Gatabaki v Muga Developers Limited (Civil Case 90 of 2015)
[2023] KEHC 22452 (KLR) (Civ) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22452 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 90 OF 2015

AA VISRAM, J

SEPTEMBER 21, 2023

BETWEEN

NANCY WANJA GATABAKI ..... PLAINTIFF

AND

MUGA DEVELOPERS LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on 25th February, 2015. Her case is that by an agreement between the parties dated 7th March, 2012 ("the Contract"), the Defendant agreed to compensate her the sum of Kshs. 10,000,000/= for loss occasioned, arising out of demolition of her houses on the parcel of land known as L.R No.28223/2 (Originally 5980) and 45081/1.

2. She claimed that the terms of the Contract required the Defendant to pay the said amount within 90 days from the date of execution of the agreement, which was on or before 7th May, 2012, which had not been done. Accordingly, she claimed interest and costs of the suit as per the terms of the said Contract.

3. Vide its defence dated 3rd March, 2015, the Defendant averred that the terms of the Contract ought to be read in totality and in conformity with the consent entered into in HCCC. No. 352 of 2011 on 6th September, 2011. Further, that the performance of the Contract was premised on certain obligations on the part of the Plaintiff as stipulated in various separate agreements, dated 5th March, 2012 and 8th March, 2012 respectively, which had not been complied with.

4. Further to the above, the Defendant averred that the present matter was the subject of pending proceedings between the parties in relation to the same suit property which had not yet been heard and determined.

5. The Plaintiff filed its statement of issues dated 20th January, 2017 and the same forms part of the record. The Defendant did not file a list, but raised its issues for determination in its submissions dated 26th April, 2023. This court shall attend to the issues by reformulating the same in the following terms:-

    a. Has the Plaintiff proven her case on a balance of probability?

    b. Is the Plaintiff entitled to the various reliefs sought?

6. The matter proceeded to full hearing on 8th March, 2023. The Plaintiff prayed that the court adopt her witness statement dated 5th March, 2012, as her evidence in chief; and admit her list and bundle of documents, as duly produced exhibits marked NG1 to NG4.

7. An objection was raised by the Defendant in respect of NG4, a valuation report, on the basis that the Plaintiff was not the maker of the statement. The court ruled that it would deal with the objection as part of the judgement. I have considered the objection and I find that is in the interest of justice to admit the document on the basis that both parties eventually relied on the valuation report, and this court found the same useful to determine the issues in dispute.

Plaintiff's submissions

8. The Plaintiff submitted there was no such agreement dated 8th March, 2012, which was be read in tandem with the Contract. Further, any reference to the same was not a typographical error, but rather, and effort to mislead this court and obfuscate the issues.

9. Further, that the reference by the Defendant to the agreement dated 5th March, 2012, was not relevant to the present matter because the same was between her and Dr. Samuel Gatabaki. The Defendant herein was not a party to that agreement, and the same had nothing to do with the demolition of the Plaintiff's home, which is the subject matter of the current lawsuit.

10. She contended that the consent dated 6th September, 2011 arising out of HCCC No.352 of 2011 ("the Consent") was also irrelevant to the present suit because the orders contained therein related to the Plaintiff and an entity known as Suraya Property Group Limited, not the Defendant herein.

11. Based on the above, the Plaintiff submitted that the Contract could not be subject to the above-mentioned agreements dated 5th and 8th March, 2012 respectively, or the Consent.

12. She submitted that the Contract did not provide for her compliance with any conditions whatsoever in order to perform the agreement. Accordingly, the defence could not impose conditions.

13. She contended that the Defendant had not raised the issue of duress in its defence prior to the hearing and it could not do so at this point, because it was bound by its pleadings. She relied on the decisions of the High Court of Kenya in Elizabeth Odhiambo v South Nyanza Sugar Co. Ltd (2019) eKLR and the decision of the Supreme Court case of Raila Odinga & Another v IEBC & 2 Others (2017) eKLR in support of the above argument.

14. As regards the Defendant's submission, that Mr. Muraya had no authority to enter into the Contract with her on behalf of the Defendant in the absence of a board resolution validating the same, she contended that she was protected by the Turquand principle. Accordingly, the Defendant could not purport to argue that the Contract was unenforceable or illegal.

15. Finally, the Plaintiff submitted that the Defendant was under receivership, not administration, and accordingly, the Defendant was capable of taking part in the present legal proceedings.

Defendant's submissions

16. The Defendant submitted that the Plaintiff had not produced any proof in court to show that she owned the land on which the alleged demolitions took place on.

17. He submitted that pursuant to Section 26 of the *Land Registration Act*, proof of ownership is evidenced by a certificate of title or certificate of official search. Without proof of ownership, she was not entitled to compensation for the demolitions. He contended that no such evidence of ownership had been presented by the Plaintiff because she was not the owner of the property. This fact had been confirmed by way of a judgment in HCCC 352 of 2011, in which the Plaintiff by way of her own plaint dated 10th August, 2011, acknowledged that the present suit property was transferred and registered in the name of the Defendant on 23rd July, 2009. Accordingly, when the alleged demolitions took place on 11th December, 2011, she was not the owner of the property.

18. The Defendant submitted that the Plaintiff's valuation report dated 22nd July, 2011, exhibit NG4, was contradictory because it spoke of L.R NO.5980/PT as opposed to L.R No. 28223/2 (originally 5980 and 4508/1), which was the title referred to in the Plaint. Further, based on the valuation, the demolition took place on the part of the property which had classrooms, staffrooms, block stores, and dormitories rather than a house. Clause No. 9 of the valuation report stated that the school user had been discontinued which meant that the school would not have been operational at the time of the demolition.

19. The Defendant submitted that in any event, even if demolitions took place on the property, the same were legal because they were carried out by the registered proprietor of the suit property. He relied on the decisions of the High Court in Edward Kamau Muchoki & another v County Executive Officer, Ministry of Roads Housing & Public Works & Another (2018) eKLR and in Kida Trading and services Limited v Supplies and Services Limited & 3 Others (2019) eKLR.

Analysis and Determination

20. I have considered the evidence and the rival submissions of the parties. The issues which emerge for my determination are as follows:-

    i. Whether the agreement dated 7th March, 2012 is enforceable? And, if so, is the same subject to any further conditions?

    ii. Has the Plaintiff proved her case on a balance of probabilities?

    iii. Is the Plaintiff entitled to the reliefs sought?

Whether the agreement dated 7th March, 2012 is enforceable? And, if so, is the same subject to any further conditions?

21. The Plaintiff's case was that this court ought to enforce the terms of the Contract dated 7th March, 2012.

22. DW1, Mr. Muraya, on the other hand contended that the Contract ought to be read as part of a series of agreements between the parties, rather than in isolation. He testified that the true meaning and purport of the same could only be ascertained in light of the agreements dated 5th March, 2012; 8th March, 2012; and the Consent.

23. The starting point is therefore to look at the terms of the Contract. In doing so, it is worth noting that the Contract is a hand-written document, presumably crafted on the spot, by the parties, and without the assistance of lawyers.

24. The relevant part of the Contract provides as follows:-

> " Whereas:
>
> 1. Demolitions were carried out on 8th and 11th December, 2011 without notice to Mrs. Gatabaki
> 2. both parties agreed to settle the matter amicably
>
> Now this agreement witnessth as follows
>
> ...
>
> Total amount payable – 10,000,00 Kshs.
>
> The amount of 10,000,000 Kenya shillings shall be paid by Muga Developers Ltd to Mrs. Gatabaki as final compensation regarding the demolitions
>
> ...
>
> The said amount shall be paid in instalments within a timeframe of 90 days from the date hereof"

25. It is worth stating, that the above quotation represents almost the entirety of the Contract between the parties. There is also no reference in the Contract to any other agreements or the Consent. However, having said that, the Contract is rather short, vague, and the terms appear uncertain, to say the least.

26. Neither of the arguments as stated above appear appealing, there is clearly no express intention that the Contract be read as part of a series; however, a reading of the same in isolation leaves many questions unanswered, which I will come to at a later stage.

27. Moreover, the Plaintiff's testimony and her documentary evidence appear to be disconnected from the terms of the Contract. I say this because the Contract speaks to demolitions that took place "without notice". The primary reason for compensation (under the terms of the Contract) is based solely on lack of notice.

28. Further, the rationale for compensation (under the terms of the Contract) is equally unclear. The Contract refers to payments for "Notice"; "Materials"; and "Nominal damages", the total of which is the sum of Kshs.10,000,000/=, payable to the Plaintiff.

29. The Plaintiff's testimony had nothing to do with notice, materials, or nominal damages. Moreover, her case is not that the Defendant failed to give her notice and breached the terms of the Contract, but rather, that the Defendant demolished her matrimonial house. To my mind, this is a totally different claim. Demolition of a home is a tragic and dramatic event. Demolition on property (other than the home) without notice ordinarily sounds more like a construction related nuisance.

30. Nonetheless, the Plaintiff testified that her house was demolished by the Defendant and that she was claiming the sum of Kshs.10,000,000/= as compensation for her loss.

31. Noticeably, what was missing from the Plaintiff's testimony were the details of what exactly within her home was destroyed. She did not mention any personal items of great value to her that would have been lost during a demolition; she did not speak to the loss of any sentimental items, as I would have

expected; and she did not specify the value of any of the items she would have lost during the course of the demolition of her home. In this regard, I cannot help but wonder how someone who testified that she has lived in a home since 1940 would not tell the court about the loss of her valuables and items presumably accumulated over a life time in a matrimonial home.

32. Again, the Contract between the parties refers to 'notice', 'materials' and 'nominal damages'. I reiterate that no evidence was led in connection with those items either.

33. Further, and even more striking, the Plaintiff could not say, and there was insufficient evidence laid before this court to ascertain the answers to a number of critical questions. Namely, was there a house present on the property? If so, who owned it? Was it destroyed in a demolition? And, finally, who owned the property affected by the demolition?

34. The Plaintiff testified that "the house that was demolished was my matrimonial home since 1967" and "I had put up houses that I was renting, school, and classrooms that was demolished". Yet, in the same breath, she testified "I do not know who owns 28223/2", which for the avoidance of doubt, is the suit property on which the alleged demolitions took place.

35. Further to the above, the Plaintiff produced exhibit NG4 as part of her evidence presumably to show the value of her loss. However, the said exhibit refers to a different title, being L.R. 5980/ PT, and the valuation report does not show the presence of any house on the land. The Plaintiff was unable to explain the contradiction. During her cross examination she stated that "page 4 is my valuation report. I cannot see bungalow or houses were destroyed or a matrimonial home. It is not in that report".

36. In view of her failure to clarify the apparent error to the court or to provide some explanation, it is simply not clear to me if the said valuation was intended for the suit property or a totally different property. Faced with the above scenario, I am of the view that the said valuation creates more confusion than clarity. At best, it proves the Defendant's case, that no house could have been demolished as alleged by the Plaintiff. On the other hand, it may have no probative value at all.

37. Based on the facts as stated above, it would appear that the Contract may have been premised on an event which either never occurred, or on a suit property that does not belong to the Plaintiff. The evidence was insufficient to show that she owned the land; that her house was demolished; and she did not show the court the value of the loss occasioned by the alleged demolition.

38. The above ingredients are essential. It was incumbent on the Plaintiff as the party alleging the breach on the part of the Defendant, to discharge the burden of proof to the requisite degree of probability and show evidence of the loss that she suffered as a result of the breach.

39. I do not think that the above burden has been discharged on a balance of probability. The Plaintiff could not show that the property on which the demolition took place even belonged to her. Neither a title deed, or an official search was produced to that effect. In fact, she testified that she did not know who the owner was. In which case I ask myself, where does the breach arise? Secondly, she could not prove that her house was demolished. Third, she could not and did not explain how she arrived at the figure of Kshs. 10,000,000/= as compensation for damages.

40. To my mind, damages are ordinarily available to compensate one for loss occasioned arising out of a breach. The damages must therefore be pleaded and proved. In the case of David Bagine V Martin Bundi CA No. (Nrbi) 283/1996, the Court of Appeal referring to Lord Goddard CJ in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177) held that:-

> " It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and so to speak,

throw them at the head of the Court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

41. Based on the reasoning above, I find the Contract incapable of enforcement. I further find that the Plaintiff failed to prove the damages she incurred, and failed to prove her case on a balance of probability. Having found the above, the remaining issues are moot. The Plaintiff's suit is accordingly dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Plaintiff

.....For the Defendant