settlement wrote a letter in the following terms:-

“Further to my provisional approval ref.98802/16 of 10th April, 1995 and the recommendation by the Director of City Planning ref.CP&ARCH/FP/0050150/LR.209/4877/2 final approval is hereby granted”.

The court's finding in respect of first issue is that the Plaintiffs have proved that an approval to subdivide the suit property as pleaded was obtained by the Defendants.

In respect of the second issue the Defendants denied refusal to implement the aforesaid approval by saying that there was a common wall shared by the buildings on the subplot A and B and that there was a beam that ran across the buildings on the two subplots. The Defendants in evidence and in their pleadings stated that subdivision of the two subplots could only undertaken under The Sectional Properties Act. The defendants also stated that the plaintiffs have refused to participate in the subdivision under the aforesaid Act. That argument suffers a technical defeat because the application of that Act only applies in land held on freehold title or on a leasehold title where an expired residue of term is not less than 45 years. See Section 2 of the said Act. The suit property is a leasehold with unexpired residue term of 40 years. Accordingly the Act does not apply to the suit property. Much more than that the evidence of DW2 was not entirely credible. He relied on architectural drawings which defence exhibit No.3 and

thereon he referred to a yellow line which seemed to have been a later addition on the architectural drawings which addition seemed to have taken place after approval of those drawings by the Nairobi City Council. The court got the impression that DW2's evidence was simply to muddy the waters in this dispute. On the other hand PW3 who the court found to be very honest and credible said that the building on subdivision B was an older building than the flats on subdivision A. That witness was not cross examined in respect of that assertion and it would therefore, follow that the buildings were built at different periods and therefore, could not be sharing a wall or a beam. In any case the Defendants when they entered into the main contract dated 4th February, 1994 they did not state in that agreement that the walls or the beams were shared by the buildings on the two subplots. I find considering the agreement dated 4th February, 1994 and the other dated 9th May, 1995 the Defendants have willfully refused to carry out the implementation of the approval by the Nairobi City Council and by the Ministry of Lands and Settlement. In failing to implement that approval the Defendants have failed as provided by the aforesaid agreements to issue the plaintiffs with individual title in respect of flat No.4. It ought to be noted that the 1st and 2nd Plaintiff's evidence related to their purchase of flat No.4 on the suit property. The court found it hard to follow the evidence of the 3rd Plaintiff who said that she sold her flat No.3 to 2nd plaintiff and her son. The said son is not a party in these pleadings and in any case the plaint does not support the claim for an order in respect of flat No.3.

In respect of issue No.3 the 1st and 2nd Plaintiff purchased flat No.4 from Nadjima with the consent of the Defendants, who co-signed the agreement for sale between the 1st, 2nd Plaintiff and Nadjima dated 9th May, 1995. The agreement provided that all parties were to conform to the main agreement dated 4th February, 1994. In that latter agreement it provided that Nadjima who was described as the third purchaser would on approval being obtained from the relevant authorities of the subdivision of the suit property be issued with her individual title in respect of flat No.4. This would represent one fourth of the undivided share in subplot A of the suit property. The agreement dated 9th May, 1995 signed by the 1st, 2nd plaintiff, Nadjima and the defendants stated that the 1st and 2nd plaintiffs purchased Nadjima's rights title and interests in the agreement dated 4th February, 1994. The Defendants having obtained their appropriate approval to subdivide the suit property, there is no reason given why the defendants have refused to grant the Plaintiffs the individual titles in respect of flat No.4. The 1st and 2nd Plaintiffs are therefore entitled to an order that the defendants do transfer one fourth undivided share in the said subplot A of the suit property. The Defendants as per the agreement dated 4th February, 1994, shall be responsible to obtain the rates clearance certificate, consent to transfer the share of the suit property to the 1st and 2nd plaintiff and also shall be responsible for the costs of registration of such a transfer.

The 3rd Plaintiff seems to have no interest in this case and indeed stated so in evidence and looking at the pleadings the 3rd Plaintiff is not mentioned in any meaningful way thereof. Accordingly the court will dismiss this action in respect of 3rd Plaintiff. Having considered the pleadings, the evidence presented before the court and the submissions of counsel the court finds that 1st and 2nd Plaintiff have proved their case and are entitled to judgement as follows:-

- 1. The Court does hereby issue an order for specific performance for the defendants to transfer one fourth of undivided share of subdivision A on property LR. 209/4877/2 flat No.4.**
- 2. The Defendants shall obtain from Nairobi City Council rates clearance certificate and the necessary consent to transfer in respect of No. 1 hereinabove.**
- 3. The Defendants shall pay costs of registration of the aforesaid transfer to the 1st and 2nd Plaintiffs.**
- 4. The 1st and 2nd plaintiff are awarded costs of this suit as against the Defendants.**
- 5. The suit on behalf of the 3rd Plaintiff is dismissed with no orders as to costs.**

MARY KASANGO

JUDGE

Dated and delivered this 30th October, 2006.

MARY KASANGO

JUDGE