



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 208 OF 2008

DAVID KIVUTI GATIMO.....PLAINTIFF

VERSUS

NGECHA PROPERTIES LIMITED.....DEFENDANT

JUDGMENT

1. In the Plaintiff dated 17th November, 2008, the Plaintiff averred that on or about 22nd December, 2005, the Defendant owed him Kshs. 302,782 for goods received on credit or money had and received and that when the Defendant was unable to repay the money, they agreed that the Defendant will deposit his title number L.R. No. 12715/2190, Mavoko Municipality with him as security.
2. According to the Plaintiff, it was a term of the Agreement that if the Defendant fail to refund or pay the money owed on or before 12th February, 2006, the Defendant would forfeit the suit land to the Plaintiff; that the Defendant having failed to honour the Agreement to repay the money as agreed, the suit land stands forfeited to him and that the Defendant should transfer the suit land to him.
3. The prayers that the Plaintiff is seeking in the Plaintiff is for an order compelling the Defendant to sign all the completion documents in respect of L.R. No. 12715/2190 and in default, the Deputy Registrar to sign the said documents.
4. In his Defence, the Defendant denied all the averments in the Plaintiff's Plaintiff and put the Plaintiff to strict proof thereof.
5. The Plaintiff, PW1, informed the court that the deceased, who was the initial Plaintiff, was his wife; that before the deceased passed on, she had a business by the name of Waciama Hardware and that the Defendant owed his wife Kshs. 302, 782 for goods received on credit.
6. It was the evidence of PW1 that in early December, 2005, they approached Peter Njeru Mugo Advocate and instructed him to draw a repayment Agreement dated 22nd December, 2005 and that the Agreement provided that if the Defendant failed to repay Kshs. 302,782 on or before 15th February, 2006, he would transfer land parcel number L.R. No. 12715/2190 in favour of his late wife.
7. According to PW1, the Defendant failed to repay the said money and that he surrendered to them the Title Deed for L.R. No. 12715/2190, signed and sealed the Transfer document but declined to give them his passport photographs to finalize the transfer process. PW1 informed the court that before the Defendant's Director agreed to sign the Agreement, he was arrested after giving them a cheque which bounced and that he gave them all the completion documents except the passport photographs and PIN.
8. DW1 informed the court that he is the Managing Director of the Defendant; that the Plaintiff had a hardware shop in Kawangware and supplied to him some building materials, namely, cement, timber and twisted iron bars and that the Defendant owed the Plaintiff Kshs. 302,782.
9. DW1 stated that when the two cheques had issued to the Plaintiff bounced, he informed the Plaintiff to give him more time to source for money; that the Plaintiff arranged for his arrest because of the debt and that he was taken to Industrial Area Police Station where he spent the night in cells. It was the evidence of DW1 that the police officer who arrested him compelled him to sign the Agreement and provide security for the money that was due and owing. DW1 admitted that he did sign the Agreement dated 24th February, 2006 in the office of Mugo Advocate and that he signed it under duress.
10. The Plaintiff's advocate submitted that the Defendant willingly signed the Agreement of 22nd December, 2005 and the commitment of 24th February, 2006; that the allegation of duress was raised by the Defence for the first time vide the Defendant's witness statement and that the issue of the Defendant having signed the Agreements under duress was never raised in the Defence.
11. Counsel submitted that the Defendant did not tender any evidence to support the allegation that he was forced to sign the Agreement made on 22nd December, 2005 and that the Defendant subsequently on 24th February, 2006 acknowledged that the Defendant's Director had

sold the suit land to the Plaintiff and even received a further sum of Kshs. 25,000 from the Plaintiff. Counsel submitted that the Defendant's Director having signed the Agreement of 22nd December, 2005, an order of specific performance should issue.

12. The Defendant's counsel submitted that under Order 2 Rule 3(1) of the Civil Procedure Rules, it is only facts and not evidence that should be pleaded; that the Defendant's Director was treated as a criminal by the police and that he signed the Agreement under duress.

13. Counsel submitted that in any event, the typed Agreement was not an Agreement to sell the suit property; that the said Agreement was a guarantee Agreement for repaying the money owed to the deceased and that the handwritten Agreement was not sealed by the Defendant's seal contrary to law.

14. The Defendant's advocate finally submitted that specific performance is an equitable remedy and can only be granted on clearly stated grounds; that the parties must have voluntarily signed the Sale Agreement for an order of specific performance to issue and that the sum of Kshs. 302,782 was not an agreed purchase price for the land.

15. The Plaintiff's case in these proceedings is that as at 22nd December, 2005, the Defendant owed the Plaintiff Kshs. 302,782 for the construction materials that he had sold to the Defendant. According to the Plaintiff, when the Defendant was unable to pay the said sum, and after issuing two cheques that bounced, the Defendant agreed to either pay the said sum on or before 12th February, 2006 or forfeit parcel of land known as L.R. No. 12715/2190 to the Plaintiff.

16. The Defendant's Director has admitted having signed the Agreement of 23rd December, 2005. However, it is the Defendant's case that the said Agreement was signed under duress and that in any event, the same is not valid.

17. The Plaintiff pleaded in his Complaint that on 22nd December, 2005, the Defendant owed him Kshs. 302,782 which he admitted in writing. The Plaintiff further averred in the Complaint that the Defendant agreed in writing that he will pay the owed amount on or before 12th February, 2006, and if not, the Defendant would forfeit the suit land.

18. In its Defence, the Defendant did not raise the issue of having signed the Agreement under duress. Instead, the Defendant denied having signed the alleged Agreement, or at all, and put the Plaintiff to strict proof thereof. The first time the Defendant raised the issue of having signed the Agreement under duress was when he filed the witness statement.

19. The rules on pleadings are provided for under Order 2 of the Civil Procedure Rules. Order 2 Rule 4 provides as follows:

"4. (1) A party shall in any pleading subsequent to a complaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."

20. It is clear from the above provision that the Plaintiff having averred that the Defendant signed an Agreement in which he agreed to transfer the suit land in the event he defaults in paying the admitted sum, the Defendant was under an obligation to specifically plead that he signed the said Agreement under duress. The failure to plead that he signed the Agreement under duress in his defence is contrary to Order 2 Rule 4, and the said Defence is not maintainable.

21. That being the case, and having admitted in evidence that he signed the typed Agreement of 23rd December, 2005 and the handwritten note of 24th February, 2006, I will only consider the validity of the two documents.

22. The Agreement dated 23rd December, 2005 was between Joseph Siro Mosioma and Waciama Hardware Limited. The said Agreement was titled "*Liability Agreement for payment of debt.*" The body of the Agreement referred to "*Ngecha Properties Limited*" as a Debtor and "*Waciama Hardware*" as a Creditor.

23. The Agreement further provided as follows:

"NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. The Debtor undertakes to pay the said sum of Kshs. 302,782 to the Creditor on or before 15th February, 2006.

2. Joseph Siro Mosioma personally guarantees this payment failure of which he undertakes to fully indemnify or personally be liable to pay the said sum of money.

3. That as security of payment of this money the Debtor has deposited its Certificate of Title L.R No. 12715/2190 with the lawyer P.N. Mugo & Company Advocates who is acting for both Creditor and Debtor.

4. ...

5. That as security for the execution of this contract the Vendor and Joseph Siro Mosioma have signed the transfer of L.R. No. 12715/2190.

6. That the Debtor and Joseph Siro Mosioma agrees in case of breach or failure to pay this debt, the Creditor is at liberty to take or have the said piece of land transferred into his name in full and final settlement of this liability.”

24. The Agreement was signed by the proprietor of Waciama Hardware and the two Directors of Ngecha Properties. In addition, the two Directors of Ngecha Properties Limited signed the Transfer of Lease form and the letter requesting the Commissioner of Lands to give his consent for the transfer of the suit property. The Defendant also handed in the original Certificate of Title of L.R. No. 12715/2190.

25. Indeed, were it not that the Land Registry demanded for the passport photographs of the Directors of Ngecha Properties Limited, the Plaintiff would have transferred the suit property in favour of his late wife without much ado.

26. Indeed, in a letter dated 24th February, 2006, the Directors of the Defendant did a letter in the following terms:

“We Directors of Ngecha Properties Limited have sold the above property for Kshs. 325,000. So both parties will not have any further claim from each other.”

27. The two Directors of the Defendant agreed to sell to the Plaintiff’s late wife, who was trading as Waciama Hardware, the suit land. They signed the Agreement of 22nd December, 2005 which clearly stated that in the event they do not pay a sum of Kshs. 302,782 by 15th February, 2006, the Plaintiff’s wife was at liberty to have the land transferred in her favour. Indeed, the two Directors went ahead and signed the transfer forms and the letter informing the Commissioner of Lands to give his consent to transfer the land to the Plaintiff’s wife.

28. The Defendant’s Director admitted that he never paid the sum of Kshs 302,782. Instead, he requested for an additional sum of Kshs. 25,000 from the Plaintiff, which he was given.

29. As observed by the learned author of “*Chitty on Contracts*”, page 1962, the jurisdiction to order specific performance of a contractual obligation is based on the existence of a valid enforceable contract. An order of specific performance will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.

30. The Agreement of 22nd December, 2005 was signed by the two Directors of the Company. The two Directors surrendered the title document and signed the transfer form. The Agreement dated 22nd December, 2005 was signed in the presence of an advocate, thus complying with the provisions of Section 3(3) of the Law of Contract Act.

31. That being the case, and the Directors of the Defendant having admitted in the letter of 24th February, 2006 that they had sold the suit land for Kshs. 325,000, I find and hold that the order of specific performance should issue.

32. For those reasons, I allow the Plaintiff’s Plaint dated 17th November, 2008 as follows:

a. The Defendant’s Director be and are hereby compelled to sign all the completion documents and transfer the land known as L.R. No. 12715/2190 Mavoko Municipality to the Plaintiff.

b. In case the Defendant’s Directors default on (a) above, the Deputy Registrar of this court to sign all the necessary documents to effect the transfer of L.R. No. 12715/2015 from the Defendant to the Plaintiff.

c. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE