



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 434 OF 2014

NDUNDE INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

EUGINIE MUTHONI DADET.....DEFENDANT

JUDGMENT

1. The plaintiff **NDUNDE INVESTMENT LIMITED** through a plaint dated 1st October 2014, filed on 3rd October 2014 sued the defendant **EUGINIE MUTHONI DADET** praying for judgment against the defendant for the following:-

- a) A permanent injunction do issue restraining the Defendant by themselves, their employees, agents, assigns, servants and any other persons howsoever acting under their directions from selling, offering for sale, transferring, charging, mortgaging and/or dealing in any manner whatsoever detrimental to the Plaintiff with all the parcels of land known as **L.R. No.2/52/1 (Wado Apartments)** Nairobi.
- b) An order of specific performance compelling the Defendant to complete the Sale Agreement dated 6th October 2011.
- c) An alternative order, without prejudice to those prayed for hereinabove, that the Defendant repays the total amount paid to her and or her assigns by the Plaintiff in fulfilment of this duties that is, Kenya Shillings Seven Million (Kshs.7, 000,000/-) as stated in the Sale Agreement dated 6th October 2011 and the interest thereon from the date of issuance of the demand letter.
- d) Costs of this suit.
- e) Any other relief that this Honourable Court may deem fit to grant.

2. The defendant was served with copies of the summons to enter appearance and extracted order issued by the court as per the affidavit of service by Charles M. Njagi dated 20th February 2017 and a copy of the advertisement "MN-3" attached as evidence of service of the summons upon the defendant dated 23rd December 2016.

3. The plaintiff filed a request for judgment dated 20th February 2017 for Kshs. 7,000,000/- and for other prayers. On 5th April 2017 interlocutory judgment was entered in favour of the plaintiff. On 30/7/2018 the matter was set down for mention on 26th September 2018 before a Judge for formal proof; on which date the case was set down for formal proof on 14th November 2018.

4. On 14th November 2018 the plaintiff gave evidence, produced his witness statement (**Exhibit P-1**) and bundle of documents (**Exhibit P-2**) in support of his claim. The witness statement was adopted as the plaintiff's evidence in chief and the plaintiff's bundle of documents as **Exhibit P-2** and supplementary list of documents as **Exhibit P-3**.

5. The plaintiff called one witness, **PW1** Joseph Mbai Mbugu, a director of the plaintiff company who adopted his witness statement (**Exhibit P-1**) as his evidence in chief and produced; plaintiff's list of documents (**Exhibit P2**) and plaintiff's supplementary list of documentary as **Exhibit P-3** in support of the plaintiff's claim.

6. I have perused the plaint, the witness statement Exhibit **P-1** and exhibits **P-2** and **P-3** and the issue arising thereto for consideration can be summed up as follows:-

- a) **Whether the plaintiff company entered into an agreement with the defendant and what were the terms and conditions of the agreement?**

b) Whether the defendant breached the parties agreement?

c) What relief is the plaintiff entitled to in this matter (if any)?

A. Whether the plaintiff company entered into an agreement with the defendant and what were the terms and conditions of the agreement?

7. The plaintiff testified that the defendant's advocate M/s Muchangi Nduati & Co. Advocates drafted a Sale Agreement dated 6th October 2011, which the plaintiff company and the defendant executed (*see page 2 of the plaintiff's list of documents*). The defendant in the said agreement being the registered proprietor of all the property known as **LR. No. 2/52/1 Nairobi Wado Apartments** agreed to sell the same to the plaintiff company at an agreed purchase price of Kshs.7, 000,000/- which sum the defendant acknowledged receipt in cash being paid to Ecobank (K) Limited upon execution of the agreement. The vendor was to sign and execution the transfer indicating and ensuring the plaintiff company records reflect the purchaser is the correct owner. The said Kshs. 7,000,000/- was to be paid by the purchaser on or before 31st April 2013 upon which the defendant was to surrender the original title **No. L.R. No.2/52/Nairobi Wado** to the purchaser which would be retransferred to the vendor upon repaying the purchase price in full. That upon payment of purchase price the vendor was to take complete possession of the aforesaid property.

8. In view of the plaintiff's uncontroverted evidence, I am satisfied that the plaintiff company has demonstrated that it entered into a sale agreement with the plaintiff in terms and conditions set out in the Sale Agreement on page 2 of the plaintiff's bundle of documents. The plaintiff company has further demonstrated throughout annexure 1, dated 10th October 2011 to Eco Bank Kenya and No. 2 a cheque requisition voucher cheque No. via **RTGS** in respect of file name Ndunde Investment Limited payable to Ecobank Kenya Limited; A/c Euginie Muthoni Dadet, A/c No. [...] in respect of 2009 Redemption money an amount of Kshs.7, 000,000/- was paid on 10/10/2011 as per exhibit **P-3** on plaintiff's supplementary list of bundle of documents.

9. In view of the above, I am satisfied a valid agreement was entered into between the plaintiff company and the defendant, whose terms and conditions were clear and unambiguous and whose terms binds both the plaintiff company and the defendant.

B. Whether the defendant breached the parties agreement?

10. The parties agreement dated 6th October 2011 required the vendor to sign and execute the transfer documents immediately and ensure the company records reflected the purchaser as the correct owner. The vendor was also required to surrender the original title **LR. No.2/52/1 Nairobi Wado Apartments** to the purchaser upon repaying the agreed purchase price of Kshs. 7,000,000/- and that the vendor was to remain in complete possession of the property.

11. In this suit there is no dispute that the defendant's Advocate prepared the Re-Assignment of mortgage investment, had it duly executed by the mortgagee in favour of the defendant and the mortgagee released the title documents to the property to the plaintiff's Advocate with full knowledge and consent of the defendant. The defendant also furnished the plaintiff's Advocate with her photographs and copy of the Pin Certificate but the plaintiff urges the defendant in breach of the agreement failed to execute the transfer documents. The terms and conditions of the sale agreement were specific in that the defendant was to sign and execute the transfer immediately. That though the plaintiff performed it's part of the terms agreed upon, the defendant by failing to sign and execute the transfer documents breached the terms and conditions of the sale agreement. I therefore find that the plaintiff has proved on balance of probability, that the defendant has breached the terms and conditions as set out in parties agreement dated 6th October 2011.

C. What relief is the plaintiff entitled to in this matter (if any)?

12. The parties Sale Agreement dated 6th October 2011 is silent on the relief, that each of the pay would have sought in case of the breach of the contract by any of the party to the contract. The offended party therefore is entitled to turn to law of the contract to seek appropriate relief. In the plaintiff's plaint, it has sought five prayers; however during the hearing of this matter the plaintiff specifically prayed for prayer No. 2 in the plaint; thus an order for specific performance compelling the defendant to complete the Sale Agreement dated 6th October 2011 be granted. The prayer was part of the parties agreement under clause 3 of the Sale Agreement which provides:-

"That the vendor shall sign and execute the transfers immediately and ensure company records reflect the purchaser is the current owner."

13. The plaintiff performed it's part of the contract but the defendant has not done so. The parties are bound by the terms and conditions of their agreement and court cannot purport to change the parties terms and conditions of the agreement. In view of the above I find that the plaintiff's prayer for specific performance is well found and is within the law and the terms and conditions of the contract and same should accordingly be granted.

14. The upshot is that the plaintiff's suit succeeded. I proceeded to make the following orders:-

a) An order for permanent injunction be and is HEREBY issued restraining the defendant by themselves, their employees, agents, assigns, servants and any other persons howsoever acting under their directions from selling, offering for sale, transferring, charging, mortgaging and/or dealing in any manner whatsoever detrimental to the plaintiff with all the parcel of land known as L.R. No.2/52/1 (Wado Apartments) Nairobi.

b) An order of specific performance be and is HEREBY issued compelling the defendant to complete the Sale Agreement dated 6th October 2011 within the next 30 days from todote.

c) In the alternative to (b) above, the Defendant repays the total amount plaid to her and or her assigns by the plaintiff in fulfilment of its duties that is, Kenya Shillings Seven Million (Kshs.7,000,000/-) as stated in the Sale Agreement dated 6th October 2011 and the interest thereon from the date of issuance of the demand letter.

d) Costs of the suit to the plaintiff.

Dated, signed and delivered at Nairobi this 13th day of December, 2018.

.....

J .A. MAKAU

JUDGE