



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELCNO.535 OF 2013

ZIPPORAH MUTHONI NDUNGU.....PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LTD & ANOTHER.....DEFENDANT

JUDGEMENT

Introduction

1. This suit was filed on 31st December 2003 by Simon Ndungu Gathaiya who is now deceased (Deceased). The deceased was substituted by his wife Zipporah Muthoni Ndungu on 23rd April 2010. The deceased through his company Mark Rays East Africa Limited was operating Shed Nos 15 and 36 which had been leased to the company by the Defendant. The deceased was also operating shed No. 48 (suit premises) which was on LR No.209/11501. This particular shed was being operated under the deceased's name. The deceased had purchased the suit premises from Japhet Galagati Shamalla who was in the process of purchasing it. Japhet Shamalla sold his interest to the deceased who took it over with the outstanding amount due to the Defendant.

2. The deceased then entered into an agreement with the Defendant in respect of the suit premises. The deceased through his company Mark Rays East Africa Limited was unable to pay the amounts due to the Defendant. The company surrendered the two sheds that is shed No.15 and shed No.36 to the Defendant. The Defendant thereafter repossessed the suit premises for breach of agreement. This is what prompted the deceased to claim the following reliefs through amended Plaintiff filed on 26th January 2007:-

a) Specific performance of the contract between the Plaintiff and the Defendant.

b) A Declaration that the Defendant's act of purported repossession of the Plaintiff's property L.R No. 209/11501, off Likoni Road, Industrial Area, Nairobi (Shed No.48) is illegal, unlawful, null and void.

c) An injunction restraining the Defendant , its servants and/or agents and each or any of them or howsoever from trespassing upon the property of the Plaintiff known as land Reference Number 209/11501 off Likoni Road, Industrial Area, Nairobi from harassing, evicting , denying access, obstructing , or interfering with the Plaintiff's business operations conducted on the said property , use , peaceful occupation and/or enjoyment of the suit property , or otherwise from doing anything or act adversely affecting the Plaintiff's interest in the suit property.

d) An account of the payments made by the Plaintiff to the Defendant up to date, and a refund of any monies found to have been overpaid by the Plaintiff.

e) Special damages in the sum of Kshs.38,820,853/= as at the date hereof and a further sum of Kshs.90,000/=per month with effect from 1st May 2006 until the hearing and determination of this suit.

f) Damages for breach of contract

g) Damages for Tresspass

h) Aggravated damages

i) Costs of this suit

j) Interest on (d), (e), (f), (g),(h), and (i) at Commercial rates.

Plaintiff's Case.

3. It is the Plaintiff's case that the deceased entered into a sale agreement with Japhet G Shamalla on 9th February 1995. Mr Shamalla was in the process of purchasing the suit premises from the Defendant on the basis of tenant purchase basis. As at the time the deceased entered into the agreement with Mr Shamalla, the arrears in the account of Mr Shamalla were Kshs.1,214,278/=. The amount which Mr Shamalla owed the Defendant was Ksh.3,422,188/=. It was agreed between Mr Shamalla and the deceased that the deceased was to clear the arrears of Kshs.1,2,142,278/= and arrange on how to clear the balance of the outstanding amount with the Defendant.

4. When the deceased went to the Defendant, it turned out that the sum outstanding on the account of Mr Shamalla was slightly higher due to a cheque of Kshs.200,000/= which Mr Shamalla had given the Defendant but which had been dishonored . There was also some Kshs.65,975/= which had not been factored when the Defendant gave Mr Shamalla a statement of what he owed it. This is how the deceased entered into an agreement dated 13th April 1995 in which the loan which he took over was now Kshs.3,794,339/=. This amount included interest on the amount which had not been factored.

5. It is the Plaintiff's contention that the agreement between the deceased and the Defendant was on the basis that the loan taken over was to be repaid over a period of 10 years and that the Defendant was to obtain title in favour of the deceased which title was to be charged as security for the repayment of the outstanding mortgage amount. The Plaintiff argues that the Defendant failed to obtain title and that as such, the relationship between the deceased and the Defendant was not defined and there was therefore no basis for charging interest on account of a mortgage which was non-existent.

6. It is the Plaintiff's case that there being no mortgage, the Defendant had no basis of levying interest and that the deceased used to make payment for the mortgage amount due to constant threats of being evicted from the suit premises. It is the Plaintiff's contention that the deceased actually paid more than what he owed the Defendant. The Plaintiff further contends that the Defendant illegally locked the suit premises on 12th February 2001 as well as shed Nos 36 and 15 which were being operated by the deceased's company Mark Rays East Africa Limited which had leased the two sheds to tenants. The closure of the three sheds forced the deceased to write a handwritten letter surrendering shed 36 and 15 and also promising to reduce the arrears on account of the suit premises.

7. It is the Plaintiff's case that the subsequent repossession of the suit premises had no legal basis and that this was done through instigation of the Defendant who caused the deceased's arrest and incarceration at Industrial Area Police Station by the deceased's tenant on 6th August 2004 on allegations of leasing out the suit premises which did not belong to him.

8. The Plaintiff argues that despite the deceased meeting all the requirements pertaining to processing of title in respect of the suit premises, the Defendant refused to release the mother title to facilitate subdivision. It is on this basis that the Plaintiff argues that the Defendant was in breach of the agreement of 13th April 1995 hence the claim for an order of specific performance. The Plaintiff also argues that the deceased was coerced into relinquishing shed No. 36 and 15. This is the basis upon which the Plaintiffs claims the reliefs in the Plaintiff.

Defendant's case.

9. It is the Defendant's case that the relationship between it and the deceased stemmed from the agreement between the deceased and Japhet G Shamalla. In the agreement between Japhet G Shamalla and the deceased, the deceased had agreed to pay the arrears which Mr Shamalla owed the Defendant and continue to service what was outstanding. The Defendant states that it entered into an agreement with the deceased whose terms were very clear and that the deceased agreed to the terms.

10. It is the Defendant's case that the deceased ran into arrears and the Defendant sent him demands to rectify the default on a number of occasions. When it became clear that the deceased was unable to clear the huge arrears which were running into millions, the Defendant had to issue notice of repossession in accordance with the agreement. The deceased subsequently removed the deceased from the suit premises to mitigate the Defendant's losses. The Defendant denied the deceased's allegations that there was no mortgage put in place and argued that there was no way a mortgage would have been created where the title in respect of the suit premises had not been processed.

11. The Defendant argues that the deceased took over the mortgage which Mr Shamalla had with the Defendant. The deceased was therefore bound to continue repaying what he had taken over. The Defendant denies that there was coercion directed at the deceased. The Defendant argues that all the letters written by the deceased were voluntarily written including the cheques which the deceased issued. The Defendant maintains that the removal of the deceased from the suit premises was in accordance with the terms of the agreement of 13th April 1995 which did not provide for creation of a mortgage as the deceased alleged. It is on this basis that the Defendant argues that the Plaintiff's suit has no basis and should be dismissed with costs to the Defendant.

Analysis

12. I have gone through the evidence adduced by the Plaintiff as well as that of the Defendant. I have also gone through the submissions by the Plaintiff and the Defendant. There is no contention that the person who had initially wanted to purchase the suit premises from the Defendant is Japhet G Shamalla. When Mr Shamalla was unable to carry on with the transaction, he entered into an agreement with the deceased who agreed to clear the arrears which Mr Shamalla owed the Defendant and then take over the mortgage which Mr Shamalla had with the Defendant. The agreement between Mr Shamalla and the deceased is clear that the deceased was to agree with the Defendant on how he was to proceed with repaying the mortgage which he had taken over.

13. Once the deceased went to the Defendant, an agreement between him and the deceased was entered into. This agreement is the one which governed the relationship between the deceased and the Defendant. The issues which emerge for determination are firstly, whether the

Defendant breached the agreement of 13th April 1995. Secondly, whether the repossession of the suit premises was lawful. Thirdly is the Plaintiff entitled to the reliefs in the amended Plaintiff. Lastly, which order should be made on costs.

14. On the first issue, it is clear that the agreement between the deceased and Japhet G Shamalla was that the deceased was to take over the mortgage which Mr Shamalla had with the Defendant. The agreement was clear that the deceased was to agree with the Defendant on how the mortgage was to be repaid.

15. When the deceased went to the Defendant, it was discovered that Mr Shamalla had given a cheque of Kshs.200,000/= which had bounced. There was also some Kshs.65975/= which had not been factored. It is after this that the deceased and the Defendant entered into the agreement of 13th April 1995. The Plaintiff argues that it is the Defendant who breached the agreement in that there was no title which was processed in respect of the suit premises which would have been the basis of a charge over title to the suit premises which would have been given as security.

16. The plaintiff argues that the deceased had paid all the requisite amounts required and that the consent from the Commissioner of Lands had been granted. There is no doubt that the deceased paid monies towards processing of title. However, a look at the agreement of 13th April 1995 shows that there was no agreement between the parties that a title was to be processed which would then be given as security for the amount due. The Plaintiff's claim is that the amount would have been paid over a 10-year period. There is nothing in the agreement to this effect.

17. The deceased took over the mortgage which Mr Shamalla had with the Defendant. The details on the relationship between Mr Shamalla and the Defendant as regards the mortgage were not disclosed when the deceased entered into the agreement with Mr Shamalla. The correspondence in the file which were produced as evidence show that Mr Shamalla had a mortgage with the Defendant. This is the mortgage which the deceased took over when he decided to purchase the suit premises. This being the case, the Plaintiff cannot be heard to argue that there was no charge which would have been the basis of charging interest.

18. The deceased was given the amount due as at the time he entered into a fresh agreement with the Defendant whose basis was takeover of Mr Shamalla's mortgage. The agreement stated that interest would be charged on the amount outstanding which will then be debited to the mortgage account. The evidence adduced show that the deceased was in arrears. A number of correspondence produced show that indeed the deceased was in arrears. In some correspondence, he pleaded with the Defendant to accommodate him so that he could clear the arrears. The deceased even said that his inability to service the mortgage was due to drop in business.

19. The deceased at some stage raised issues of amounts he had paid which was not reflected in the statement given to him. In a letter dated 14th March 2001, the Defendant acknowledged that indeed the deceased paid Kshs.320,000/=and 330,000/=which had not been captured in their statement. The Defendant however informed the deceased that his account had been adjusted. He was informed that as at 31st March 2001, the balance of the mortgage account was Kshs.4,177,360/= and the arrears were Kshs.1,262,471/=.

20. As at 31st December 2003 when the deceased filed this suit, he was contending that he had so far paid a total of Kshs. 3,589,278/= of the loan which he inherited from Mr Shamalla. It is important to note that as at 31st March 2001, the outstanding amount was Kshs.4,177,360/= and the arrears were Kshs.1,262,471 /=. The deceased in his claim stated that he paid whatever he paid as a result of constant threats of repossession of the suit premises. According to the deceased, there was no agreement on the terms of payments of monthly installments and that any payments which were being demanded were illegal.

21. The agreement of 13th April 1995was clear in its terms. Clause 7 of the special conditions of the agreement provided that the deceased was to pay monthly installment of Kshs.51,283.65. Clause 8 of the same agreement provided that if the deceased defaulted in payment of any installment as provided in clause 7, the Defendant was at liberty to repossess the suit premises upon giving one month's notice. The evidence on record is that as at 31st December 2003 when the deceased filed this suit the amount outstanding was Kshs.10,426,886.35 . This is as per the statement produced by the Defendant.

22. During the hearing, the wife of the deceased who took over this case upon the demise of her husband conceded during cross-examination that the deceased did not make any payment between 1996 and 1999. The deceased himself admits in his statement of claim that any payment he made was as a result of threats of repossession of the suit premises because according to him, there was no basis upon which he would remit any payment.

23. It is clear that the deceased was in arrears. He was determined not to pay and any payment he made, it was as a result of being pushed to do so. This is despite the fact that he had a tenant on the suit premises who used to pay him rent of Kshs.80,000/= per month . when the Defendant finally repossessed the suit premises, the repossession was on the basis of breach of the agreement of 13th April 1995 by the deceased. There was no breach of the agreement on the part of the Defendant. The agreement signed between the deceased and the Defendant was not predicated on obtaining of title in respect of the suit premises which would then have been charged as the deceased seemed to argue. I therefore find that there was no breach of the agreement by the Defendant.

24. On the second issue, it is clear while dealing with the first issue hereinabove that the agreement provided for the manner of termination. If the deceased was in breach of the agreement, the Defendant was at liberty to repossess the suit premises upon giving one month's notice. The Defendant gave repossession notice vide letter dated 23rd January 2003. This was in accordance with clause 8 of the agreement which the deceased signed. The Defendant subsequently repossessed the suit premises. This being the case, I find that the repossession was in accordance with the agreement and there was nothing unlawful in the repossession. The deceased's argument that there was nothing guiding their relationship and that he was waiting for title which he expected to charge is not supported by the agreement.

25. The Plaintiff is seeking specific performance of the contract that is the agreement of 13th April 1995. The remedy of specific performance is an equitable remedy. It can only be given when there are no alternative remedies which are appropriate and only if the one

seeking it shows that he has met all that was expected of him under the contract or that he is ready and willing to complete the agreement. In the case of **Purple Rose Trading Company Limited Vs Bhanoo Shashikant Jai (2014) eKLR**, Justice Odunga quoted a decision of Court of Appeal in Civil Appeal No.165 of 1996 between **Gurdev Singh Birdi and Marinder Singh Ghorta and Abubakar Madhubuti**, in which Gicheru J A (as he then was)

Stated as follows:-

“When the appellants sought the relief of specific performance of sale of the respondent’s property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property...as stipulated in the agreement. There was, however, no express stipulation nor any indication in the agreement that time was of the essence of the agreement. The appellant’s failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation...Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim...The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.

26. In the same case of **Purple Rose Trading Company Ltd (supra)** , Tunoi J A (as he then was) stated as follows:-

“However, the appellants’ conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated”.

27. It is evident that the deceased was in arrears of the mortgage account which he had inherited from Mr Shamalla . The deceased as can be seen from his own pleadings was not ready to pay the amount due on the mistaken believe that there was no basis for him to pay. This is clearly a person who had not met his side of the bargain and was not prepared to do so. The remedy of specific performance is therefore not open to the Plaintiff.

28. The Plaintiff seeks a declaration that the repossession of the suit premises was illegal null and void. I have demonstrated hereinabove that the repossession was done in accordance with clause 8 of the agreement. The deceased was in arrears and was not ready to pay. The suit premises were therefore lawfully repossessed. The Plaintiff is not therefore entitled to a declaration that the repossession was unlawful, null and void.

29. The Plaintiff is seeking injunction restraining the Defendant from trespassing to the suit premises. The evidence on record is that the suit premises was repossessed on 26th May 2004. This being the case, the prayer for injunction has been overtaken by events.

30. The Plaintiff is seeking for an order for account and refund of any money found to have been overpaid by the deceased. It is clear that as at the time the suit premises was repossessed, the deceased was in arrears of over ten million. In his own pleadings, the deceased had paid Kshs.3,589,278. This was far less than what he owed the Defendant. The deceased was given a statement of what he owed the Defendant but he appeared to hold the view that the demands were illegal as there was no basis for charging interest. There is therefore no basis for an order of account when the deceased was clearly in huge arrears which went on accumulating even after the suit premises was repossessed.

31. The Plaintiff tried to argue in her submissions that if indeed there were arrears owed, the Defendant should have filed a counter-claim to recover the same. Failure by the Defendant to mount a counter-claim is not evidence that it was not owed and this cannot be a basis for ordering accounts. The deceased was given a statement. The mere fact that the statement given in evidence is from 2000 and above does not justify the grant of an order for accounts.

32. The Plaintiff is seeking special damages of Kshs.38,820,853/= as at 26th January 2007 as well as loss of rental income of Kshs.90,000/= per month. The amount of Kshs.38,820,853/= which is being claimed as special damages is comprised of Kshs.1,720,000/=for loss of rental income from 1st August 2004 to 30th April 2006, loss of trading profits in the sum of Kshs.29,791,192 and loss of director fee in Mark Rays East Africa Limited.

33. There was no evidence at all tendered in support of the special damages of Kshs.38,820,853/=. PW1 Zipporah Muthoni Ndungu who is the Plaintiff having taken over the case from the deceased never gave any evidence touching on this amount. There was no evidence adduced touching on the 90,000/=rental income per month which is being claimed. This witness adopted her statement which is dated 13th December 2011 and filed in court on 15th December 2011. There was no mention of these special damages. The law is clear that special damages should be pleaded with clear particulars and evidence led on the same.

34. In the case of **Capital Fish Kenya Limited Vs The Kenya Power & Lighting Company Limited** (2016) eKLR, the Court of Appeal stated as follows: -

***“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur)*.**

35. The evidence of the valuer who testified as PW5 stated that he valued mesne profits at Kshs.14,190,000/= . The go down which was on the suit premises was valued at 46,000,000/=. These amounts were never pleaded in the Plaint. The valuer estimated loss of rental income as at 6th October 2014 to be Kshs.20,640,000/= . This evidence did not support the Plaintiffs claim of loss of rental income which as at December 2003 was put at Kshs.1,720,000/= between 30th April 2004 and 30th April 2006. The valuer did not say for which period he arrived at loss of rental income of Kshs.20,640,000/=. Be that as it may, the deceased failed to purchase the suit premises as had been agreed. There was therefore no basis upon which he could claim loss of rental income or other special damages or even mesne profits which are in themselves special damages.

36. The Plaintiff is seeking for damages for breach of contract. As I have found out herein above, there was no breach of contract on the part of the Defendant. In any case, even if there was breach of contract which is not the case, the plaintiff had tabulated his alleged loss in form of special damages. The law is that no general damages for breach of contract can be allowed in addition to quantified damages. See **Dharamsi Vs Karsan (1974) EA** where it was held that general damages are not allowable in addition to quantified damages.

37. The Plaintiff claims damages for trespass. The evidence herein shows that the Defendant repossessed the suit premises after the deceased failed to pay the purchase price as had been agreed. The Defendant’s entry upon repossession cannot amount to trespass as the deceased had not become an owner of the same.

38. The Plaintiff seeks aggravated damages. In the case of the **Nairobi Star Publication Ltd Vs Elizabeth Atieno Oyoo (2018) Eklr** Justice Cherere quoted from the Halsbury’s Laws of England instances when aggravated or exemplary damages are awardable. According to Halsbury’s laws of England paragraph 243, exemplary damages should only be awarded in cases within the following categories: -

i. Oppressive, arbitrary or unconstitutional action by servants of government:

ii. Conduct calculated by the Defendant to make him a profit which may well exceed the compensation payable to the Plaintiff;
or

iii. Cases in which payment of exemplary damages is authorized by statute.

39. In the instant case, the Plaintiff’s case does not fall on any of the categories which can attract aggravated or exemplary damages . The suit premises were repossessed so as to mitigate losses which were accumulating and the deceased was not paying any agreed amount despite that he had a tenant on the suit premises.

Disposition

40. From the above analysis, it is clear that the Plaintiff has failed to prove her case. The same is hereby dismissed with costs to the Defendant.

Dated, Signed and Delivered at **Nairobi** on this **4th** day of **February 2021**.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Muriithi for Plaintiff

Mr Wainaina for Mr Oundo for Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE