



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 193 OF 2011

SAMMY KURIA NDUNGU.....PLAINTIFF

VERSUS

SAMUEL MBUGUA IKUMBU.....DEFENDANT

JUDGMENT

BACKGROUND AND PLEADINGS

1. By an agreement executed by the parties hereto on the 2nd October 2010 and witnessed by the parties Advocate Kanyi Ngure, the plaintiff agreed to purchase from the Defendant part of the Defendant's land parcel No **Nakuru Municipality Block 10/92** which property was at the material times registered in the defendant's names, and particularly **Plot 4B measuring approximately 0.0231 Hactares** (herein called the suit plot)

2. The Salient terms of the Sale agreement were that the vendor acknowledged that the original lease document was in the possession of the Nakuru Municipal Council for purposes of sub-division, thus only a copy of the lease was shown and presented to the purchaser.

3. **At Clause 1** of the agreement, the purchase price was agreed at kshs 7,500,000/= payable as follows:

a. Kshs 5,000,000 payable to the vendor upon execution of the sale agreement herein whereby the vendor acknowledges receipt.

b. Kshs 1,250,000/= payable to the vendor on or before the 31/12/2010.

c. Kshs 1,000,000/= payable to the vendor on or before the 31/3/2011.

4. **Clause 2** stated that the purchaser herein undertakes to pay the full and final balance as agreed on or before the 31st March 2011, **provided that the vendor shall be ready and willing to surrender a clean certificate of lease at the time of completion.**

5. The Sale agreement was prepared and drawn by the Advocate, Mr Kanyi Ngure, upon instructions of the vendor who was accompanied with his Surveyor and the purchaser, as to what they had agreed.

As the Advocate prepared the agreement, the parties went away and came back later to execute the agreement, which they did upon being satisfied that the terms thereof were as agreed.

6. **In particular, the vendor acknowledged receipt of the deposit of kshs 5 million in terms of Clause 1(a).** The Advocate Kanyi Ngure witnessed the agreement and was duly paid his legal fees by both the parties. That was on the 2nd October 2010.

7. It was a further term of the agreement at Clause 11 that whoever defaults shall pay to the other 100% of the purchase price in damages and if it's the vendor he shall return the purchase price and the damages of 100% within two (2) months of breach of agreement.

At Clause 13, it is stated that the parties herein enter into the agreement voluntarily without any coercion whatsoever.

8. In terms of **Clause 1 (b)** of the agreement, the purchaser called upon the vendor to collect the instalment of shs 1,250,000/= but he failed to collect it, explaining that he had no evidence of payment of the initial shs 5 million. And thereafter upon the purchasers Advocates forwarding the four payment cheques for the balance, the vendor returned them through his advocates M/S Ndeda and Advocates, despite a

demand by the purchaser for the release of the Certificate of Lease for the subject suit plot which was never done.

The above precipitated the filing of this suit by the plaintiff (purchaser).

THE PLAINT

9. By a **plaint** dated **26/7/2011** and **Amended on the 19/9/2011**, the plaintiff, (Purchaser) alleging breach of the sale agreement by the Defendant (Seller) and citing wilful, neglect and refusing to acknowledge payments for the balance of the purchase price as per the sale agreement and failure to surrender a clean certificate of lease for the suit plot, including fraudulent misrepresentation of the status of the suit plot by the defendant, among others, sought **Orders FOR:**

a. A permanent injunction restraining the Defendant by himself, his servants/agents and all those allied to him from entering, remaining, cultivating, sellingor in any other manner howsoever from dealing with plot No 4B measuring approximately 0.0231 Ha. of parcel No Nakuru Municipality Block 10/92 so as not to interfere with the plaintiff's rights.

b. An order of Specific performance against the Defendant to, upon receipt of the balance of the purchase price, within 30 days, to surrender to the plaintiff a clean certificate of lease for plot No 4B (the suit Plot) as per the Sale Agreement executed on the 2/10/2010.

IN THE ALTERNATIVE;

c. The Defendant be compelled to pay the plaintiff kshs 12,250,000/= within 30 days from date of Order by the court, which money comprise of kshs 5,000,000/= the initial deposit on the purchase price together with kshs. 7,250,000/= as penalty for breach of the terms of the Sale Agreement with interest at court rates from time of the breach being the 31/3/2011 till payment in full.

d. Costs of the suit.

10. In denying the plaintiffs claim, the defendant filed a **statement of defence and counterclaim** on the 30/August 2011. It is dated 21/8/2011

In summary, the defendant denied ever receiving any money from the plaintiff and puts him to strict proof.

11. **Without prejudice**, the defendant denied receiving the deposit of Kshs 5 million and thus was in breach of the terms of the Sale Agreement. By the **Counterclaim** the defendant avers that as a result of the breach of contract, the defendant claims damages in line with terms of the agreement together with costs and interest thereon.

12. Upon closure of the parties evidence, they filed written submissions which I have carefully considered against the respective pleadings and testimonies.

13. ISSUES FOR DETERMINATION

1. Whether there was a valid contract between the parties.

2. Whether there was a breach of the sale agreement and if so, by which party.

3. Whether the parties are entitled to their respective reliefs as sought in their respective pleadings.

14. VALID CONTRACT?

What constitutes a valid contract between parties is stated under **Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya.**

Section 3 (3) states; No suit shall be brought upon a contract for the disposition of an interest in land unless;

a. The contract upon which the suit is founded

i. Is in writing

ii. Is signed by all the parties thereto; and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such parties.

15. **Black's Law Dictionary, 8th Edition** defines the term **Contract:** to refer to three different things:-

i. The series of operative acts by the parties resulting in new legal relations.

ii. The physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself.

iii. The Legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers and privileges.

16. The Court in **L Estrange V.F Graucob Ltd (1934) 2 K.B, 394** cited by the court of Appeal in **Securicor Courier (K) Ltd –Vs- Benson David Onyango & Another (2008) KLR** held

“when a document containing contractual terms is signed, then in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he had read the document or not”

Gladly, both parties to the contract by their evidence and submissions agree that there exists a valid and enforceable contract by the sale agreement executed on the 2/10/2020.

17. **BREACH OF THE CONTRACT, AND IF SO, BY WHICH PARTY?**

None performance of any of the terms of a contract constitutes a breach by the party that fails to perform. It has not been alleged that any of the two parties to the contract herein was under a disability when they executed the agreement for sale. The court is thus under a duty to interpret and construct the said agreement in plain meaning of the words and sentences contained therein, so as to conform to the written expression of the parties intention.

18. It is never the business of the court to re write the parties contract, unless there exists coercion, fraud undue influence or misrepresentation, which must be pleaded and proved – **National Bank of Kenya Ltd Vs. Pipeplastic Samkolit (K) Ltd & another (2001) KLR Pg 112.**

19. The **Court of Appeal in Securicor Couriers (K) Ltd - Vs- Benson David Onyango & another (2008) eKLR**, rendered that;

“if a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature is shown to be obtained by fraud or misrepresentation”.

20. I have earlier stated that there is no evidence that either of the parties were under any disability.

Under Clause 1 (1) of the sale agreement, the defendant acknowledged having received the deposit of Kshs.5 million and agreed to the balance of Shs.2,250,000/= being paid in agreed instalments.

The plain meaning of the above, clause, in my view, is that, before signing the agreement, the vendor (defendant) had already received the deposit of Kshs.5 million. It matters not in whatever form or manner the payment was made, provided that the receiver acknowledges the receipt.

21. It could have been paid in cash or kind. That is what, in my view, the learned Judges of Appeal held to be the legal position in the **Securicor Couriers Case (Supra)**.

By his acceptance of the terms of the agreement by appending his signature thereto, the Defendant (Vendor) assented to the totality of the contract.

There is no pleading by the defendant that his signature was obtained by fraud or coercion, or even misrepresentation.

22. To the contrary, it is the defendant who misrepresented the true status of the suit plot 4B to the plaintiff, by not disclosing that he had no clean interest and title to pass to the plaintiff as it had been charged to KCB as it came to light during the hearing and that no authority to subdivide or sale had been obtained, but instead, misrepresented to the plaintiff that the original certificate of lease was held by the Nakuru Municipal Council pending sub division.

The defendant did not, in his pleadings, evidence or submission challenge this piece of evidence adduced by the plaintiff.

23. I find it very difficult to accept the Defendant’s evidence on how the deposit of Kshs. 5 million shilling was withdrawn by the plaintiff and re - deposited back to his Barclays Bank account after he could not bank it into his HFCK Bank Account on the 2nd October 2010, before he executed the sale agreement. The facts do not add up or make any sense or at all.

24. If that were so, one would wish to know why the defendant willingly and readily signed the agreement acknowledging receipt of the said money if indeed he had not received it.

Further, the evidence of banking slips to and from the plaintiff’s Barclays Bank account are all stamped on the 4th October, 2010 not the material date, the 2nd October 2010.

25. A party who wishes a court to find in its favour ought to call sufficient evidence to prove its claim – **Section 107 of Evidence Act**. While it was the duty of the Defendant to call evidence to prove the above allegations, he failed to do so. A Barclays Bank official would have explained to the court how money withdrawn on the 2nd October 2010 by the plaintiff as alleged and was re-deposited on the same day. Would have the withdrawal and deposit receipts stamped, two days after the 4th October 2010.

Being not a qualified and or expert witness as to the credibility of the above bank slips, I can only trust such evidence as of no evidential value on the dealings on the 2nd October 2010.

26. It is trite that failure by a party to call as witness any person whom he might reasonably be expected to call if that person's evidence be favourable to him, may prompt a court to infer that, that person's evidence would not have helped the party's case - **Kimotho versus Kenya Commercial Bank (2003) IEA 108**.

27. There is sufficient evidence that the plaintiff was ready to complete his part of the bargain under the contract. He issued cheques, within the stipulated period for the balance of the purchase prices which were returned by the defence on an explanation that he had not received the initial deposit of Kshs 5 million for lack of evidence that the said money had been paid to him, forgetting that he had acknowledged receipt of the same in the Sale Agreement.

28. I have discounted that kind of evidence after the defendant willingly acknowledged receipt thereof in the sale agreement. It cannot be that the plaintiff is the party who frustrated performance of the contract when all evidence before the court point to the defendant as the party who frustrated the contract. An allegation that the defendant reported the matter to the police and was investigated remains as such, an allegation, as no prove was tendered in any form.

29. From the foregoing, I find and hold that there was indeed a material breach of the contract/sale agreement by the defendant.

30. **RELIEF SOUGHT BY THE DEFENDANT BY ITS COUNTERCLAIM.**

Having come to the finding that the defendant breached the terms of the sale agreement, it follows that the default **clause Number 11** of the agreement cannot come to his aid. The counterclaim is dismissed.

31. **RELIEF TO THE PLAINTIFF.**

The defendant at the material times did not have a clear certificates of lease, free from encumbrances. It was charged to Kenya Commercial Bank. No evidence was adduced during the hearing that the suit plot was available for transfer to the plaintiff or any other person, or at all, without authorization by the charge, the Bank. No evidence was tendered that by the time of hearing of the suit, the said suit plot was available for transfer to the plaintiff.

To that extent, the plaintiff's prayer for specific performance cannot be granted.

32. **The alternative relief** for refund of the sum of Kshs 5 million being penalty (default clause 11) is more appropriate.

The default clause, which the parties willingly and freely executed shall therefore apply against the party in breach.

33. I have already rendered that the terms of the contract are binding to both parties. The court cannot attempt to rewrite it, nor amend the terms, unless it is proved, by credible evidence, that there was fraud, coercion or misrepresentation by either of the parties. This has been found to have been lacking.

Clause 11 of the sale agreement states

“That whoever defaults shall pay to the other 100% of the purchase price in damages and if it's the vendor he shall return the purchase price and the damages of 100% within two (2) months of the breach of the agreement”.

34. The Vendor shall bear consequences of the breach. He received a sum of Kshs 5 million deposit towards the purchase price agreed as Kshs 7,250,000/=. He is under an obligation to pay back to the plaintiff the sum of shillings 5 million plus the penalty of Kshs 7,250,000/= as stipulated in the agreement.

35. The upshot is that, the plaintiff has proved his case to the required standards.

Consequently

1. There shall be Judgment for the plaintiff against the defendant in the sum of Ksh 12,250,000/= plus interest at court rates from the date of this judgment until payment in full.

2. The defendants' counterclaim is dismissed with costs.

3. Costs of the suit shall be borne by the defendant.

DELIVERED, SIGNED AND DATED ELECTRONICALLY AT KERUGOYA THIS 1ST DAY OF OCTOBER, 2020.

J.N. MULWA

HIGH COURT JUDGE

ADVOCATES:

1. Kanyi Ngure & Company

Advocates

Nakuru

2. Ndeda & Associates

Advocates

Gate House

Nakuru