



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 91 of 2004

WILLIAM MUTHEE MUTHAMIPLAINTIFF

VERSUS

BANK OF BARODADEFENDANT

J U D G M E N T

The plaintiff's claim against the defendant is for special and general damages for breach of contract.

The plaintiff pleads that the defendant agreed to sell, and the plaintiff agreed to buy property L.R.No 36/1V/14/(20A) (herein after called the suit property). That the defendant specifically covenanted with the plaintiff that it was selling the suit through its exercise of its statutory power of sale, which had arisen. That the parties agreed the purchase price to be kshs 15 million. That the conveyance in favour of the plaintiff was registered on 16th April, 2002., that at the time of the registration of the conveyance the plaintiff did not know that the court of appeal had issued an order stopping the sale of the suit property which was within the knowledge of the defendant. That the plaintiff purchased the suit property with a view to making profit and as a consequence of the cancellation of his conveyance he lost rental income, he also claimed for the refund of the purchase price, the stamp duty paid and legal fees.

The plaintiff's witness, David Muthami Muthee P.W. 1, gave evidence as follows; that the plaintiff had given him a general power of attorney dated 1st January 2004. He described himself as a businessman. The plaintiff in his son who is 24 years old. He purchased the suit property in his son's name at an auction where he was declared the highest bidder. He did not pay the purchase price at once because he requested the auctioneer to persuade the bank to give him more time. P W 1 referred to plaintiff's exhibit 1 page one which was a letter from Baseline Auctioneers, dated 26th June 2001.

I think it useful to reproduce some parts of that letter here: -

“ Mr. William Muthee Muthami

P O Box 69449

NAIROBI

Dear Sir,

RE PURCHASE OF L.R. NO. 36/1V/14 EASTLEIGH – NAIROBI.

The above matter refers.

Your offer to purchase the above property at kshs 15 million has been accepted by our client.

At this stage kindly let us have a specific time frame showing how you shall be paying the purchase money until completion.....”

P w 1 further said that after the offer was accepted he went to his advocate when an agreement for sale was concluded and signed. The same was dated 29th October 2001, and was between the plaintiff and defendant hereof. P W 1 drew the court’s attention to clause No. 9 of that agreement, and said that although it provided for vacant possession on completion, that the defendant failed to give vacant possession. That as he completed this transaction he was unaware that the court of appeal had granted an order to stop the sale. That on completion he went on the premises, where he found that the suit property had over 200 tenants. That he was renovating the property when he was chased away by a group of ‘Mungiki’ and thereafter he was served with the court of appeal order issued on 5th December 2001, stopping the sale of the suit property. He said that it ought to be noted that completion of the sale transaction was on 5th April 2002. P w 1 said that prior to the transaction; he had carried out searches over the suit property and had found that there was no hindrance to the purchase.

As a consequence of the later cancellation of the conveyance, P.W. 1 said that he had not derived any benefit from this transaction, he did not collect rents; that he instead under went expenses, kshs 600, 000 stamp duty, kshs 250 registration fee and the expenses related to the renovation total kshs 285, 145 and advocate’s costs kshs 278, 284, and the lost of bargain.

P.w 1 stated further that the defendant’s applied to court to cancel the plaintiff’s conveyance so as to return the title in the state it was when the court of appeal granted the order of injunction. P W 1 said that his registration was cancelled on 14th March 2004; and he was refunded by the defendant kshs 15 million, the purchase priced.

Despite that refund P W 1 said that he was claiming from the defendant kshs 57, 622, 844 plus damages.

In chief P w 1 finally said that he purchased the suit property in his son’s name but that he was the beneficial person and he had a power of attorney from his son.

In cross-examination P W 1 said that the transaction was for his benefit; that he negotiated and paid for the property from his own resources; but that the sale agreement was signed by his son, the plaintiff. P W 1 concluded by saying, **“I paid so I say I suffered loss.”**

Even though P W 1 completed the payment of the purchase price 5 days after the completion date, he said the agreement for sale had not provided consequences for late payment.

He accepted that he purchased the property for investment purpose and accordingly he was not keen to get vacant possession of the suit property.

David Ogega Nyamboge D W 1 said that he is a manager at the defendant's branch and that he had worked for the defendant for 23 years.

He said that the defendant bank had granted a loan facility to a company called Central Kenya Agencies Ltd and the security for that loan was the suit property.

That due to non-payment the defendant put the suit property for sale, and sale agreement was concluded with the plaintiff in October 2001. That an injunction had been initially granted by the High Court but later was vacated. That the beneficial owners of the suit property referred the matter to the court of appeal. That at the hearing at the court of appeal the defendant's advocate by error failed to inform the court that a sale had already taken place, where the plaintiff had purchased the property. That the defendant later complied with the court of appeal ruling when it sought an order before the High court for the cancellation of the plaintiff's conveyance.

That the plaintiff by filing this case repudiated the agreement of sale, which was left subsisting after the cancellation of the conveyance. That the defendant accepted that repudiation and refunded the plaintiff the purchase price. D W 1 denied that the defendant is liable for any of the plaintiff's claim.

He said that the defendant did not have a contract with David Muthami Muthee P W 1. That it was the plaintiff who paid the purchase price, stamp duty, legal expenses and registration fees.

He finally accepted that the defendants were in error in failing to inform the plaintiff of the court of appeal order.

I have considered the evidence presented before me. The plaintiff did not give evidence in this case but gave general power of attorney to P W 1. P W 1 in evidence failed to give evidence in support of the plaintiff. He said that he purchased the suit property but in his son's name, the plaintiff. The plaintiff however pleads that **"the defendant herein agreed to sell and the plaintiff agreed to purchase the subject property."**

P w 1 further stated that in purchasing the suit property he wanted to make money. The plaintiff on the other hand states, **"The plaintiff further avers that he purchased the suit property with a view to making a profit."** where as the plaintiff further states that it is the plaintiff who undertook the renovation of the suit property, P W 1 said that it was he who incurred expenses in the repair and renovation.

I could continue to show several other examples where the evidence of P w 1 did not follow the plaintiff as pleaded but essentially substitute his name whenever the plaintiff's name appeared in the plaintiff, but the above suffices.

On that basis alone this case cannot succeed because the claim indeed, from the oral evidence seems to belong to P W 1. It is not clear why the pleadings did not disclose this fact. In the case of JACKSON V HORISON HOLIDAY OTD [1975] 3 ALL ER 92 a father had booked a holiday for himself and his family. Lord Denning Mr. At the appeal said that the father had made a contract for the benefit of his wife and children and could recover damages for their loss as well as his own. It is not clear to me whether the scenario of that case would fit into our present case but it was necessary for the plaintiff to consider his pleading in relation to the oral evidence tendered.

If it was not for my finding herein before I would have indeed found for the plaintiff for the defendant were guilty firstly of failing to inform the court of appeal of the sale transaction and secondly for failing to inform the plaintiff. Indeed the plaintiff in those circumstances would have been entitled to damages for loss of a bargain being the difference between the valuation of the suit property by Shelter, for kshs 44 million and the purchase price kshs 15 million. The plaintiff would have also been entitled to judgment for the stamp duty, and legal fees paid plus registration fees. The plaintiff failed to sufficiently, and on a balance of liability, to prove the claim for renovation.

However as result of my finding that the plaintiff's case was not proved by the evidence tendered

before me the same therefore cannot succeed.

The order of the court is that the plaintiff's case is dismissed with costs to the defendant.

Dated and delivered this 25th July 2005.

MARY KASANGO

JUDGE