



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2254 OF 1997 (O.S)

MALVIN INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

CHEPLETING MITEI..... DEFENDANT

RULING

Applicant in this Originating Summons seeks three orders namely:-

- (a) Respondents be compelled to refund and or release to the applicant the amount of purchase price plus interest at 40% paid to her on trust and on her professional undertaking in the transaction relating to plot No. L.R 209/12824 (Original No. 209./140)
- (b) And or in the alternative the respondent do refund and or release to the applicant half of the purchase price paid to her together with interest accrued thereon held by her in trust and on her professional undertaking aforesaid within a period of seven (7) days.
- (c) Respondent do pay to the applicant the costs of this application.

The respondent is a lawyer and was acting for Pagaru Traders ltd who were selling plot no. L.R. 209/140 Nairobi along Ngara Road. M/S P.J. Kakad Advocates were acting for the purchasers - the applicant.

The full terms of the contract are contained in the Agreement for sale executed by the respective directors of the parties on 22.9.95. There is a letter dated 30.8.95 (exhibit "PS2" annexed to the supporting affidavit. It is a letter from purchasers advocates to vendors advocates asking for amendment of Agreement of sale as specified. The executed agreement shows that the agreement for sale was amended in terms of paragraph 1, 2, and 5 of that letter but amendments in para 3,4,5,7,8,9, of the letter were not incorporated in the executed agreement.

The amendment sought in para 8 and 9 of the letter dated 30.8.95 state respectively:

"8 The vendor shall remove any light, telephone polls and toilets if any on the said property.

"9 The vendor shall undertake that the Area should be as per the letter of allotment (0.44 hectares) and if the same is less then the total purchase price should be adjusted downwards accordingly"

At the time of the execution of the Agreement, the vendor had only a letter of Allotment. The Grant had not been issued to him. The purchase price was shs 13,500,000 A deposit of shs 1350,000 was to be paid to vendors Advocates as stake holders upon the execution of the Agreement. The vendors were to execute

an in formal Transfer Agreement to facilitate the issuance of Grant to the purchaser. By clause (b) and (d) of the Agreement, the balance of purchase price - shs 12,150,000 was to be paid to vendors Advocates on the completion date. The earliest completion date was the date the Grant was registered in favour of the purchaser and delivered to the purchaser. The property was sold with vacant possession and vacant possession was of essence to the contract. By clause 7, if the vendor was unable to give vacant possession on completion date then the Agreement would be a nullity and the deposit of shs 13500,00 was refundable with all interest accrued. The executed Agreement does not show that the balance of purchase price - shs 12,150,000 was to be released to vendors advocates on the completion date on any further condition.

The respondent by a letter dated 6.2.96 (part of exhibit "PS4" to the supporting affidavit) informed vendors advocates inter alia, that they had forwarded to purchasers advocates, by a letter dated 16.1.96, a duly signed and registered Grant in purchasers name. By that letter dated 6.2.96, Respondent forwarded a copy of the Grant and original receipts for payment of stand premium, stamp duty, consent fees and rates. Respondent confirmed that the structures on the plot had been removed and asked purchasers to take possession of the plot on the same day. Lastly respondent called upon the purchasers advocates to release the balance of purchase price of shs 12,150,000 in terms of the professional undertaking given on 10.11.95. The letter dated 16.1.96 and the professional undertaking dated 10.11.95 have not been exhibited.

By a letter dated 2.4.96 purchasers advocates forwarded two cheques for a total of shs 12,060,000 to the vendors advocates being balance of the purchase price. The forwarding letter stated in part:

"In consideration of our sending you the payment aforesaid, the same is to be held upon your professional undertaking in trust for us and upon your further undertaking that the vendors shall fulfill the following conditions:-

- (a) To remove electricity and /or any polls on the plot
- (b) To point out the beacons marking the boundaries of the plot to the purchaser

We should be grateful if you would please acknowledge receipt and confirm the terms hereof".

The respondent acknowledged receipt of the two cheques and the letter by a letter dated 9.4.96 in the following words:

"We refer to the above matter and acknowledge receipt of your letter together with the enclosed two cheques and confirm the terms therein. We shall revert to you once the terms are fulfilled."

The purchasers apparently caused the plot to be surveyed by Map Consult limited who made a report dated 17.4.96. The surveyors found inter alia, that the area enclosed by beacons as shown on the g round was approximately 0.503 acres and not 1.0 acre as shown in the Deed Plan and Survey plan and that the shape of the plot is different from the one on the survey plan and Deed Plan.

The report confirms that the beacons on the ground were shown to the surveyors by the owner and his agents.

Apparently the plot had been re surveyed before Grant was issued and given a new number LR 209/12824 and not LR 209/140 which was in the letter of Allotment and in the Agreement. What followed after the revelation is vendors attempt to either get refund of half of the purchase price or to have the deal cancelled and full purchase price refunded with interest by vendors. This failed resulting in the present application.

By the present application, purchasers are asking the court to enforce the professional undertaking contained in the purchaser's advocates letter dated 2.4.96 and confirmed by the respondent by the letter dated 9.4.96. The applicants case is that the vendors have failed to turn up to physically point out the

beacons of the plot and therefore the balance of purchase price paid to respondent in trust for purchasers advocate and on professional undertaking that the money would not be released until, inter alia, the vendors have pointed out the beacons should be enforced.

Christine Mitei deposes in paras 6, 7, 9, that the beacons were pointed out by the vendors to the purchaser and also to Map Consul ltd. She deposes in para 15 and 16 that the issue of acreage and refund is not covered by the professional undertaking. In para 17(ii) of her replying affidavit, she deposes that upon the Grant being issued and being sent to purchasers she passed the balance of purchase price to the vendors as per the agreement and therefore any refund has to come from the vendors.

The Respondents advocates have also filed grounds of opposition in ground no. 2 she states that the alleged professional undertaking was not unambiguous. Unequivocal and same is not binding on the Respondent. In ground no. 4 she states:

“The purported undertaking was allegedly given when the Transaction had been completed and when the title was already in possession of the applicant the essence of the purported undertaking was to protect the purchaser’s interest before the issuance of the title Deed”

I have considered the respective affidavits and counsels submissions.

Firstly, although the respondent states in her replying affidavit that the Agreement for sale was amended in terms of letter dated 30.8.95 (exhibit “PS2) the Agreement for sale was executed on 22.9.95 after the date of the letter dated 30.8.95. I have already shown that some terms in that letter were incorporated in the executed Agreement but others were not incorporated. More importantly clause 9 of the letter dated 30.8.95 dealing with issue of less acreage was not incorporated in the executed Agreement. It follows that the issue of less acreage was not a term of the Agreement for sale.

Secondly, although the application is ostensibly brought as an application for enforcement of the undertaking for failure by vendor to point out the beacons it is clear that the two affidavits of Mr. Praful Savla and from the correspondence that this application was brought because the land sold was found to be less in acreage than contained in the Agreement and further because the vendors failed to refund half of the purchase price. This is evident from para 6 and 9 of Mr. Salva’s further affidavit sworn on 3.3.98 The fact is that the owners of the plot - vendors pointed out the beacons to Map Consult ltd who surveyed the plot and found it to be 0.503 acres in size. The reality is that purchasers know the beacons on the plot have been pointed out and that the plot upon survey has been found to be 0.503 acres in size and not the contracted one acre. The problem purchasers have is that they got half the size of the plot they contracted in the circumstances even if the vendors go to the plot and point out the beacons again, that will not change the acreage of the plot.

Thirdly the terms of the undertaking contained in the letter dated 2.4.96 are inconsistent with the terms of the Agreement for sale.

By the sale agreement the balance of purchase price was payable to the respondent upon the registration, issuance and delivery of the Grant in the name of the purchaser. There is no provision in the Agreement that upon receipt of the balance of purchase price, the respondent was to withhold releasing the money to the vendor pending fulfillment of additional conditions. The Grant was registered in the name of the purchasers. It was issued and delivered to purchasers advocates who then released the balance of the purchase price. The Agreement for sale was at that stage completed. It was later found that the acreage was less. So, in effect the so called undertaking alters the terms of executed contract without authority of the vendor.

Fourthly, when the undertaking was sought by a letter of 2.4.96 and given by a letter of 9.4.96 the fact that the plot measured less than contracted for was not known to the purchasers or their advocates. That fact was known on or about 17.4.96 when Map Consult ltd made the Report. So the term of the undertaking that the vendors were to point out the beacons cannot be construed to mean more than pointing out of the beacons marking the plot. In other words, I would not be construed to mean that the

respondent undertook to refund half of the purchase price or the whole of the purchase price.

Further, the term of the undertaking that the vendor had to point out the beacons is incapable of being performed by the Respondent. She had not means of forcing the vendors to go to the plot and point out the beacons.

Fifthly, the vendors by selling less acreage than contracted for breached the Agreement for sale and no doubt the purchasers have suffered a huge loss. The purchasers remedy lies in a suit against the vendors for appropriate orders. The respondent was not a party to the Agreement for sale and there is no evidence that she gave the warranty as to the size of the plot. Granting the orders sought would be tantamount to finding the respondent liable for breach of contract by the vendor.

For the above reasons I am not satisfied that there is a legally enforceable undertaking in the circumstances of this case. Further I am not satisfied that the undertaking can be enforced in the manner sought in the application.

Consequently, I dismiss the application with costs to the respondent.

E. M. Githinji

Judge

19.10.2000

Mr. Nyawara present

Mr. Koome absent

Mr. Nyawara

I apply for a certified copy of the Ruling.

Order: Ruling to be typed and supplied as prayed. Deputy Registrar to inform Mr. Koome of the result to the application forthwith

E. M. Githinji

Judge