



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 4415 OF 1994

MAMA NGINA KENYATTA & ANOTHER PLAINTIFF

VERSUS

MAHIRA HOUSING COMPANY DEFENDANT

J U D G M E N T

This suit concerns a piece of land previously known as L.R No. 10901/7/R and now known as L.R. Nos. 10901/36 and 10901/37 South of Ruiru. The salient paragraphs of the plaint are as follows:-

"3.By an agreement for sale dated 14th May, 1986 made between the plaintiffs and the Defendant, the plaintiffs agreed to sell and the Defendant agreed to purchase a portion of the property held in trust known as L.R No. 1090/7/R now known as L.R. Nos.10901/36 and 10901/37 South of Ruiru at the purchase price of Kshs.5,00,000/-.

4.The defendant defaulted to honour the terms of the said Agreement when it failed to pay the purchase price as agreed and in terms of the said Agreement the Plaintiffs rescinded the Agreement in May, 1987.

5.On 28th March, 1990 the Defendant filed proceedings in this Honourable Court being High Court Civil Case No. 1570 of 1990 seeking orders inter alia for specific performance of the said Agreement and an injunction to restrain the Plaintiff from alienating the said portion of land.

6.Further the Defendant filed an application in the said suit seeking orders for an interim injunction in the above mentioned terms which application was dismissed by this Honourable Court on 5th June, 1990 and eventually the whole suit was dismissed for want of prosecution on 2nd November, 1994.

7.The plaintiffs state that after the commencement of the said suit, the Defendant through its representative or agents has forcefully and unlawfully taken possession of parts of the said land and have refused to vacate the same despite several requests from the Plaintiffs and the Defendant through its agents or representatives still retains possession of the said property as a trespasser.

8.Despite demands made in that behalf and written notice of intention to institute legal proceedings in default thereof the Defendant has refused or declined to vacate the said land.

9.The said piece of land is situated in Ruiru within the jurisdiction of this Honourable Court.

WHEREFORE the Plaintiffs pray for:-

(a) Possession of the said land

- (b)Eviction of the Defendant or its agents from the said land;
- (c)Mesne profits
- (d)Costs
- (e)Interest
- (f)Such other relief or reliefs that this Honourable court shall deem just to grant".

The defendant's defence was as follows:-

"3.The Defendant admits paragraph 3 of the Plaintiff.

4.The Defendant denies the contents of paragraph 4 of the Plaintiff. The Defendant fully paid the agreed purchase price.

5.The Defendant avers that it is not responsible for the circumstances which led to the dismissal of Nairobi HCCC No. 1570 of 1990. The said dismissal was caused by the negligence of the Defendants Advocates then on record but does not create any right on the Plaintiff nor any liability on the Defendant. Members of the defendant have only occupied part of land lawfully and legitimately bought from the plaintiff is put to strict proof (sic).

6.The contents of paragraphs 7 & 8 of the Plaintiff are denied. The defendant specifically denies that it has through its representatives or agents forcefully and unlawfully taken possession of any land that belongs to the Plaintiff.

7.The defendant denies that the Plaintiff is entitled to any of the prayers made on the Plaintiff.

8.Jurisdiction of this Honourable Court is admitted subject to the provisions of the law

REASONS WHEREFORE the Defendant prays that the Plaintiff's suit be dismissed with costs"

Looking at the Plaintiff and the defence the area of dispute is rather narrow. The Plaintiff's claim is based on the written sale agreement of 14th May, 1986. The defendant admitted the existence of that agreement in paragraph 3 of the filed defence. According to the plaintiff the defendant defaulted as it failed to pay the purchase price as agreed and so the agreement was rescinded in May, 1987.

The defendant's case is equally simple. According to its version of the story there was indeed this Sale Agreement of 14th May, 1986 in which the purchase price was agreed at Shs.5,000,000/- but this amount was paid in full by the defendant and hence the plaintiff has no justification in bringing this suit to court. This suit should be dismissed with costs.

In view of the foregoing, the main issue for determination is whether the defendant paid the full purchase price. The plaintiff's advocates acknowledged receiving only the 10-% deposit of Shs.500,000/-. A receipt to that effect was produced as exhibit A. That receipt is dated 30th April, 1986. Then there are two other receipts (Exhibit B and C) issued from the office of the plaintiff's advocates (Shapley Barret & Co., Advocates). The defendant's case is pegged on those two receipts (Exhibits B and C). I say so because the plaintiff's advocates have denied ever issuing these receipts.

Exhibit B is a receipt dated 30th March, 1987 showing a payment of Shs.3,100,000/= Exhibit C is a receipt dated 24th November, 1988 for Shs.1,400,000/-. The amount shown on these two receipts makes a total of Shs.4,500,000/-. And as Exhibit A was for Shs.500,000/- then the total amount paid is shs.5,000,000/- which was the agreed purchase price. This would make the defendant's case very simple. But there is a dispute as regards Exhibits B and C.

Mr. Da Gama Rose (PW1) senior partner in the firm of Shapley Barret & Co., Advocates was the first witness for the plaintiff. He gave a detailed account of this transaction. He was emphatic that the defendant company paid only the deposit of Shs.500,000/- as per Exhibit A. As regards the other two receipts (Exhibit B and C) Mr. Da Gama Rose dismissed them as forgeries. Mr. Da Gama Rose explained how these were forgeries since they all refer to deposit and yet deposit had already been paid vide Exhibit A. Mr. Louis Manuel De Souza (PW2) who was an employee of Shapley Barret & Co., Advocates was called as the second witness for the plaintiff. He agreed that he issued the first receipt (Exhibit A) but denied issuing Exhibits B and C. Mr. De Souza explained that there was no way he could have issued these two receipts (Exhibit B & C) since they refer to deposit and yet it was only the first receipt (Exhibit A) which was in respect of the deposit.

Mr. Peter Githuka (DW1) testified on behalf of the defendant company. According to his evidence full purchase price was paid since the three receipts produced as Exhibits A, B and C were all issued by the Plaintiff's advocates and these receipts show that the full purchase price of Shs.5,000,000/- was paid. He went on to explain that after buying the land it was subdivided into plots. Then each member was given his plot and title deeds were issued for individual plots and members took possession in 1984.

The defendant's problem starts with that evidence of Mr. Githuka (DW1) in which he states that the members of the defendant company took possession in 1984. That cannot be correct since in 1984 the Sale Agreement had not come into existence. The Sale Agreement to which there is no dispute is dated 14th May, 1986 and the deposit of Shs.500,000/- was paid on 30th April, 1986 hence there was no way members of Mahira Housing Company would have occupied this land before payment of the deposit and signing of the Agreement. Indeed the Agreement is clear as to when possession was to take place. If the defendant took possession in 1984 as stated by Mr. Githuka (DW1) then that was contrary to the terms of the Sale Agreement.

Going back to the issue of the two cheques (Exhibits B and C) we find that according to the three cheques the full purchase price was paid on 24th November, 1988 when Shs.1,400,000/- was paid. But what is surprising is that by a letter dated 8th February, 1989 (in the bundle produced in court) the advocates for the defendant is stating that Kenya Finance Ltd. had approved a loan for Shs.3.0 million for the purchase of the land in dispute. If full purchase price was paid by 24th November, 1988 why were the advocates for the defendant talking of a loan to purchase the same land in February, 1989?

Then in a letter dated 21st September, 1989 from Wambugu & Co., Advocates who were acting for the defendant company it is stated inter alia:-

"We have instructions to forward to you a cheque for Kshs.1.0 million and further give you an undertaking to pay you a sum of 3.0 million shillings within 7 days from date of registration of transfer of the above premises in the name of the purchaser".

The letter was written to Shapley Barret & Co., Advocates and the property in question was "South Ruiru Town L.R No. 10901/36 and 10901/37" which is the property in dispute. That letter was written in September, 1989 and yet according to the receipts produced the last payment was effected on 24th November, 1988. I have gone through the correspondence exchanged between the advocates for the plaintiff and the defendant and in the end have come to the conclusion that the defendant company paid only the deposit of Shs.500,000,000/-. The evidence of Gama Rose (PW1) and De Souza (PW2) clearly showed that Exhibits B & C were not genuine receipts from the firm of Shapley Barret & Co., Advocates. The evidence on record also shows that the defendant had not paid the balance of Shs.4.5 million as subsequent correspondence clearly show that the defendant had not paid the balance of the purchase price. And then there is High Court Civil Case No. 1570 of 1990 which was filed by the defendant (Machira Housing Company Ltd.,) against the Trustees of Waunyomu Ngeke Ranch (plaintiff herein). That suit was filed at the High Court Registry on 28th March 1990. The Plaintiff is dated 27th March, 1990. In that suit, the defendant (as Plaintiff) refer to the Sale Agreement of 14th May, 1986 in which the purchase price was Shs.5,000,000/-. The defendant also refer to deposit of 500,000/- which was paid to the plaintiff's advocates. Now, that plaintiff was filed in the March, 1990. The defendant do not refer to the two receipts of Shs.3,100,000 and 1,400,000/- .

If indeed these two receipts had been issued pursuant to genuine payment as stated by Mr. Githuka (PW1) that important fact would not have escaped the attention of the defendant's officers who were instructing Wambugu & Co., Advocates. In the plaint of 1990 reference is made only to deposit of Shs.500,000/-.

I have taken the trouble of giving all these examples to show that there was no payment of Shs.3,100,000/- and Shs.1,400,000/- vide Exhibits B and C respectively. In any case PW1 and PW2 proved to the satisfaction of this court that these receipts were not issued from Shapley Barret & Co., Advocates. Hence the simple answer now is that the defendant did not comply with the conditions of the Sale Agreement. The company was in default. The agreement was rescinded.

There is the issue of the head title having been released and new titles issued. It has been shown that the letters purported to have come from the lands Office in Nairobi were forgeries. This indeed is a sad case in which the defendant company which was set up to settle the landless has ended up in this problem. The unfortunate thing is that the Chairman of the company who is said to have been receiving money and paying for the land died. This means the members of the defendant company were somehow misled by the officials of the company.

It was submitted on behalf of the defendant that its members had acquired ownership of their respective portions and that by virtue of Section 28 of the Registered Land Act (Cap.300) they acquired absolute titles which cannot be challenged or the register rectified under Section 143 of that Act. It is true that under Sections 27 and 28 of the Registered Land Act (Cap.300) the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. The High Court decisions in Esiroyo v. Esiroyo and Another (1973) E.A. 388 and Obiero v Opiyo (1972) E.A 227 were concerned with the effect of customary law as an overriding interest under the Registered Land Act. The land in dispute was not under Registered Land Act. The head title produced by the plaintiff shows clearly that this land was governed by the Registration of Titles Act (Cap.281 Laws of Kenya). So here we have a situation in which the head title and the original deed plan are safely kept by the plaintiff's advocates in their offices in Nairobi but the land in question is being surveyed, subdivided and new titles being issued under a different Act of Parliament. According to correspondence produced in evidence the head title was surrendered to the Government in 1996. But how can that be when this suit was filed in 1994? When the suit was filed in 1994 the head title was with the plaintiff's advocates. In 1976 (when the head title is said to have been surrendered), this suit was pending in the High Court. The head title and deed plans were produced by Mr. Da Gama Rose (PW1) when he gave evidence on 30th October, 1998. These documents have never been surrendered to the Government. We now have an interesting scenario in which the plaintiff's advocates are in possession of the head title and deed plans to this land but on the other hand members of Mahira Housing Company have individual titles issued under Registered Land Act (Cap.300 Laws of Kenya). Mr. Letangula appearing for the defendant company submitted that since everything was done legally the defendant company proceeded to subdivide the land and settle its members numbering 1600 people together with their families. He went on to argue that the problem arose when Shapley Barret & Co., Advocates demanded further payment of Shs.10 million. I must point out that there was no evidence that such amount was demanded. The issue as regards purchase price was beyond dispute. The agreement of 14th May, 1986 talked of shs.5,000,000/- as the purchase price. The plaint and the defence refer to this amount of Shs.5,000,000/-. The defendant's case was that the full purchase price of Shs.5,000,000/- was paid while the plaintiff's case was that only the deposit of 500,000/- was paid and as the defendant defaulted in payment of the balance of Shs.4,500,000/- the contract was rescinded. In this judgment, I have already shown that the evidence on record clearly shows that the defendant company paid only the deposit of 500,000/-. Hence, it was improper for Mr. Letangula to introduce a completely new issue of a further payment of Shs.10 million being demanded by the plaintiff's advocates.

This is a sad case in which the members of the defendant company must have contributed money to buy land but through dishonest officials of the company and Lands office, the members have landed in a situation in which they have to lose what they have always thought to be lawfully theirs.

This case is a living example of what misery the dishonest officials of the Lands Office and company

officials can bring to the poor of this country.

Since evidence on record shows that the defendant never bought the land in dispute as the contract was rescinded, then the plaintiff is entitled to judgment as prayed in the plaint. The result of this case will be painful to the members of the defendant company but it is unfortunate that they were cheated by the officials of Mahira Housing Company. Hence, there will be judgment in favour of the plaintiff but the issue of mesne profits may be set down for arguments at a later date should it be necessary. Since the members of Mahira Housing Company are on this land, they will be given three (3) months from the date of this judgment in which to vacate. Costs of the suit will be awarded to the plaintiff. Order accordingly.

Delivered at Nairobi this 26th day of May, 2000.

E. O. O'KUBASU

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JUDGE OF APPEAL