



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3645 OF 1995

AVVERSI ERNESTO & ANOTHERPLAINTIFFS

VERSUS

RICCARDO LIZIER & 2 OTHERSDEFENDANTS

J U D G E M E N T

By a plaint filed in court on 14th December, 1995, the plaintiffs Avversi Ernesto and Actis Dato Graziella, (husband and wife respectively), sued the 3 defendants jointly and severally seeking a

“(i) Declaration that the plaintiffs are the sole legal and beneficial owners of the parcel of land compri sing 0.205 of a hectare or thereabouts described as part “C” in the proposal of the subdivision approved by the Ministry of Lands under cover of their letter of 19 th April, 1989 being a portion of Land Reference Number 9953/1 together with all the fixtures thereon”

“(ii) an injunction to restrain the defendants by themselves or by their agents or servants or otherwise, howsoever, from selling, charging disposing of, parting with in any way dealing with the said property,

(a) “an order that the defendants do all such necessary acts and execute all such necessary documents so as to transfer the legal beneficial title of the said premises to the plaintiff”,

(b) “further and in the alternative, damages and interest thereon at court rates”

. (c) “costs and interest”.

Filed at the same time as the plaint was a chamber summons application seeking urgent orders of injunction to restrain the defendants from evicting the plaintiffs from the suit premises, and also from selling, charging, leasing or parting with the suit premises being a portion of Land Reference Number 9953/1.

The first plaintiff’s application supported the injunction application. The affidavit is dated 14th December, 1995. It gives details of the agreement of sale between the plaintiffs and the 1st defendant.

In paragraph 5 of the affidavit, the plaintiff referred to a letter from the advocates of the 3rd defendant, giving him notice to vacate the suit premises by the 15th December, 1995 or face eviction. The plaintiff was that time in Italy. The plaintiff’s saw this as a real threat and that is why he filed this suit and indeed the injunction application under a Certificate of Urgency.

The court records show that the chamber summons application was tabled in court on 15th December, 1995. It was certified urgent, for the reasons which were recorded, and the court proceeded to grant prayers 1 and 2 (ex-parte) of the application.

Those orders were granted by me, and at a subsequent date at an inter-partes hearing on 30th May, 1996, Kuloba, J confirmed the ex parte orders and directed that the orders would be subject to the applicants undertaking to pay damages if the suit fails. The orders have been in force to date. The case was eventually listed for hearing on 19th and 20th December, 2000.

On the 19th December, 2000 at 9.00 a.m during the “mini-call over” that plaintiffs were both present in court as well as their lawyer and an official from the Italian Embassy.

However, none of the defendants were present in court. A lawyer, one Miss Miencha held brief for a Mr. Munyalo, Counsel for the defendants. She asked for adjournment upto 11.00 a.m saying that Mr. Munyalo was “in another court”. I refused to grant the adjournment as no good reason was given. However, as I had another case, I told all the parties in this case that I would start this hearing at 10.00 a.m.

By 10.00 a.m. that morning, I was ready to start the hearing of this case. Once more, both plaintiffs were present plus their lawyer and one Ms Carmen Aiazzone, an Italian interpreter. The defendants were not in court either. As I had allocated time for this case, I decided to proceed and record the evidence of the 2 plaintiffs, whom I learnt had traveled from Italy to give evidence in this case.

The hearing started with the 1st plaintiff giving evidence as the record shows:- He recalled the years 1988 – 1989 when he came to Kenya on holiday, he liked the country and the weather and decided to buy property here. The plaintiff knew both the 1st and 2nd defendants, and particularly the 1st defendant as they worked together in Italy. According to the plaintiff the 1st defendant offered to sell to him a plot of land and they entered into agreement. He produced the agreement as Ex.1 in court. The agreement said that the plaintiff would buy a plot of land in exchange for a folk-lift. The plaintiff also gave the 1st defendant a tractor which was in Italy. This was in exchange for materials which the 1st defendant would give him for building the house. Both the tractor and the folk-lift were given in Italy.

The defendants signed the agreement and also the receipt of the machinery. The plaintiff got the plot of land, but not any documents. The defendant were required to sub-divide the land and get title documents. They only gave the plaintiff the number of the plot. It is marked C on the sub-division. The plaintiff proceeded to build a house on that plot marked C, and he started coming to Kenya every year for 3 months, and he lived in the house.

In 1995, the plaintiff received a letter from the 1st defendant’s lawyer instructing him to be in Nairobi by 15.12.95 to remove all his belongings from the house, or they would be thrown out and the house taken.

The plaintiff came to Kenya hurriedly and managed to get an injunction order from this court. The plaintiff is asking this court to enforce the contract between him and the defendants and also give him his house. The plaintiff lives in Italy for 9 months, then comes to live in Kenya for 3 months, i.e. December, January and February, every year. The house is situated in Zimmerman estate, Nairobi. The 2nd plaintiff, Actis Dato Graziella, is the wife of the 1st plaintiff. She recalled that in 1988, Riccardo, the 1st defendant invited her and the 1st plaintiff to come to Kenya as tourists. They came and liked the country and her husband PW1 entered into an agreement over sale of land which bought and eventually built a house which they normally occupy for 3 months every year.

The 2nd defendant felt a bit agitated because of what she said happened, i.e the letter they received in Italy from a lawyer here in Kenya asking them to move out of the house which the 1st defendant Riccardo now claimed was his. PW2 asked the court to allow them to become owners of the house built on the plot of land which they paid for. She recalled that her husband gave Riccardo a folklift in Italy. She has seen this folklift being used somewhere close to Riccardo’s house on Kamiti road. This is the area where they also live in Nairobi.

PW2 stated further that in addition to the folk-lift, they gave Riccardo new tractors in exchange for materials which was to be used for the construction of the house. That Riccardo had to buy materials in

exchange for the tractor. (Riccardo entered the court room at this point. His lawyer was still not present in court).

The second plaintiff (PW2) said that Riccardo did not supply all the building materials, so they had to buy some more, elsewhere. PW2 identified the agreement, which is still in force. She prayed to be allowed to become the owner of the house they built. Riccardo who was now in court did not ask her any questions.

The plaintiffs called a witness, one Richard Muchai Kibadhi, a businessman dealing in the sale of building materials in Kasarani that he sold building materials, i.e. cement, timber, block boards to Ernesto, during the period 1989 – 1991. He produced as an exhibit a list of invoices of the materials he sold. He carried the goods to the site opposite Zimmerman Estate on Kamiti road. This is where the 1st plaintiff, Ernesto and other people were constructing a house.

At the conclusion of the evidence of this witness, the 1st defendant who was in court was ready to ask questions. His lawyer, a Mr. Munyalo entered the court room (Chamber 15 was being used as a court room). He apologised for being late saying that he was before another Judge. He did not elaborate. I allowed the advocate to sit in court, for whatever it was worth, having been absent as the 2 plaintiffs gave evidence.

The 1st defendant Riccardo questioned the witness Richard Muchai Kibadhi about the building materials and the construction of the suit premises. The witness answered

“You did not pay me any money for this construction, but you paid me for other constructions”.

The 1st defendant Riccardo Lizzier is now aged 77 years old. He used to be a building contractor. He also runs a Non Governmental Organization called IVREA GROUP, sued as the 3rd defendant. He has been in charge of this NGO since 1970.

He identified the 2 plaintiffs as people he has known for more than 30 years. He worked with Ernesto, the 1st plaintiff in a building company in Italy. Ernesto was his employee for many years and he invited him to come and join his group here in Kenya, who were doing the work of searching for water. The 1st defendant owns a property, title No.IR37032. He owns it jointly with Pierto, the 2nd defendant.

Riccardo bought a house here in Nairobi and put it in Pierto’s name as he was the 1st volunteer to join his (Riccardo’s group). Later on 17.4.89, he entered into a sale agreement with Ernesto, the 1st plaintiff. As previously done with Puerto, he was supposed to give a plot of land to the next person coming to work. He gave the plot of land to Ernesto, the 1st plaintiff. He was to get a tractor in Italy bring it here and pay all the Customs Duty. He said that this is what happened. He did not consider the compensation by Ernesto, adequate.

Riccardo testified further,

“The condition was that Ernesto would have come to Kenya and taken care of the machinery, the tractor and other similar machinery. It was an initial agreement that Ernesto would be a permanent member of my group. I paid for their air tickets for the 1st two years, for him and his wife. He did not remain a permanent member of my group. This meant, in my opinion that he could not own the land privately. Ernesto had not fulfilled the condition to own land in Kenya.

The condition of helping Pierto (2nd defendant) in his work in Isinya, searching for water had been met. Pierto got Presidential consent to own land. I would have asked for the same consent from the President. In order to make Ernesto work for my

group and also allow him to live comfortably, I would have asked for Presidential consent. The sale agreement was not valid. It was as if cancelled”.

About the house, Riccardo explained when he took part in the building and when Ernesto did so, for the 3 months he is normally present in Kenya.

Riccardo said that the ownership of the land on which the house is, remains his. That he took part in the construction of the house on the understanding that it was for the group, or the primary school.

Several questions were put to Riccardo by lawyer Mwangi for Ernesto to which he answered that he is the President of the NGO, which is the 3rd defendant, and the 2nd defendant is the 1st member of that group which searches for and distributes water. They also help missions. Riccardo confirmed that Ernesto has been living in this house since 1993, he was not kicked out. He also confirmed that the written agreement was not cancelled. On re-examination, he said that he wants the house back so that he can give it to the teachers, that the house has to remain for social services that is why land was given.

At the conclusion of the oral evidence, the advocates representing the parties made detailed submissions, which now form part of the court record. The advocate for the defendant went through the evidence of the plaintiff's witnesses, which was given in his absence, but perhaps he read it from the court file or may be notes were taken down for him.

According to him, the plaintiffs stayed in the house as mere licencees who acquired no rights to the house. The defence posed several question for the court to consider, and asserted that what the plaintiffs signed was only,

“a proposal to offer to the 1 st plaintiff permanent accommodation for his volunteering to join them permanently.....”.

The defence submitted that there was no enforceable agreement of sale in terms of Sec.3(3) of the Law of Contract Act, as amended by Act No. 21 of 1990.

Counsel for the plaintiffs relied on the evidence adduced by the 2 plaintiffs to the effect that they entered into an agreement of sale with the defendants on 17.4.89 (Ex.1) and the plaintiffs delivered to the defendant the consideration which was a fork-lift and tractor, in Italy. Thereafter, the plaintiffs built a residential house on their portion of land, and have been in possession since 1989. The 1st defendant confirmed this in his evidence in court.

The plaintiff's Counsel referred to the statement of defence filed on 17th July, 1996, where the contract of sale was termed null and void. See para 2 of the defence. Possession of the suit premises was also denied in para 3 yet the 1st defendant admitted this in court. The defence also terms the 1st plaintiff a mere licencee.

Submitting further on the defence, the plaintiff's counsel said that the 1st defendant failed to produce any documents to support the alleged variation of the agreement of sale. He submitted further that the 1st defendant also failed to produce any evidence to show that the 1st plaintiff was engaged on or employed by the 3rd defendant and further, that the 1st defendant purchased any building materials for the construction of the house in dispute.

Finally, Counsel for the plaintiff submitted that by 17.4.89 when the parties herein entered into the sale agreement, the Law applicable was Sec.3(3) of the Law of Contract Act, Chapter 23, Laws of Kenya, before the amendment. The relevant part of the law reads,

(3) “No suit shall be brought upon a contract for the disposition of all 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 has performed or is willing to perform his part of a contract: -

(i) has in part performance taken possession of the property or any part thereof

(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”. So much has been said about the agreement of sale between the parties herein. What were the terms of it?

To answer that question, I have decided to reproduce the whole agreement. It is headed “Proposal for Sale”,

and it reads,

“The undersigned Riccardo Lizzier and Pierto Langio (the 1 st and 2 nd defendants) undertake to sell to Mr. Ernesto Avversi and Mrs. Graziella Actis Dato, the plot of land marked with c, being part of plot No. L.R. 9953/1 located in the Municipality of Nairobi, in compliance with the proposal of division approved on the 9th April, 1989 as per copy of letter and drawing herewith attached. The actual survey, still pending will be carried out according to the terms already established by ourselves by mutual consent”

. Signed

RiccardoLizzier

Pierto Langio.

Plot of land already paid for in 1990

. Signatures

Riccardo Lizzier

Pierto Langi

o Stamped and signed

Italian Embassy

Nairobi

The defendant’s counsel bring this agreement within Section 3(3) of the Law of Contract Act, as amended by Act 21 of 1990. He relied on the Court of Appeal decision of MACHAKOS DISTRICT CO OPERATIVE UNION – appellant vs PHILIP NZIKI KIILU – respondent.

My research from the High Court Library shows that Act 21 of 1990 which amended Section 3(3) of the Law of Contract Act has never been given a date of commencement, though gazetted. It was to be commenced by Notice, which has never been given. For that reason, its operation cannot be legal in my view. I am therefore unable to rely on the Court of Appeal authority based on Sec. 3 (3) as amended by Act 21 of 1990.

In any event, evidence shows that as at the date of the agreement which was 17.4.89, the relevant Law in force was as found in Section 3(3) of the Law of Contract Act, before the amendment which I have found is not effective.

Having found thus, and looking at the agreement, Ex. 1 and considering that the evidence of PW1 and PW2 concerning the agreement was not challenged I find that the agreement Ex. 1 is valid, because it has a Memo or note in writing. It is signed by the vendors, but more importantly, it is signed and stamped by the Italian Embassy in Nairobi on behalf of the purchasers who are the plaintiffs.

This satisfies the requirement of the Law to the effect that it should be signed by the person to be charged or by some person authorized by him to sign (the underlining is mine). The 1st plaintiff authorized the Italian Embassy in Nairobi to sign the agreement on his behalf. The agreement even shows that

“the plot of land had been paid for”.

Besides, there is, of course evidence on record that the plaintiffs took possession of the land and built a house which they occupy to date. An attempt by the 1st defendant to chase the plaintiffs from their house in 1995 was resisted when the plaintiffs came to court and obtained an injunction, which is still in force to date.

I am satisfied from evidence on record that the plaintiffs have proved their case on balance of probabilities, and I proceed to grant orders in terms of prayers (a), (b) and (c) of the plaint. I also award the plaintiffs the costs of the suit.

Dated at Nairobi this 3rd day of May, 2001.

JOYCE ALUOCH

PUISNE JUDGE