



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MILIMANI
ELC NO.1570 OF 2014

AMINA MOHAMED EGA.....PLAINTIFF

VERSUS

ABDIKADIR MOHAMED MOHAMUD1ST DEFENDANT

HASSAN BULLE T/A HASSAN BULE &

CO.ADVOCATES2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

JUDGEMENT

1. By an amended Plaint filed in Court on 23rd March 2015, the Plaintiff sought the following reliefs against the Defendants:-

- i. An order of the Court compelling the 1st and 2nd defendants to release to the plaintiff her titles, namely LR No. 209/13329 /110 ,LR No. 20913329/ 111, LR No. 209/ 13329/ 112 and LR No.13329/113.*
- ii. An Order of the Court compelling the 3rd Defendant to remove the caveats registered against titles on the 2nd and 5th November 2012 respectively in respect of LR No.209/13329/111, LR No. 20913329/111, LR No. 209/13329/112 and LR No.13329/113.*
- iii. An order of the court to the effect that the deposit sum of Kshs.4,500,000/= was forfeited by the 1st Defendant to the Plaintiff for the breach of the Agreement for sale dated 18th September 2012 and /failure to comply with the contract completion notice on 2nd July 2013.*
- iv. Damages to be paid by the 1st and 2nd Defendants for illegally maintaining caveats against the Plaintiff's titles.*
- v. Costs*
- vi. Any other relief which the court may deem relevant.*

2. The 1st Defendant filed a defence to the Plaintiff's claim and raised a counter-claim through amended defence and counter-claim filed on 3rd April 2017 in which he sought the following reliefs against the Plaintiff.

- i. Specific performance for sale dated 18th September 2012*
- ii. In the alternative loss of business profits in the sum of Kshs.80,700,000/= .*
- iii. A refund of Kshs.4,5,00,000/= being the deposit paid to the plaintiff by the 1st Defendant.*

3. The Plaintiff and the 1st Defendant entered into a sale agreement in respect of LR No.209/13329/111, LR No. 20913329/111, LR No. 209/13329/112 and LR No.13329/113 (suit properties) which are registered in the Plaintiff's name. The agreement was entered into on 18th

September 2012. The purchase price of the suit properties was Kshs.45,000,000/= . As at the time the two entered into the sale agreement, the suit properties had not been transferred into the Plaintiff's name. The suit properties were transferred into the Plaintiff's name on 21st September 2012.

4. It was a term of the agreement that completion date was 90 days from the date the suit properties were registered in the Plaintiff's name. The Plaintiff was paid 10% of the purchase price on execution of the agreement. The balance of the purchase price being Kshs.40,500,000/= was to be paid on or before the completion date. Soon after the execution of the agreement, the Plaintiff left for the United States of America (USA) . She gave a Power of Attorney to her father who was to receive the balance of the purchase price on her behalf.

5. As part of the completion documents, the Plaintiff released the originals of titles in respect of the suit properties to the 2nd Defendant who was the common advocates during the execution of the sale agreement. The Plaintiff later engaged the firm of Soita & Saende Advocates to act for her in place of the 2nd Defendant. The firm of Soita, Saende & Co. Advocates called for the original titles from the 2nd Defendant who declined to release the same arguing that the Plaintiff owed his firm fees and that he was not going to release the titles until he was paid his fees.

6. Shortly before the completion date, the 1st Defendant on the advice of the 2nd Defendant caused registration of caveats against title for LR NO.209/13329/110 and LR NO.209/13329/111 ON 2nd November 2012 and LR NO.209/13329/112 on 5th December 2012. On 10th June 2013, the plaintiff issued a 21 days' notice requiring the 1st Defendant to complete the agreement but the 1st Defendant did not oblige. This is what prompted the plaintiff to file this suit.

7. The 1st defendant in his defence stated that he was not the one to blame for the breach of the agreement. He stated that the agreement was frustrated by a relative of the plaintiff and that he was at all material times ready and willing to complete the agreement and that it is the Plaintiff who did not avail completion documents and that the plaintiff cannot rely on a notice which was never issued to rescind the contract. The 1st Defendant contends that he had lost what he would have gotten as profits because the intention of purchasing the suit properties was to put up flats for sale. As this did not materialize, he now claims loss in the sum of Kshs.80,700,000/= and refund of the deposit paid if his claim for specific performance cannot succeed. The 1st Defendant states that the caveats were registered to protect his interest in the suit properties which he intended to purchase.

8. The 1st defendant stated that he had applied for development approval and change of user from single dwelling to multi-dwelling and that he had received notification of approval. On the issue of the 21 days' notice he states that the notice was issued while he was away and the same was not brought to his attention. The Plaintiff's current advocates wrote to his previous advocates on the need to enter into a fresh agreement but his previous advocates insisted that the previous agreement was still valid. The 1st Defendant therefore states that he was ready and willing to complete the agreement but that the Plaintiff failed to provide completion documents.

9. The 2nd Defendant stated that the Plaintiff had been a long time client of theirs. When she wanted to sell the suit properties, she asked the firm to look for a purchaser. Upon a purchaser being found, it was agreed that the plaintiff was to pay the 2nd defendant Ksh.3,000,000/= as commission. The Plaintiff later withdrew her instructions from the 2nd Defendant. The Plaintiff's new advocates asked for release of the titles but the 2nd Defendant told the advocates that they could only release the titles upon being paid their fees which was in the region of Kshs.19,000,000/=.

10. The new advocates of the plaintiff then issued 21 day days' notice to complete. The Plaintiff and her husband sought for mediation from the elders regarding payment of fees. The mediation agreement was that the 2nd defendant was going to deduct his fees from the purchase price and that he was not going to tax his bill and that the final fees was going to await a final mediation. The 2nd Defendant therefore states that he is holding the titles to the suit properties as lien and that the caveats were registered at the request of the 1st defendant who wanted to protect his interest in the suit properties.

11. I have carefully gone through the evidence adduced by the parties herein. At the close of the defence case on 22nd October 2019, the parties were directed to put in written submissions. Four months later on 25th February 2020, only the Plaintiff had filed submissions. The defendants were given 14 days within which to file their submissions. As at the time of writing this Judgment in April 2020, the Defendant had not filed their submissions and if any were filed, then they are not in the file. I have considered the evidence adduced by the parties herein. I have also considered the submissions by the Plaintiff. The following issues emerge for determination.

i. Which party was in breach of the agreement of 18th September 2012.

ii. Did the second Defendant have any basis for retaining the Plaintiff's original titles on account of non-payment of legal fees?.

iii. Was there any justification for placing caveats on the Plaintiff's titles?.

iv. Is the Plaintiff liable to refund Kshs.4,500,000/= to the 1st defendant?.

v. Are the parties entitled to the prayers in their respective claims .

vi. Which order should be made as to costs

Which party was in breach of the agreement of 18th September 2012.

12. The sale agreement was designed to fail right from the drafting stage. The terms were not clear and appear to have been designed to favour one party to the detriment of the other. The parties signed the agreement on 18th September 2012. A 10% deposit of Kshs.4,500,000/= was paid to the Plaintiff. The balance was Kshs.40,500,000/= which was to be paid on or before the completion date. The completion date was 90 days with effect from the date the titles were registered in the Plaintiff's name. The titles were registered in the Plaintiff's name on 21st September 2012.

13. The Plaintiff surrendered all the titles to the 2nd Defendant and she left for the USA. The Plaintiff granted a power of attorney to her father who was to collect the balance of the purchase price. Ten days after the signing of the agreement, the 1st Defendant started the process of registering caveats on the titles to the suit properties. Three of the titles were eventually caveated on 2nd and 5th November 2012 allegedly on grounds of protecting the interest of the 1st Defendant as purchaser.

14. The Advocate for the purchaser and the vendor was the same, that is the 2nd Defendant. When the Plaintiff's father went to the 2nd Defendant's offices to collect the balance of the purchase price, he was informed that payment could only be made to the Plaintiff who was already in the USA. The 2nd Defendant who was supposed to pursue certain completion documents such as clearance certificates, demands for rates and rents and any other consent on behalf of the Plaintiff did not do so. There was no transfer drawn for execution by the Plaintiff.

15. The 1st and 2nd Defendants blame the Plaintiff of failure to provide completion documents. Already the Plaintiff had surrendered the originals of the titles to the 2nd Defendant. The other completion documents would have easily been obtained on the Plaintiff's behalf by the 2nd Defendant. The 2nd Defendant had been paid Kshs.600,000/= as legal fees. There is no evidence at all to show that the Plaintiff was unwilling to carry on with the transactions yet the 1st Defendant with assistance of the 2nd Defendant went ahead to caveat the suit properties. The caveating of these properties had an implication on the performance of the agreement. No registration could be possible without the caveats being removed. No consent to transfer could be obtained from the Commissioner of Lands in the face of the caveats.

16. The Completion date ended in December 2012 without the transaction being sealed. As I have said hereinabove, the Plaintiff was not to blame. The blame clearly falls on the shoulders of the 1st Defendant who started throwing a spanner in the works barely 10 days after signing the sale agreement. When the Plaintiff realized that their common lawyer was not acting in her interest, she decided to engage the firm of Soita & Saende Advocates to act for her. The firm of Soita & Saende Advocates called for the original titles including transfer from the 2nd Defendant vide their letter of 13th May 2013. When this letter did not elicit any response from the 2nd Defendant, the Plaintiff's new advocates issued a 21 days' notice on 10th June 2013. The 2nd Defendant acknowledged receipt of the letter on the same date but did not act on it until 16th July 2013 when they wrote stating that they were holding the titles as lien for their unpaid fees amounting to Kshs.19,000,000/= for various legal services rendered to the Plaintiff and her company known as Leeban Builders Limited. The Advocates also intimated that the Plaintiff had agreed to pay the Advocates a commission of Ksh.3,000,000/= upon successful sale of the suit properties.

17. It is therefore clear that it is the 1st Defendant who was in breach of the sale agreement. There was no payment of the balance of the purchase price and there is no evidence that the 1st Defendant was ready and willing to perform his part. Instead, he was busy frustrating the agreement. Six months after completion date, the Plaintiff issued a 21 days' notice making time of essence. There is evidence that the Advocates for the 1st Defendant received the notice and acknowledged that fact in writing. The 1st Defendant in his statement claimed that the notice was not brought to his attention as he was out of the country. There is no evidence that he was out of the country. There is no evidence that his advocates did not bring this notice to his attention.

18. The law society conditions are clear that a notice is deemed to have been served if the same is delivered to the party or his advocate. In this case the notice was received by the 2nd Defendant who was acting for the 1st Defendant. The 2nd Defendant only ceased to act for the 1st Defendant after receiving the notice and that is when the firm of Hassan N Lakicha & Co. Advocates took over and started corresponding with the Plaintiff's lawyers. The agreement which the parties signed did not expressly indicate that time was of essence. It is however important to note that the agreement by clause 3 thereof incorporated the Law Society conditions for sale. Either party was therefore at liberty to issue a completion notice. In compliance with this, the Plaintiff's advocate issued a notice on 10th June 2012 which made time of essence. The 1st Defendant was given 21 days within which to remedy the default but he did not do so. The agreement therefore stood rescinded after 1st July 2012.

Did the 2nd Defendant have any basis for retaining the Plaintiff's original titles on account of non-payment of legal fees

19. The 2nd Defendant was given the Plaintiff's original titles in his capacity as advocate representing the Plaintiff. The instructions were later withdrawn and given to M/s Soita & Saende Advocates who then requested for the documents to carry on with the transaction on behalf of the Plaintiff. The 2nd Defendant declined to release the documents on account holding them as lien for their fees which was in the sum of Kshs.19,000,000/=. The fees arose out of the 2nd Defendant's representation of the Plaintiff in Leeban Builders Limited, where the Plaintiff had 50% shareholding in addition to this transaction.

Was there any justification for placing caveats on the Plaintiff's title?

20. There was absolutely no justification for the placing of caveats. Evidence on record show that the affidavits in support of the caveats were sworn on 28th September 2012 before the 2nd Defendant who subsequently lodged them in November 2012 when they were registered. As at the time of registration of the caveats, the 1st Defendant had only paid a deposit of kshs.4,500,000/= and there is no evidence that the Plaintiff had given any indication that she was not going to proceed with the transaction to justify lodging of the caveats. The original titles were with the 2nd Defendant and the Plaintiff had not indicated that she was going to sell the suit properties to a third party to justify what the 1st Defendant did.

21. There was no basis at all for the 2nd Defendant to hold on to the titles especially after there was mediation wherein it was agreed that the 2nd Defendant was to deduct his fees from the purchase price of the suit properties . There was also an agreement that the 2nd Defendant was not to tax his bill before the transaction went through. It would appear that the 2nd Defendant had given up on the transaction because they proceeded to tax their bill in which they were claiming a sum more than 19,000,000/=. The bill was finally taxed at Kshs.2,557,115 .60 on 7th March 2016. Out of the taxed amount, some monies have already been paid as admitted by the 2nd Defendant during the hearing. The bill of the 2nd Defendant having been taxed, there is no basis of the 2nd Defendant holding on to the titles. If there is any balance remaining unpaid, he should have executed for the same. It is common knowledge that commissions are only earned upon successful completion of a sale. In this case, there was no completion of sale. There is therefore no basis upon which the 2nd Defendant can hold onto the titles for not having been paid commission of Kshs.3,000,000/= which in any case was not proved in evidence.

Is the Plaintiff liable to refund kshs.4,500,000/= to the 1st Defendant?

22. I have already found that the 1st Defendant is the one who breached the agreement. In breaching this agreement, the 1st Defendant was actively aided by the 2nd Defendant who deliberately did not discharge his professional work as required . A notice for the breach was duly issued and as per condition 13.4.1 (a) (i) of the Law Society conditions of sale, the 10% deposit comprising of Kshs.4,500,000/= was forfeited to the Plaintiff . The Plaintiff is therefore not liable to refund the 10% deposit paid by the 1st Defendant.

Are the parties entitled to the prayers in their respective claims?

23. The 1st Defendant is claiming for an order of specific performance of the agreement of 18th September 2012. I have already demonstrated hereinabove that the 1st Defendant was not keen on concluding the agreement. He started registering caveats against the titles barely ten days after signing the agreement. He in concert with his advocate did not want to do their part. The result of this is that the 1st Defendant ended breaching the agreement. He cannot therefore benefit from the remedy of specific performance when it is clear that he was the one who breached the agreement.

24. The 1st Defendant is in the alternative seeking loss of business profits in the sum of Kshs.80,700,000/-. This would have been considered were it to be found that it is the Plaintiff who was in breach of the agreement. The 1st Defendant is basing the alleged loss on construction of 36 flats which he had intended to put up. He produced a notification for a approval of amalgamation and change of user from Nairobi City Council. There is no way the 1st Defendant would have obtained permission to amalgamate when the suit properties were not in his names and the Plaintiff had not authorized him to do so. This is the case with change of user which would have been possible with express permission of the Plaintiff as vendor.

25. There was no basis upon which the valuer arrived on the figures. There were no bills of quantity availed to justify the figures he arrived at. The figures he gave in his report were just speculative which cannot be a basis for calculation of any anticipated loss if the alleged flats would have been constructed. There is therefore no basis upon which this court can grant the sum of Kshs.80,700,000/=

26. As regards, refund of Kshs.4,500,000/= I have already found that the same was forfeited to the Plaintiff . It is therefore not available for refund to the 1st Defendant. The upshot of this is that the 1st Defendant's counter claim fails and is hereby dismissed in its entirety with costs to the Plaintiff.

27. As for the Plaintiff's claim, I find that the plaintiff has proved her case against the Defendants on a balance of probabilities. There have been caveats which have been in existence against the titles to the suit properties. The caveats have been in existence since 2nd and 5th November 2012. This is a period of over 7 years. The Plaintiff is entitled to damages which I hereby assess at Kshs.3,000,000/= . I therefore enter Judgment for the Plaintiff against the Defendants as follows:-

i. An order compelling the 1st and 2nd Defendant to release to the Plaintiff her titles namely LR No. 209/13329/110 ,LR No. 20913329/111, LR No. 209/13329/112 and LR No.13329/113.

ii. An order compelling the 3rd Defendant to remove caveats registered against the titles on 2nd and 5th November 2012 respectively in respect of LR No. 209/13329/110 ,LR No. 20913329/111, LR No. 209/13329/112 and LR No.13329/113.

iii. An order that the deposit of Kshs.4,500,000/= was forfeited by the 1st Defendant to the Plaintiff for breach of agreement dated 18th September 2012 due to failure to comply with completion notice dated 10th June 2012 which expired on 1st July 2013 and whose effect took place on 2nd July 2013.

iv. Damages of Kshs.3,000,000/= against the 1st and 2nd Defendants for illegally maintaining caveats against the Plaintiffs tiles.

v. The damages in (iv) above will attract interest at court rates from the date of this Judgment.

vi. Costs of this suit to be paid to the Plaintiff by 1st and 2nd Defendants.

Dated, Signed and delivered at Nairobi on this 7th day of May, 2020

E.O.OBAGA

JUDGE

In the virtual Presence of :-

M/s Mbulu for Plaintiff

M/s Ahomo for Defendants

Court Assistant: Hilda

E.O. OBAGA

JUDGE