



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 144 OF 2010**

**LACTON MURITHI NJOKA.....PLAINTIFF**

**VERSUS**

**TRUSTEES NATIONAL SOCIAL SECURITY FUND.....DEFENDANT**

**JUDGMENT**

The plaintiff's case:

The plaintiff brought this suit by way of plaint dated 11<sup>th</sup> March, 2010. The plaintiff averred that he bought all that property known as L.R No. Nairobi/ Block 146/40 Hazina estate (hereinafter referred to as "the suit property") from the defendant under a tenant purchase scheme. The plaintiff averred that he offered to pay the entire purchase price and redeem the suit property but the defendant failed to forward the completion documents so that the suit property could be registered in his name before the release of the purchase price. The plaintiff averred that on 10<sup>th</sup> March, 2010, the defendant served him with a notice of its intention to repossess the suit property. The plaintiff averred that the intended repossession was illegal, null and void. The plaintiff averred that he would suffer irreparable loss and damage if the defendant proceeded with the illegal repossession of the suit property. The plaintiff sought judgment against the defendant for;

- a) General damages for intended unlawful repossession.
- b) An order of a permanent injunction to restrain the defendant, its agents and or servants from alienating, disposing, charging, selling and or in any manner whatsoever dealing with all that property known as L.R No Nairobi/Block 146/40 Hazina estate (the suit property).
- c) An order of a mandatory injunction to compel the defendant to forthwith release the completion documents to the plaintiff on appropriate undertaking to pay the balance of the purchase price upon successful registration of the transfer in the plaintiff's favour.
- d) Cost of the suit.
- e) Any other or further relief that this honourable court may deem just and fit to grant.

At the trial, the plaintiff, Lacton Murithi Njoka (PW1) testified as follows: He had worked for Central Bank of Kenya (CBK) for 26 years. He purchased the suit property that was also known as Nairobi Block 93/1611, Hazina estate and M4 from the defendant through tenant purchase scheme. He paid Kshs. 500,000/- upon making an application for the property and took possession of the property in August, 2001. He signed an agreement of sale with the defendant in September 2001. He was required to pay the balance of the purchase price in monthly instalments of Kshs. 62,982/-. At one point, the defendant claimed that he had not signed the agreement of sale. He went to the defendant's office and was told by the investment manager that the defendant could not trace the agreement that he had signed. The defendant gave him another set of the agreement to sign. The interest rate that was being charged under the tenant purchase scheme was 15% per annum. He paid the monthly instalments until sometime in 2002 when he started to experience financial constraints due to illness and subsequent death in the family. His financial difficulties worsened in 2003 that resulted in him falling into arrears in his monthly instalment payments. He continued to make monthly payments with difficulties until 2005 when his employer, CBK agreed to lend him money at an interest rate of 3% per annum to pay off the balance of the purchase price that was attracting an interest rate of 15% per annum. CBK gave him a letter of offer for the loan on 30<sup>th</sup> January, 2006. The defendant had no objection to his proposal to pay off the balance of the purchase price. He appointed the firm of Musyoka & Wambua advocates to act for him in the transaction while the defendant appointed the firm of Kiplagat & Co Advocates to act for it. The firm of Musyoka & Wambua advocates gave a professional undertaking to the defendant that it would pay to the defendant the balance of the purchase price upon registration of the suit property in favour of the plaintiff and a charge in favour of the CBK. The defendant acknowledged receipt of the undertaking and indicated that interest was to continue accruing on the balance of the purchase price until the debt was paid in full. He wrote to the defendant requesting for his account to be frozen because of the delay on the part of the defendant to furnish his advocates with the completion documents. The same request was made on his behalf by the firm of Musyoka &

Wambua advocates. The defendant through a letter from its advocates Kiplagat & Co. Advocates agreed to freeze his account. As at the time of freezing the account, the balance of the purchase price that was outstanding was given by the defendant as Kshs. 4,348,802/-.

Following the freezing of his account, the firm of Musyoka & Wambua advocates wrote to Kiplagat & Co. Advocates on 15<sup>th</sup> November, 2006 giving an irrevocable professional undertaking to pay the said sum of Ksh 4,348,802/- in full and final settlement of the loan balance within 14 days of registration of the transfer and charge instrument in the name of the plaintiff and CBK respectively. In the letter, the firm of Musyoka & Wambua advocates gave out the particulars of the completion documents that were required for the completion of the transaction as; original certificate of lease, original lease, a duly executed transfer in the name of the plaintiff, rent clearance certificate, rates clearance certificate, consent to transfer and charge.

The undertaking by the firm of Musyoka & Wambua advocates was accepted by Kiplagat & Co. Advocates on behalf of the defendant. He thereafter signed the instrument of transfer on 27<sup>th</sup> March, 2007. The instrument of transfer could not be registered without the completion documents that the defendant was to provide. The firms of Musyoka & Wambua Advocates and Kiplagat & Co. Advocates exchanged several letters on the issue. The firm of Kiplagat & Co. advocates kept promising that it would avail the documents. He was always keen to complete the transaction. The completion of the transaction was delayed by the failure of the defendant to make available the completion documents.

On 1<sup>st</sup> March, 2010, he received a repossession notice from the defendant. He did not receive the defendant's letter dated 19<sup>th</sup> February, 2010 that was allegedly addressed to him prior to the said repossession notice. It was 12 years since he started the process of paying off the amount that was due to the defendant and he was near his retirement. The defendant held on to the completion documents until 2010 when it issued the repossession notice. He had paid to the defendant over Kshs. 4,100,000/- as at the time the defendant was given an undertaking regarding the balance of the purchase price and that he was not in arrears. The defendant had not informed him that his account had been activated and that the defendant's purported letter dated 19<sup>th</sup> February, 2010 was not received by him.

He stated that he was ready to complete the agreement with the defendant within 30 days of receipt of the completion documents and that he had been ready and willing to complete the process of paying off the amount due to the defendant since 2006. He produced several documents as exhibits. He urged the court to grant the reliefs sought in the plaint.

#### The defendant's case

The defendant filed a defence and counter-claim against the plaintiff on 23<sup>rd</sup> January, 2013. The defendant denied that the plaintiff had purchased the suit property from the defendant. The defendant averred that there was no formal contract recognised in law between the plaintiff and the defendant in respect of the suit property because the plaintiff had failed to sign the tenant purchase agreement. The defendant averred that it was entitled to repossess the suit property since the plaintiff had neglected to pay monthly instalments on the principal sum despite being in possession of the property. The defendant averred that it was selling the suit property to the plaintiff on among other terms and conditions that the purchase price was to be paid in monthly instalments that was to attract interest in the event of default. The defendant averred that the plaintiff having failed to pay the balance of the purchase price despite demand lacked moral authority to demand the completion documents.

The defendant averred that as a result of the plaintiff's default in the payment of monthly instalments, the balance of the purchase price had attracted interest and the total amount outstanding from the plaintiff as at December, 2012 stood at Kshs. 12,024,602.20. The defendant averred that when the plaintiff's account was frozen, it was only the payment of interest that was frozen and that the plaintiff was required to continue paying monthly rent for the suit property. The defendant averred that the plaintiff failed to pay rent despite having undertaken to do so. The defendant averred that the unpaid rent had accumulated to Kshs. 5,520,000/- as at December, 2012. The defendant averred that rent continued to accrue at market rates as long as the plaintiff remained in possession of the suit property and the balance of the purchase price together with interest remained unpaid.

The defendant averred that due to the default on the part of the plaintiff in the payment of the balance of the purchase price as aforesaid, the defendant was entitled to repossess the suit property. The defendant averred that it had no obligation to release to the plaintiff the completion documents until the plaintiff had paid the balance of the purchase price together with interest and the outstanding rent. The defendant averred that it was contrary to justice and morality for the defendant to be compelled to release the completion documents to the plaintiff without a binding agreement and performance of the terms thereof by the plaintiff.

In its counterclaim, the defendant reiterated the contents of its statement of defence and sought judgment against the plaintiff for;

1. Execution of a binding agreement for the sale of the suit property at the current market rate upon payment of rent of Ksh 5,520,000/- from May 2006 up to December 2012 together with interest and accruing rent up to the date the purchase price is paid in full.

2. IN THE ALTERNATIVE, PAYMENT OF;

- a) Loan and interest up to 19<sup>th</sup> December, 2012 amounting to Kshs. 12,024,602.20 and interest at the rate of 15% p.a till payment in full.

- b) Rent of Kshs. 5,520,000/- from May, 2006 up to December, 2012 together with interest.

- c) Rent from January, 2013 until payment of the entire purchase price and interest at the prevailing market rate.

- A. FURTHER IN THE ALTERNATIVE;

a) Vacant possession of the suit property and rent of Ksh 5,520,000.00 from May, 2006 up to December, 2012 together with interest and accruing rent up to the date the purchase price is paid in full.

The plaintiff filed a reply to defence and defence to counter-claim on 5<sup>th</sup> February, 2013 in which he joined issue with the defendant in its defence save where the same consisted merely of admissions. With regard to the counter-claim, the plaintiff denied the same in its entirety. The plaintiff urged the court to dismiss the defendant's counter-claim and to enter judgment for the plaintiff as prayed in the plaint.

At the trial, the defendant's loans' officer, Daniel Obebo (DW1) gave evidence on its behalf. DW1 adopted his witness statement dated 19<sup>th</sup> May, 2019 as his evidence in chief. He produced the defendant's bundle of documents filed on 23<sup>rd</sup> January, 2013 and supplementary bundle of documents filed on 26<sup>th</sup> February, 2018 as exhibits. In his statement, DW1 reiterated the contents of the defendant's defence and counter-claim that I have highlighted above. It is not necessary to repeat the same here.

#### Submission.

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff filed his submissions dated 11<sup>th</sup> May, 2020 on 3<sup>rd</sup> June, 2020 while the defendant filed its submissions dated 5<sup>th</sup> June, 2020 on 3<sup>rd</sup> August, 2020. I have considered the evidence tendered by the parties in proof of their respective cases and the submissions of counsels. The parties did not agree on the issues for determination by the court. In my view the following are the issues arising for determination in this suit;

1. Whether there was an agreement between the plaintiff and the defendant for the sale of the suit property.
2. Whether the said agreement was varied to allow the plaintiff to pay the purchase price in lump sum.
3. Which party as between the plaintiff and the defendant breached the said agreement?
4. Whether the plaintiff is entitled to the reliefs sought in the plaint.
5. Whether the defendant is entitled to the reliefs sought in the counter-claim.
6. Who is liable for the costs of the suit?

#### Whether there was an agreement between the plaintiff and the defendant for the sale of the suit property.

From the totality of the evidence placed before the court by both parties, I am persuaded that there was an agreement between the plaintiff and the defendant for the sale of the suit property and that the agreement was in writing. Correspondence exchanged between the plaintiff and the defendant that was produced in evidence by the defendant points to the existence of the said agreement of sale. Some of the correspondence referred to specific clauses of the said agreement. A verbal agreement could not have had specific clauses on which the defendant could have based its various demands for payment addressed to the plaintiff. If there was no agreement of sale between the parties as claimed by the defendant, on what basis did the plaintiff take possession of the suit property and make various payments to the defendant? The demands that were made by the defendant against the plaintiff and the defendant's entire claim herein would have no basis in the absence of such agreement. The statements of account that were issued by the defendant to the plaintiff indicated that the payments that were made by the plaintiff and whatever was due were in respect of the tenant purchase scheme. The defendant also executed an instrument of transfer in favour of the plaintiff. Such instrument could not have been executed in the absence of an agreement of sale. An institution of the defendant's calibre cannot be taken seriously by this court when it claims that all the engagements that it entered into with the plaintiff were on the basis of unsigned standard tenant purchase agreement. While I am in agreement with the defendant that the burden was upon the plaintiff to prove the existence of the said agreement of sale, I am of the view that after the plaintiff placed evidence before the court showing that such agreement existed, the burden shifted to the defendant to prove otherwise.

For the foregoing reasons, it is my finding that there was a written tenant purchase agreement between the plaintiff and the defendant in respect of the suit property.

#### Whether the said agreement was varied to allow the plaintiff to pay the purchase price in lump sum.

It is not disputed that on 30<sup>th</sup> January, 2006, the plaintiff's employer, CBK offered to give him a loan of Kshs. 4,556,000/- to purchase the suit property on various conditions and that CBK undertook to release a sum of Kshs. 4,361,359/- of the said amount to the defendant upon registration of the suit property in the name of the plaintiff and a charge in its favour against the title of the suit property. It is also not disputed that the said offer and undertaking by the CBK were communicated to the defendant by the plaintiff through his advocates, Musyoka & Wambua Advocates in a letter dated 17<sup>th</sup> February, 2006 in which the said firm also set out the documents that were required to complete the transaction. It is also not disputed that the defendant did not object to the plaintiff's proposal to pay the balance of the purchase price in lump sum and that it gave the loan balance as Kshs. 4,387,303.83 as at 2<sup>nd</sup> March, 2006 and appointed the firm of Kiplagat & Company Advocates to act for it in the transaction. It is also not disputed that pending the completion of the transaction, the plaintiff requested the defendant to freeze the accrual of interest on his account and that the request was accepted by the defendant through its advocates letter dated 10<sup>th</sup> November, 2006 in which the said advocates also notified the plaintiff's advocates that the balance outstanding after the freezing of the account was Kshs. 4,348,802/- in respect of which they asked for a fresh undertaking. It is also not disputed that on 15<sup>th</sup> November, 2006, the plaintiff's advocates, Musyoka & Wambua Advocates gave the defendant's said advocates an irrevocable undertaking to pay to them a sum of Kshs. 4,348,802/- in full and final settlement of the balance of the purchase price that was due to the defendant within 14 days of registration of the transfer of the suit property in favour of the plaintiff and a charge in favour of the CBK. It is not disputed that in the same letter, the plaintiff's said advocates requested the defendant's said advocates to furnish them with several

documents to enable them complete the transaction. It is common ground that despite several promises by the defendant's said advocates, they did not furnish the plaintiff's advocates with all the completion documents to facilitate the registration of the suit property in the name of the plaintiff and a charge in favour of the CBK which was a condition precedent to the release of the balance of the purchase price to the defendant.

It is my finding from the foregoing that the plaintiff and the defendant agreed to vary the tenant purchase agreement to allow the plaintiff to pay the balance of the purchase price in lump sum. It is also my finding that it was the defendant who breached the agreement by its failure to furnish the plaintiff's advocates with the completion documents so that they could have the property registered in the name of the plaintiff and a charge in favour of CBK so that the payment of the balance of the purchase price could be released to the defendant.

Which party as between the plaintiff and the defendant breached the said agreement?

This issue has been answered above.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff has demonstrated that he had agreed with the defendant that the balance of the purchase price of the suit property was Kshs. 4,348,802/-. The plaintiff has also demonstrated that the defendant agreed to freeze the plaintiff's account so that the outstanding amount remained Kshs. 4,348,802/- pending the processing and perfection of the security documents in favour of the CBK on the strength of which the plaintiff was to receive the funds to settle his indebtedness to the defendant. The plaintiff has also demonstrated that the defendant accepted a professional undertaking from the plaintiff's advocates to pay to the defendant the said sum of Kshs. 4,348,802/- on registration of the transfer of the suit property in favour of the plaintiff and a charge in favour of the CBK. The plaintiff has also established that the defendant agreed to furnish the plaintiff's advocates with several documents that were to enable the plaintiff's advocates to register the said transfer and a charge in favour of the CBK and that it failed to do so.

I am satisfied that the plaintiff has established valid grounds for the prohibitory and mandatory injunctive reliefs sought in the plaint. I am in agreement with the plaintiff that the purported repossession notice that was served upon him by the defendant was illegal. The defendant had no right to repossess the suit property for the purpose of selling the same to other persons allegedly on account of the plaintiff's default in the payment of monthly instalments. As I have observed above, the payment of monthly instalments and interest had been frozen since the defendant had allowed the plaintiff to pay the balance of the purchase price in lump sum and had received a professional undertaking for the entire amount that was outstanding. The defendant having failed to furnish the plaintiff with the completion documents that would have unlocked the release of the loan that was advanced by CBK to the plaintiff to pay the balance of the purchase price that was due to the defendant, the defendant could not turn round and claim that the plaintiff had defaulted in the payment of monthly instalments. The defendant has failed to demonstrate that a part from the sum of Kshs. 4,348,802/- in respect of which the defendant had received a professional undertaking, the plaintiff was liable to make any other payment. The defendant claimed that the plaintiff was liable to continue paying the principal amount or rent even after it had received an undertaking for the entire balance of the purchase price. I wonder how this could be the case. The defendant having agreed to freeze the plaintiff's account so as to crystalize the amount payable by the plaintiff could not expect any further payments. The defendant's advocates' letter dated 10<sup>th</sup> November, 2006 in which the defendant had communicated the freezing of the account and the outstanding amount did not indicate that the plaintiff would be expected to make any further payment. The defendant did not lay any basis for its claim for further payments over and above the said sum of Kshs. 4,348,802/-. The defendant had claimed that it had unfrozen the plaintiff's account and as such the plaintiff was expected to continue paying the monthly instalments and interest. I am in agreement with the plaintiff that the defendant could not unilaterally unfreeze the plaintiff's account. The plaintiff had to be consulted on the issue. Secondly, the defendant did not satisfy the court that its letter dated 19<sup>th</sup> February, 2010 through which it purportedly activated the plaintiff's account was delivered to the plaintiff.

I am therefore not satisfied that the plaintiff breached any of the agreements that he entered into with the defendant that would have entitled the defendant to repossess the suit property. The plaintiff is in the circumstances entitled to an injunction to restrain the defendant from dealing with the suit property in any manner prejudicial to the plaintiff's interest in the same.

I am also satisfied that the plaintiff has established a case for the mandatory injunction sought. The defendant had agreed to release to the plaintiff necessary documents to enable the plaintiff obtain a loan from the CBK to pay off the balance of the purchase price of the suit property. The plaintiff has established that the defendant had without any lawful or reasonable cause and in breach of the agreement between the parties refused to release the said documents. A mandatory injunction compelling the defendant to release the said documents would be appropriate in the circumstances.

The plaintiff had also claimed general damages for "intended unlawful repossession". I have considered the plaintiff's submission regarding this head of claim. No basis has been laid either in the evidence tendered or submission for the claim. As submitted by the plaintiff, damages is compensatory. No evidence was led of any loss or damage that was suffered by the plaintiff as a result of the repossession notice that was served by the defendant that the defendant can be called upon to make good. The plaintiff is therefore not entitled to an award of damages my finding that the purported repossession notice was illegal notwithstanding.

Whether the defendant is entitled to the reliefs sought in the counter-claim.

For the reasons that I have given above, the defendant has not proved its claim against the plaintiff and as such it is not entitled to the reliefs sought in the counter-claim. The main relief sought by the defendant in the counter-claim is an order compelling the parties to enter into an agreement of sale of the suit property at the current market rate after the plaintiff has paid Kshs. 5,520,000/- which the defendant claimed to be the rent unpaid by the plaintiff from May, 2006 to December, 2012. Having held that there was an agreement between the parties, the court cannot once again order the parties to enter into another agreement. In any event, the court has no power to compel parties to enter into an agreement. The defendant has also not established that it is entitled to any of the alternative reliefs sought in the counter-claim.

Who is liable for the costs of the suit?

Awarding of costs is at the discretion of the court. As a general rule, costs follow the event. In the present suit, the plaintiff has succeeded in his claim against the defendant while the defendant has failed in its counter-claim. No reason has been put forward that would justify denying the plaintiff his costs of the suit. I will therefore award the plaintiff the costs of the suit and the counter-claim.

Conclusion:

In conclusion, I hereby make the following orders:

1. An injunction is issued restraining the defendant by itself or through its servants or agents from alienating, disposing, charging, selling and/or in any other manner whatsoever dealing with all that property known as Nairobi/Block146/40 Hazina estate subject to the orders set out hereunder.
2. The plaintiff shall within forty-five (45) days from the date hereof give the defendant a fresh undertaking from Central Bank of Kenya(CBK) or its advocates that CBK shall pay to the defendant a sum of Kenya Shillings Four Million Three Hundred and Forty-Eight Thousand Eight Hundred and Two (Kshs. 4,348,802/-) within 14 days of registration of Nairobi/Block146/40 Hazina estate in favour of the plaintiff and a Charge against the title in favour of CBK.
3. Upon receipt of the undertaking referred to in two (2) above, the defendant shall within a period of sixty (60) days from the date hereof release to the plaintiff through his advocates on record the following documents;
  - i. Original Certificate of Lease in respect of Nairobi/Block146/40.
  - ii. Original Lease in respect of Nairobi/Block146/40.
  - iii. A transfer duly executed in triplicate in favour of the plaintiff unless the same has already been delivered to the plaintiff.
  - iv. Rent Clearance Certificate, subject to the payment by the plaintiff of the rent that has accrued since August, 2001 less any payment already made on account upon being advised of the same.
  - v. Rates Clearance Certificate, subject to the payment by the plaintiff of the rates that have accrued since August, 2001 less any payment already made on account upon being advised of the same.
  - vi. Consent to Transfer if necessary.
  - vii. Coloured passport size photographs of the defendant's duly authorised signatories to the transfer.
  - viii. A copy of the defendant's PIN Certificate.
4. In the event that the plaintiff fails to comply with order two (2) above within the prescribed time, the injunction granted in order one (1) above shall stand discharged without any further reference to the court.
5. The defendant's counter-claim is dismissed.
6. The defendant shall pay the plaintiff's costs of the suit.

**Dated and Delivered at Nairobi this 28<sup>th</sup> Day of January 2021**

**S. OKONG'O**

**JUDGE**

**Judgment read virtually through Microsoft Teams Video Conferencing platform in the presence of;**

N/A for the Plaintiffs

Mrs. Mbabu for the Defendant

Ms. C. Nyokabi - Court Assistant