



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 4438 OF 1994

HEZEKIAH GICHERU MWANGI.....PLAINTIFF

VERSUS

NGIMU FARM LIMITED.....DEFENDANT

J U D G M E N T

This suit HCCC 4438 of 1994 was consolidated with HCCC 3084 of 95. The parties are the same save that in HCCC No. 3084 of 1995 Agricultural Finance Corporation Limited has been added as a Defendant with the Plaintiff in HCCC 4438 of 1994.

In this Judgment I will refer to Hezekiah Gicheru Mwangi as the Plaintiff the Defendant company as Ngimu Farm and Agricultural Finance Corporation Limited as A.F.C.

The Plaintiff entered into an agreement for sale with the company to purchase a piece of Land known as Makuyu/Kimorori/Block/1/1603 (the suit premises) for a sum of Kshs.1,300,000/- the whole of which sum he claims was paid in full by a payment from him of Shs.140,000/- and a cheque from AFC for Shs.2,160,000. Indeed it is his case that the agreement was completed and the title to the suit premises transferred into his name subject to a charge in favour of A.F.C.

In furtherance of the sale the Plaintiff took possession of the suit premises the Company by its agent threatened the Plaintiff with acts of harassment and threats thus denying the Plaintiff quiet possession and peaceful enjoyment of the suit premises.

The Plaintiff is claiming in his amended plaint a declaration that the sale agreement is revoked or alternatively that the same has been frustrated and for a sum of Shs.3,092,272=80 as special damages. There is also a prayer for General damages interest and costs.

The Defence of the company is in conformity with its plaint in HCCC 3084 of 1995 which is that the Plaintiff bought the suit premises as a result of fraud and collusion between the Plaintiff and some of the directors. The company's prayers in its plaint in HCCC 3084 of 1995 is that the transfer of the suit premises to the Plaintiff is declared null and void and that the Plaintiff holds the land in trust for the company. The company seeks an injunction against A.F.C. from selling the suit premises.

The company also asks for the cancellation of the transfer and charge.

From this it is clear that the company does not wish to honour its obligations under the agreement for

sale or let the Plaintiff have quiet and peaceful possession of the land.

However it is necessary to consider the evidence to see what is the truth of the matter and if the whole transaction was a fraudulent scheme engineered by the Plaintiff and the company directors.

The Plaintiff gave evidence that he enquired of the company if they were selling land and he was told they were. As a result he agreed to purchase the suit premises and after satisfying himself as to its value he entered an agreement for sale Exh. 1. This was executed under the common seal of the company and witnessed by four directors of the company. The first witnessing director Francis W. Njoga was called to give evidence as P.W. 2. He was a director of the company between 1974 and 1994 as well as a shareholder. He saw the other directors sign the agreement for sale. The transfer was also executed by the company and the witness gave evidence that a meeting was held of the company that the land was being sold to pay debts. The shareholders agreed that the transfer should be executed. I would add that it matters not whether or not the shareholders agreed as the directors have control of the company and have power to sell land and execute the documents in connection therewith. I formed the opinion that P.W. 2 who was called by the Plaintiff was an upright member of society and I accept his evidence without question. It is highly unlikely that someone who has served a director for 20 years would be allowed to have been so if he was fraudulent as alleged by the company.

The Plaintiff also called Hezekiah Ki.mani Kariuki P.W.3 who was also a joint director of the company and signed Exh. 1. He stated the Plaintiff bought the suit premises and paid the full purchase price of Shs.2.3million.

He said the Directors had told the shareholders they were selling and that they had applied for Land Control consent to the sale.

I accept this witness evidence in its entirety as truthful.

The Defendant called Mr. Kahugi Kihara who was the Chairman of the Company from 1994. He denied that the Plaintiff bought the suit premises and said he has never seen a cheque. He claimed the Director did not have authority to sell the land as the debts of K.P.C.U. had not been paid. He also said it was not possible that the company had obtainedLand Control Board Consent in one day as to his knowledge it took 3 months. The witness also referred to a search and a restriction lodged against the title to the Land by K.P.C.U.

He claimed the directors who signed the Agreement Exh. 1 were fraudulent but gave no explanation as to how or why they were fraudulent.

In cross-examination he admitted that the directors, who signed the agreement, did have power to do so. He said he could not speak English or read it. He also claimed the Agreement Exh. 1 is a forgery and that the directors who gave evidence for the Plaintiff were telling lies. The forgery was not reported to the police but he said he was now making a complaint some seven years later.

He said he was not aware the Plaintiff had paid the money

. He also said he was not present when consent was given in 1993 as he was not a director at that time.

In general this witness did not appear to have any knowledge of the affairs of the company and I find him to be a very unsatisfactory witness. In my view he was telling lies on the basis that some of the shareholders did not want to sell the suit premises to the Plaintiff nor were they prepared to admit that the purchase price had been paid. I therefore reject this witness' evidence as worthless.

D.W.2 Peter Mburu who had been a director since 1994 gave somewhat similar evidence to that of D.W. 2. He said he did not know the Plaintiff had bought land. He could only read very little English. He said the directors could not sell without the shareholders consent. In cross-examination he was shown the cheque for Shs.2,160,000 being the balance of the purchase price and said the cheque was payable to the

company and had not been returned unpaid.

He said he had not been called to any meeting to be told the land was for sale.

He also said he did not bother to check records.

Like D.W. 1 I was not impressed by this witnesses veracity. he appeared to be unaware of the transaction in which the Plaintiff bought the suit premises and was now trying to wriggle out of the transaction by saying the former directors had no authority to sell. I reject his evidence as being of any value.

Lastly A.F.C. called its manager David Murei who confirmed that the sum of Shs.2,160,000 was paid to the Company and that a charge was cerated in favour of A.F.C. over the suit premises by way of Notification of charge over the land and the chattels.

Introduced into evidence were the Application for Land Control Board consent Exh. 8, the consent granted Exh. 9 the title deed in respect of the suit premises dated the 1.2.94 showing the Plaintiff as the absolute proprietor subject to a charge in favour of A.F.C.

There were also introduced into evidence a number of copies of the minutes of the company dealing with the sale of the land to the Plaintiff. These minutes are not to my mind relevant as I find that the directors of the company decided to sell the suit premises to the plaintiff and in pursuance thereof entered into the agreement Exh. 1. I am satisfied that the Directors had the requisite authority and power to do so and that as a result Land Control Board Consent was properly obtained and the suit premises transferred lawfully to the Plaintiff subject to the charge in favour of A.F.C. I am also satisfied that the sum of Shs.2.3m was paid to the company in the manner the Plaintiff says. I do not find any evidence of fraud on the part of the directors accused of fraud and do not accept the Defendant's evidence on this point.

To clear up a matter which appears to have caused some confusion namely the charge over the whole and in favour of K.P.C.U. It seems that the company may owe KPCU money in respect of which a charge was put over the whole piece of land owned by the company. However the portion being the suit premises purchased by the Plaintiff is free of that charge and at the time of transfer was unencumbered so that the only charge on that land is the one in favour of A.F.C.

I find that the Defendant by their actions kept the Plaintiff from lawful possession of his land and as such are in breach of the terms of Agreement (Exh.1) with regard to vacant possession. This case is somewhat unusual in that title has been transferred to the Plaintiff and his remedy might well have been to seek an order that the Defendants give him vacant possession. I am aware of the evidence that the Plaintiff was physically assaulted and put in fear of his life and that to take possession would be for him very dangerous.

I therefore find that the contract of sale has been breached by the Defendants and that the Plaintiff is entitled to damages. In this case, he is entitled to a refund of his purchase price of Shs.2.3million additionally I accept his evidence with regard to the improvements he put on the land.

I therefore allow the damages, particulars of which are set out in the plaint in this regard. I do not allow the sum of Shs.2.7million claimed in respect of loss of profits from coffee as this is an agreement for the sale of land and only the expenses actually incurred can be recovered. I allow however the interest payable to AFC as the transaction having failed the Plaintiff is still liable to pay interest to AFC through no fault of his own.

In the result I give judgment for Shs.4,267,111=00 against the Defendant together with all interest and other charges due to AFC incurred in the loan from AFC to the Plaintiff and not included in the particulars of damages up until such time as AFC is paid in full.

I dismiss the claims contained in the Defendant's plaint and award the costs of both suits to the

Plaintiff and AFC respectively.

Dated and delivered at Nairobi this 6th day of December, 2000.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.