



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 83 OF 2020

SOKO SAWA LIMITED.....PLAINTIFF

VERSUS

GEORGE KAMAU WANYOIKE.....1ST DEFENDANT

HEMGROWN MILLERS LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The 1st Defendant is the registered owner of the land known as Nairobi Block 105/392 (“the Suit Property”) while the 2nd Defendant owned a maize milling business which was operating from the Suit Property. Through an agreement for sale and goodwill dated 18/10/2019, the 1st Defendant agreed to sell the Suit Property to the Plaintiff at the agreed consideration of Kshs. 34,000,000/=. The Plaintiff was required to make a deposit of Kshs. 3,400,000/= on execution of the sale agreement. Completion was to take place 60 days from the date of the agreement.

2. In addition, the Plaintiff entered into an asset purchase agreement with the 2nd Defendant dated 18/10/2019, for the purchase of its maize milling business at Kshs. 13,000,000/=. Under that agreement, the Plaintiff was required to pay a deposit of Kshs. 1,300,000/= on execution of the agreement. The Plaintiff was to take over the 2nd Defendant’s business on completion. The 1st Defendant executed a personal guarantee on 7/10/2019 and was to ensure a smooth transition of the business as part of the goodwill. The 1st Defendant furnished the Plaintiff statements of accounts regarding the 2nd Defendant’s business.

3. The Plaintiff paid a total of Kshs. 4,700,000/= as a deposit for both agreements. The Plaintiff claimed that it requested for a copy of the lease over the Suit Property from the 1st Defendant in order to conduct due diligence but that the 1st Defendant misrepresented that he had misplaced or lost the lease despite assuring the Plaintiff that the land was for commercial use.

4. The Plaintiff claimed that the 1st Defendant availed the copy of the lease after the completion period had lapsed and on perusal, the Plaintiff noted that the lease was for residential use which therefore defeated the purpose for which the Plaintiff was acquiring the Suit Property. The Plaintiff’s advocate issued a letter to the Defendants’ advocate requiring them to remedy the breach and complete the sale within 21 days. In the plaint filed in court on 11/5/2020, the Plaintiff sought rescission of the agreement for sale and the asset purchase agreement, a refund of the deposit paid of Kshs. 4,700,000/=, loss of profit of Kshs. 10,000,000/= as of 6/12/2020, interest and costs.

5. In their defence filed on 2/7/2020, the Defendants averred that the intended takeover of the business and its smooth transition was pegged on the completion of the sale of the Suit Property and the assets which was to be done through payment of the entire purchase price agreed upon. The Defendants averred that it was a condition under the agreement that if the purchaser failed to comply with its obligations, the vendor was to give the purchaser 21 days’ notice in writing and if the purchaser failed to comply with that notice, the vendor would be entitled to rescind the agreement and the purchaser would forfeit 10% of the purchase price. The Defendant maintained that they had been able, ready, willing and fully intent on completing the transaction and that they forwarded the requisite completion documents on time as copies while awaiting the professional undertaking from the Plaintiff’s advocates to enable them release the originals. The Defendants maintained that they supplied to the Plaintiff through its advocates copies of the lease and certificate of lease over the Suit Property.

6. The Defendants maintained that the Plaintiff attempted to change goal posts mid-way through the introduction of new terms and elements which were not encompassed in the sale agreement executed by the parties. The Defendants emphasised that they had complied with their end of the bargain by performing their obligations under the agreement in full. They admitted receiving a demand from the Plaintiff but maintained that they could not comply with that demand.

7. The hearing of the suit proceeded on 8/6/2021. Suraj Dilip Shah gave evidence. He stated that he was a director of the Plaintiff and was authorised by the Plaintiff to give evidence on its behalf. He produced copies of the sale agreement and the asset purchase agreement both of which are dated 18/10/2019. That given the technical nature of the business and as a sign of good will, the 1st Defendant signed a personal guarantee on 7/10/2019 vide which he undertook to induct the Plaintiff to the business by offering his expertise, time and skill to the Plaintiff

for three months after completion to ensure the smooth running of the business. He stated that the 1st Defendant furnished a statement of management accounts for the income projection to the Plaintiff.

8. He confirmed that the Plaintiff paid the total sum of Kshs. 4,700,000/= to the Defendant. He averred that during the negotiations and execution of the agreement the 1st Defendant misrepresented to the Plaintiff's advocate that he had lost or misplaced the lease over the Suit Property and was in the process of acquiring a certified copy from the land registry. Further, that the 1st Defendant assured the Plaintiff that the user of the Suit Property was for commercial use and would therefore be fit for the Plaintiff to continue carrying out the maize milling business which the Defendant was undertaking on the Suit Property.

9. That on 19/12/2019, the Plaintiff's advocate received some of the completion documents from the Defendants which was after the completion period had lapsed. On perusing the documents, the Plaintiff discovered that the 1st Defendant was in breach of special condition number 5 of the lease because he had set up several commercial buildings and was conducting business on the Suit Property whose lease was for residential use thereby defeating the purpose for which the Plaintiff intended to acquire the Suit Property and the Defendants' assets. He added that despite giving the Defendants time to furnish a change of user, the Defendants failed to do that.

10. He produced a copy of the 21 days' completion notice issued to the Defendant. He maintained that the Defendants had breached the agreement and misrepresented and concealed material facts by failing to provide the requisite documents within the completion period and by failing to provide a copy of the lease over the Suit Property with the intention of concealing the user of the land.

11. He averred that the Plaintiff had suffered loss of the deposit of Kshs. 4,700,000/= together with profit projected at Kshs. 10,000,000/= together with interest.

12. On cross examination, he stated that the Plaintiff pulled out of the transaction because they were not given completion documents on time. According to him completion was to be on 18/12/2019. The Plaintiff requested change of user of the land after being shown a copy of the lease over the Suit Property. He denied that the Plaintiff tried to alter the terms of the agreement. He conceded that it was not in the agreement that the change of user would be effected to industrial or commercial. He stated that the clearance documents including the lease were forwarded to the Plaintiff's advocates by email on 19/12/2019. He added that they could not go ahead with the transaction because they did not want to engage in illegal or unlawful activities.

13. George Kamau Wanyoike gave evidence for the defence. He maintained that the sale transaction was subject to the terms and conditions of the lease but otherwise free from any encumbrances. He stated that the deposit paid by the Plaintiff was released to the Defendants' account for their own personal use. He maintained that the Defendants were able and willing to complete the transaction. He maintained that the Plaintiff wrote a letter in bad taste and was attempting to change goal posts through the introduction of new terms and elements. He contended that the Plaintiff's failure to complete the transaction was caused by its inability to raise the balance of the purchase price and that is why it attempted to introduce new terms to the agreement. He maintained that the Defendants could not remedy a breach which was non-existent on their part. He urged that the Defendants had incurred damages and losses and that they were therefore entitled to forfeiture of the deposit in terms of the agreement.

14. Regarding the Plaintiff's claim for loss of business, he maintained that it was unjustified because the Plaintiff had not commenced operations of the milling business and that it would amount to unjust enrichment if the court were to grant the loss of the profit sought by the Plaintiff. He produced several documents including the spousal consent, draft transfer for the Suit Property, rates payment demand note and the discharge of charge registered in February 2020.

15. On cross examination, he confirmed that the discharge of charge was presented for registration on 10/2/2020. He explained that the delay was occasioned at the lands office. He maintained that the Plaintiff was aware of the charge and the delay in the lands office. He confirmed that the Defendants did not issue any notice under the agreement. He was emphatic that he sold the business as it was and that he had allowed the buyer to oversee its operations. He was also emphatic that it was not a requirement for the Defendants to seek change of user of the land.

16. Parties filed submissions which the court considered. The Plaintiff submitted that the Defendants could not have completed the transaction owing to the fact that the discharge of charge was registered in February 2020 yet completion should have taken place on 18/12/2019. According to the Plaintiff, the Defendants could not have passed a good title free from encumbrances as stipulated in clauses 3.3 and clause 3.4 of the sale agreement.

17. The Plaintiff submitted that the Defendants breached the contract by failing to provide the requisite completion documents and that they had wrongfully declined to refund the deposit paid by the Plaintiff. The Plaintiff added that the Defendants did not issue any notice to the Plaintiff to comply with the agreement and that it was the Plaintiff who issued a notice to the Defendants.

18. The Plaintiff submitted that having been carrying on the maize milling business on the Suit Property, there was a legitimate expectation by the Plaintiff that the user of the land was the correct one. The Plaintiff relied on Section 100 of the Evidence Act on the point that when a person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, he shall not be allowed to deny the truth of that thing. The Plaintiff urged the court to grant the orders it sought in the plaint.

19. The Defendants submitted that for them to release the documents, the purchase price should have been remitted to the advocates in terms of clause 4 of the sale agreement. They submitted that their advocates informed the Plaintiff's advocate vide the letter dated 18/12/2019 which the Plaintiff's advocates acknowledged on the day after that the documents were available for completion.

20. The Defendants submitted that what the Plaintiff gave as its reason for issuing the completion notice dated 15/1/2020 was not a condition in the agreement. The Defendants maintained that the court does not re-write contracts for parties and that had the parties wished it to be so they would have included the condition the Plaintiff relied on in their agreement. The Defendants maintained that it was the Plaintiff who breached the contract and that it ought to forfeit the deposit in accordance with clause 13.3 of the agreement. They submitted that the

Plaintiff had failed to prove loss of profit.

21. The issue for determination is who between the Plaintiff and the Defendants breached the sale agreement over the Suit Property and what reliefs should the court grant. What is not disputed is that the Plaintiff entered into two agreements with the Plaintiff. One of the agreements was for the sale of the Suit Property and the second agreement was for the sale of the maize milling business which the 2nd Defendant was undertaking on the Suit Property. It is also not disputed that the Plaintiff duly paid the deposit in respect of both agreements to the Defendant.

22. The completion date under the sale agreement was 18/12/2019 when it was expected that the Defendants would transfer the Suit Property to the Plaintiff. According to the Defendants evidence, copies of the completion documents were received by the Plaintiff's advocates on 19/12/2019 which was the day after the expected completion date. It would seem that the Defendants were intent on concealing the use of the Suit Property from the Plaintiff perhaps until such time as they would have received the full purchase price from the Plaintiff. This reeks of bad faith on the part of the Defendants. The fact that the discharge of charge over the Suit Property was registered after 10/2/2020 confirms that the Defendants were not in a position to complete the sale transaction on the completion date because the land had not been discharged.

23. The Defendants did not provide proof that they availed a copy of the lease over the Suit Property to the Plaintiff before the completion date to enable it carry out due diligence. At the time of entering into the transaction, the Defendants knew the purpose for which the Plaintiff was purchasing the Suit Property and the Plaintiff had a legitimate expectation that the use of the Suit Property under the lease was compatible with the purpose to which the Defendants had put it into. The Plaintiff would have been perpetuating an illegality had it taken over the Defendants' maize milling business on the Suit Property whose user is residential and not commercial. It is not in dispute that the Plaintiff did not commence the maize milling business on the Suit Property. The Plaintiff did not lead any evidence in support of its claim for loss of profit of Kshs. 10,000,000/=.

24. The Plaintiff is entitled to rescind the agreement for the sale of the Suit Property and the asset purchase agreement. The Defendants are directed to refund the deposit of Kshs. 4,700,000/= to the Plaintiff plus interest on this sum at court rates until payment in full.

25. The Plaintiff failed to prove the claim for loss of profit. The Plaintiff is awarded the costs of the suit.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF AUGUST 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Lila Koki for the Plaintiff

Mr. Gachie Mwanza for the Defendants

Mr. V. Owuor- Court Assistant