



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 427 OF 2012

DAVIS NATHAN CHELOGOI.....PLAINTIFF

=VERSUS=

DR. NOAH MAHALANG'ANG'A WEKESA.....DEFENDANT

JUDGMENT

Background:

At the centre of the dispute in this suit are two (2) parcels of land known as Kapkoi/Mobonde Block 1/268 and Kapkoi/Mabonde Block 1/269 (hereinafter jointly referred to as “the suit properties” and singly as “plot No. 268” and “plot No. 269” respectively). At all material times, the suit properties were owned by the plaintiff although plot No. 269 was registered in the name of one, Sammy Silas Komen. The plaintiff is a retired civil servant. He served as a District Commissioner for several years before rising to the rank of Deputy Provincial Commissioner, Nairobi. As at the time of the transaction the subject of this suit, the plaintiff was serving as a District Commissioner and was based at Kitale. On the other hand, the defendant was at the material time a Member of Parliament for Kwanza Constituency.

The plaintiff brought this suit against the defendant on 20th July, 2012 seeking judgment for; Kshs. 6,000,000/= being the balance of the purchase price for the suit properties or damages for breach of legitimate expectation, and in the alternative, rescission of the agreement for sale of the suit properties and cancellation of the transfer of the suit properties to the defendant.

The plaintiff averred that on or about 10th September, 2009, he entered into an agreement for sale of the suit properties with the defendant under which he agreed to sell and the defendant agreed to purchase the suit properties at a consideration of Kshs. 12,000,000/=. The plaintiff averred that the defendant paid a sum of Kshs. 200,000/= as a deposit and was to pay the balance amounting to Kshs. 11,800,000/= through a loan that the defendant was to obtain from the Parliamentary Service Commission after the suit properties were transferred to him and a charge registered in favour of the Parliamentary Service Commission for the said sum of Kshs. 11,800,000/=. The plaintiff averred that even after the suit properties were transferred to the defendant and charged to the Parliamentary Service Commission, the defendant only remitted to him through the defendant’s advocate, additional sum of Kshs. 5,800,00/= making the total amount paid by the defendant to be Kshs. 6,000,000/=. The plaintiff averred that the payment of the said sum of Kshs. 6,000,000/= left a balance of Kshs. 6,000,00/= due and payable by the defendant to the plaintiff on account of the purchase price for the suit properties.

The defendant filed a defence on 28th August, 2012. In his defence dated 27th August, 2012, the defendant denied that he entered into an agreement for sale with the plaintiff to purchase the suit properties at a consideration of Kshs. 12,000,000/=. The defendant averred that the agreement dated 10th September, 2009 that he entered into with the plaintiff for the purchase of the suit properties provided that the consideration was Kshs. 6,000,000/= of which he paid to the plaintiff a sum of Kshs. 200,000/= and the balance thereof in the sum of Kshs. 5,800,000/= was to be paid directly to the plaintiff by the Parliamentary Service Commission from which the defendant was obtaining a loan facility to purchase the suit properties. The defendant averred that although the purchase price for the suit properties was agreed at Kshs. 6,000,000/=: he successfully applied for a loan of Kshs. 12,000,000/= from the Parliamentary Service Commission (hereinafter referred to as the “P.S.C”) a portion of which he used to clear the balance of the purchase price of Kshs. 5,800,000/= that was due to the plaintiff. The defendant averred that there was no payment outstanding from the defendant to the plaintiff as alleged or at all.

The plaintiff filed a reply to defence on 28th March, 2014 that was amended on 14th April, 2014. The plaintiff averred in his reply to defence that he was a stranger to the agreement for sale in which he had allegedly agreed to sell the suit properties to the defendant at Kshs. 6,000,000/=. The plaintiff averred that the agreement that the defendant had submitted to the P.S.C for the purposes of the loan that he had applied for had a purchase price of Kshs. 12,000,000/= for the suit properties. The plaintiff averred that the agreement for sale that the defendant presented to the P.S.C was the one that he had entered into with the defendant. The plaintiff averred that the defendant having derived a benefit from the said agreement for sale in which the purchase price for the suit properties was agreed at Kshs. 12,000,000/=: the defendant was estopped from denying the agreement or the validity thereof.

The trial:

At the trial, the plaintiff gave evidence and did not call a witness while the defendant gave evidence and called one witness.

The plaintiff's case:

The plaintiff tendered oral evidence and also adopted his witness statement dated 20th July, 2012 as part of his evidence in chief. The plaintiff produced copies of; the agreement for sale dated 10th September, 2009 with a purchase price of Kshs. 12,000,000/=, a letter from the P.S.C to Jackline P. A. Omolo & Co. Advocates dated 11th September, 2009, a letter dated 18th July, 2011 from the P.S.C to O.N.Ojwang & Co. Advocates and an agreement for sale dated 10th September, 2009 with a purchase price of Kshs. 14,000,000/= as plaintiff's exhibits 1, 2, 3 and 4 respectively. From his plaint, reply to defence, oral evidence and witness statement dated 20th July, 2012, the plaintiff's case is as follows. The plaintiff sold to the defendant the suit properties at a consideration of Kshs. 12,000,000/= through a written agreement for sale dated 10th September, 2009. The defendant paid to him a deposit of Kshs. 200,000/= leaving a balance of Kshs. 11,800,000/= which was to be paid to him by the Parliamentary Service Commission (P.S.C) from which the defendant had sought a loan to purchase the suit properties, once the properties were transferred to the defendant and charged to the P.S.C. On the strength of the said agreement for sale dated 10th September, 2009, the defendant applied for and obtained a loan of Kshs. 11,800,000/= after making representation that he was to use the proceeds of the said loan to pay for the suit properties. To facilitate the release of the loan that the defendant had applied for from the P.S.C which was to be secured by the suit properties, the plaintiff handed over to the defendant's advocates, Jackline P. A Omolo & Co. Advocates which was also acting for the P.S.C, the title deeds for the suit properties, signed applications for Land Control Board Consent to sell and transfer the suit properties and the instruments of transfer on condition that the P.S.C would pay to him the balance of the purchase price in the sum of Kshs.11,800,000/= once the suit properties were registered in the defendant's name and charged to the P.S.C.

The suit properties were duly registered in the name of the defendant and charged to the P.S.C for Kshs. 11,800,000/=. The P.S.C thereafter released to the defendant and the P.S.C's Advocate, Jackline P.A Omolo & Co. Advocates the balance of the purchase price in the sum of Kshs. 11,800,000/= for onward payment to the plaintiff. The defendant and his said advocates paid to the plaintiff a sum of Kshs. 5,800,000/= only making the total amount paid by the defendant for the suit properties to be Kshs. 6,000,000/=. The defendant declined to settle the balance of the purchase price in the sum of Kshs. 6,000,000/= despite demand. The said act by the defendant amounted to a breach of the agreement for sale. By releasing the completion documents to the defendant before payment of the full purchase price, he had a legitimate expectation that he would be paid the balance of the purchase price once the suit properties were registered in the name of the defendant and charged to the P.S.C which expectation was breached by the defendant when he failed to pay the balance of the purchase price. The plaintiff sought specific performance of the agreement for sale dated 10th September, 2009 by payment of the said sum of Kshs. 6,000,000/=. The plaintiff contended that he was also entitled to the said sum of Kshs.6,000,000/= as damages for breach of legitimate expectation.

The defendant's case:

As stated earlier in the judgment, the defendant gave evidence and called one witness, Jackline P. A. Omolo (DW1). The defendant produced copies of; an agreement for sale dated 10th September, 2009 in respect of Kapkoi/Mabonde Block 1/268 and Kapkoi/Mabonde Block 1/269 with a purchase price of Kshs. 6,000,000/=: instruments of transfer of land dated 15th October, 2009 in respect of Kapkoi/Mabonde Block 1/268 and Kapkoi/Mabonde Block 1/269, original letter from O. N. Ojwang & Company Advocates to the defendant dated 22nd February 2011, original letter dated 7th July, 2011 from O. N. Ojwang & Company Advocates to Jackline P.A. Omolo & Co. Advocates and original letter dated 7th July, 2011 from the plaintiff to O. N. Ojwang & Company Advocates as defendant's exhibits 1, 2, 3, 4, 5(a) and 5(b) respectively. The defendant's case as set out in his defence, oral evidence, witness statement dated 5th September, 2012 and the evidence of his witness (DW1) was as follows. The plaintiff was known to the defendant. The defendant purchased the suit properties from the plaintiff at Kshs. 6,000,000/=. The defendant paid to the plaintiff a sum of Kshs. 200,000/= as a deposit leaving a balance of Kshs. 5,800,000/= that was to be paid from a loan facility that he was obtaining from P.S.C. Although the purchase price for the suit properties was Kshs. 6,000,000/= the defendant managed to obtain from the P.S.C a loan of Kshs. 11,800,000/= on the security of the suit properties. The defendant did not enter into any other agreement with the plaintiff apart from the said agreement dated 10th September, 2009 and the said agreement was not varied. It was the plaintiff who was to obtain Land Control Board Consent which he did. The consideration for each property was declared in the transfer as Kshs. 3,000,000/=. The defendant contended that the plaintiff's claim had no basis as he confused the loan amount of Kshs. 11,800,000/= that the defendant obtained from P.S.C with the agreed purchase price of Kshs. 6,000,000/=. The defendant contended that the purchase price for the suit properties was not Kshs. 12,000,000/= as claimed by the plaintiff. The defendant contended that he was entitled to a mortgage loan of Kshs. 12,000,000/= from the P.S.C and that the plaintiff and he signed two (2) agreements for sale; the first one in which the purchase price was indicated as Kshs. 6,000,000/= which was the agreed purchase price and a second agreement in which the purchase price was indicated as Kshs. 12,000,000/= which agreement was to be used by the defendant to obtain a full loan amount of Kshs. 12,000,000/= from the P.S.C. The defendant contended that the agreement for sale with a purchase price of Kshs. 12,000,000/= was for his personal use and that he was only to pay to the plaintiff Kshs. 6,000,000/= which was the agreed purchase price. The defendant denied knowledge of an agreement for sale with an agreed purchase price of Kshs. 14,000,000/=. The defendant contended that the P.S.C was not aware of the purchase price that was agreed upon between the defendant and the plaintiff which was Kshs. 6,000,000/= and not Kshs. 12,000,000/=. The defendant contended that the plaintiff was aware that he was obtaining a loan of Kshs. 12,000,000/= from the P.S.C and that the plaintiff signed both the agreements in which the consideration was given as Kshs. 6,000,000/= and the other where the consideration was given as Kshs. 12,000,000/.

Issues for determination by the court:

The parties did not frame and file in court a statement of agreed issues. From the pleadings, the following in my view are the issues that arise for determination in this suit;

1. Whether the sale agreement between the plaintiff and the defendant in respect of the suit properties provided for a purchase price of Kshs. 6,000,000/= or Kshs. 12,000,000/=.

2. Whether the defendant breached the said agreement for sale.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Who is liable for the costs of the suit?

Whether the agreement for sale between the plaintiff and the defendant in respect of the suit properties provided for a purchase price of Kshs. 6,000,000/= or Kshs. 12,000,000/=.

From the evidence on record and the submissions by the advocates for the parties, I am convinced that the plaintiff and the defendant entered into only one agreement for sale and that is, the sale agreement dated 10th September, 2009 (D.Exh.1) in which the purchase price for the suit properties was agreed upon by the parties at Kshs. 6,000,000/=. The sale agreement dated 10th September, 2009 (P.Exh.1) in which the purchase price is indicated as Kshs. 12,000,000/= was a forgery created by the defendant with the knowledge of the plaintiff to deceive the P.S.C that he was purchasing the suit properties at Kshs. 12,000,000/= so as to justify a mortgage loan of Kshs. 11,800,000/= that he had applied for. In a sworn affidavit dated 19th September, 2013 and filed in court on 24th September, 2013, the defendant admitted that the said agreement dated 10th September, 2009 with a consideration of Kshs. 12,000,000/= was his own creation. In paragraph 3 of that affidavit, the defendant stated in part as follows:

*“The agreement produced by the plaintiff and marked as **BNC-1** in his further affidavit was done by me for the purposes of obtaining a bigger loan from the Parliamentary Service Commission. The plaintiff had totally nothing to do with it and the same has been fraudulently obtained by the plaintiff.”*

In his evidence in cross-examination, he stated that the said agreement was for his “personal use”. In paragraph 5 of the witness statement of the defendant’s witness, Jackline P. A. Omolo (DW1) that she adopted as her evidence in chief, she stated that the agreement for sale in which the purchase price was indicated as Kshs. 12,000,000/= was created by the defendant by altering page 2 of the agreement dated 10th September, 2009 that he had entered into with the plaintiff in which the purchase price was Kshs. 6,000,000/=. DW1 stated that the defendant did this by altering the said sum of Kshs. 6,000,000/= to Kshs. 12,000,000/= to enable him get a loan of that amount from P.S.C. In that paragraph of the statement DW1 stated as follows:

“I am informed by the defendant that he altered page 2 of the agreement for sale to reflect a purchase price of shs. 12 million in order to get a bigger loan from Parliamentary Service Commission.”

In her testimony in cross-examination, DW1 reiterated that the agreement for sale dated 10th September, 2009 in which the purchase price was given as Kshs. 12,000,000/= was made by the defendant through insertion into the agreement of a new page 2 in which the purchase price was indicated as Kshs. 12,000,000/= and the removal of page 2 which had a consideration of Kshs. 6,000,000/=.

With regard to the agreement for sale dated 10th September, 2009 in which the purchase price for the suit properties was indicated as Kshs. 14,000,000/=. the defendant denied any knowledge of this agreement. The plaintiff also denied that he had entered into such agreement with the defendant. That only left the two (2) agreements dated 10th September, 2009 one in which the purchase price is indicated as Kshs. 12,000,000/= which has been relied on by the plaintiff as the basis of his case and the other in which the purchase price is indicated as Kshs. 6,000,000/= which the defendant has claimed to be the valid agreement between the parties.

The plaintiff’s letter dated 7th July, 2011 to his former advocates O. N. Ojwang & Company Advocates (D. Exh. 5(b)) leaves no doubt that the plaintiff was aware of the two agreements I have referred to above with purchase prices of Kshs. 6,000,000/= and Kshs. 12,000,000/=. As correctly submitted by the defendant’s advocate, the letter confirms that the valid agreement that was executed by the plaintiff was the one in which the purchase price was agreed at Kshs. 6,000,000/=. In the letter, the plaintiff had contended that this agreement in which the purchase price was agreed at Kshs. 6,000,000/= was not produced before the Land Control Board for the purposes of the consent. The plaintiff contended in the letter that the defendant presented to the Land Control Board, “the other” agreement which I believe is the one with the purchase price of Kshs. 12,000,000/=. The plaintiff referred to this agreement with the purchase price of Kshs. 12,000,000/= in his letter as having been “forged”. The plaintiff claimed that if the defendant had presented to the board the agreement they had entered into with the defendant in which the consideration was Kshs. 6,000,000/= the Land Control Board would not have given consent as they would have noted that the agreement was unfair to the plaintiff.

In the letter, the plaintiff seems to be complaining of a bad bargain and his pain seems to have arisen from the fact that, whereas the suit properties were valued at over Kshs. 14,000,000/=. that value was not disclosed to him when he settled for Kshs. 6,000,000/= and that the defendant received a loan of Kshs. 11,800,000/= on the security of the suit properties and only paid him Kshs. 6,000,000/=.

The letter dated 22nd February, 2011 that was addressed to the defendant by the plaintiff’s former advocates O. N. Ojwang & Co. Advocates (D Exh. 4) which was the first demand letter to the defendant according to the evidence on record confirms that the plaintiff had entered into the agreement for sale dated 10th September, 2009 in which the purchase price for the suit properties was agreed at Kshs. 6,000,000/=. The letter also confirms that the plaintiff was aware of the other agreement that was created by the defendant in which the purchase price was indicated as Kshs. 12,000,000/=. The letter talks of “a written agreement” to pay Kshs. 6,000,000/= and “a verbal agreement for Kshs. 6,000,000/=” making a total of Kshs. 12,000,000/=. In the letter, the plaintiff’s advocates stated that:

“Our client informs us that for reasons best known to you, you directed to have two separate Agreements (emphasis added) for the payment of the amount of Kshs.12,000,000/= Kenya Shillings Twelve Million as follows:

a) A verbal agreement to pay (Kshs.6,000,000/=) Kenya Shillings Six Million

b) A written Agreement dated 10th September, 2009 to pay a deposit of (Kshs.200,000/=) Kenya Shillings Two Hundred Thousand and the balance of (Kshs.5,800,000/=) Kenya Shillings Five Million Eight Hundred Thousand to be paid directly to our client by the Parliamentary Service Commission”.

From the foregoing, I am of the view that the plaintiff has not told the court the truth when he claims that he did not sign the agreement for sale in which the agreed purchase price was Kshs. 6,000,000/=. What I can infer from D. Exh. 4 and D. Exh. 5(b) is that although the plaintiff had agreed to sell to the defendant the suit properties at Kshs. 6,000,000/=:, the two parties may have had some verbal agreement or arrangement under which the defendant was to pay to the plaintiff additional monies for the assistance the plaintiff rendered to the defendant in the processing of the loan from P.S.C which arrangement the defendant seems not to have honoured. In his letter dated 7th July, 2011, (D. Exh. 5(b)), the plaintiff poured out his frustrations as follows to his former advocates aforesaid:

“He (the defendant) dishonored all the gentleman’s agreement envisaged in the earlier agreement (emphasis added) and deliberately schemed from day one to defraud the transaction.”

The defendant’s exhibits 1, 2 and 3 supports the defendant’s case that the agreed purchase price for the suit properties was Kshs. 6,000,000/=. The plaintiff did not deny signing D.Exh. 2 and D.Exh. 3 in which the consideration for each property was given at Kshs. 3,000,000/=. In his evidence, the plaintiff claimed that he had signed blank transfer forms. As I mentioned at the beginning of this judgment, the plaintiff was a senior civil servant when he entered into this transaction; if he decided to sign blank transfer forms or to assist the defendant to obtain a loan from the P.S.C that he was not entitled to in return for some under-the-table consideration, he was doing so at his own risk and with the full knowledge of the consequences in the event that the defendant did not honour the dishonourable bargain.

Due to the foregoing it is my finding that the legal and valid agreement for sale that was entered into between the defendant and the plaintiff was the one dated 10th September, 2009 in which the purchase price was agreed at Kshs.6,000,000/=:.

Whether the defendant breached the said agreement for sale.

As I have held above, the purchase price for the suit property was agreed at Kshs. 6,000,000/=: . It was common ground that the defendant paid to the plaintiff Kshs. 6,000,000/=: . A sum of Kshs.200,000/=: was paid as a deposit and the balance in the sum of Kshs.5,800,000/=: was paid after the suit properties were transferred to the defendant and charged to the P.S.C. Since the plaintiff was paid the full purchase price that he bargained for, it is my finding that the defendant did not breach the agreement between him and the plaintiff.

Whether the plaintiff is entitled to the reliefs sought:

The plaintiff had sought payment of the balance of the purchase price in the sum of Kshs. 6,000,000/=: and in the alternative, rescission of the agreement for sale between him and the defendant. As I have held above, the purchase price for the suit property was Kshs. 6,000,000/=: which was paid to the plaintiff in full. The plaintiff is therefore not entitled to any other payment from the defendant. With regard to the alternative claim, no basis was laid to warrant the rescission of the agreement for sale dated 10th September, 2009 that was fully performed. The plaintiff had contended that the consents to transfer the suit properties were fraudulently obtained. Clause 4 of the agreement for sale placed the obligation to obtain Land Control Board consent upon the plaintiff. The defendant and DW1 stated that it was the plaintiff who obtained the consents which he has claimed to be fraudulent. The burden was upon the plaintiff to prove that the said consents were obtained by the defendant. No such proof was placed before the court. It follows therefore that if there was any fraud in the acquisition of the said consents, the fraud could only be attributed to the plaintiff. It is my finding therefore that the plaintiff is not entitled to any of the reliefs sought in the plaint.

Who is liable for the costs of the suit?

As a general rule, costs follow the event and it is at the discretion of the court. In this case, I have noted that the defendant was involved in an illegal and fraudulent alteration of the agreement for sale that he entered into with the plaintiff and created another “agreement” which he used to obtain a loan from P.S.C which he would otherwise not have been entitled to. The court will express its disapproval to such conduct by denying the defendant the costs of the suit.

Conclusion:

In conclusion, I find no merit in the plaintiff’s claim. The suit is dismissed with each party bearing his own costs.

Delivered and Dated at Nairobi this 6th Day of February 2020

S. OKONG’O

JUDGE

Judgment read in open court in the presence of:

Mr. Momanyi h/b for Mr. Mokuia for the Plaintiff

Mr. Mutua h/b for Mr. Mungla for the Defendant

C. Nyokabi-Court Assistant