



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 42 OF 2010

FEISAL AWADH IDHA.....PLAINTIFF

VERSUS

WILLIAM KAMITI GATHINJI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By his Plaintiff dated and filed herein on 17th February 2010, Feisal Awadh Idha (the Plaintiff) prays for Judgment against the Defendant for the following:-

- 1. An order rescinding the agreement of sale dated 16th May 2008 between the Plaintiff and the Defendant herein.***
- 2. In the alternative to the prayer, a declaration that the agreement for sale dated 16th May 2008 is null and void and/or is hereby repudiated, rescinded and terminated.***
- 3. An order cancelling the registration of the sub-division number 352 Section III Mainland North to the Defendant.***
- 4. A mandatory injunction compelling the Defendant, his employees, servants and/or agent to cancel the transfer of sub-division Number 352 Section III Mainland North to the Defendant and to return the original documents to the Plaintiff.***
- 5. An injunction restraining the Defendant his employees, servants and/or agents from interfering, disposing, alienating, taking possession of and/or in any manner from dealing with sub-division Number 352, Section III Mainland North pending the hearing and determination of this suit.***
- 6. General damages for breach of contract.***

2. Those prayers arise from the Plaintiff's contention that by an agreement for sale dated 16th May 2008, he agreed to sell to the Defendant all that property known as Plot No. 352 Section III Mainland North (the suit property) for a sum of KShs 4,500,000/-. The Plaintiff avers that despite paying a deposit, the Defendant failed to complete payment of the purchase price within 30 days as was stipulated in the agreement.

3. The Plaintiff further avers that by a letter dated 21st October 2008, he informed the Defendant that the transaction stood cancelled and asked him to return all the original documents that had been forwarded to him. Contrary to that request, the Defendant instead proceeded to register himself as the proprietor of the suit property by reason whereof the Plaintiff has suffered loss and damage and hence the orders sought herein.

4. But in his Statement of Defence dated and filed herein on 19th May 2011, William Kamiti Gathinji (the Defendant) while admitting having entered into the said sale agreement avers that the failure to complete the transaction was wholly occasioned by the Plaintiff who did not have the title deed for the property at the time of execution of the agreement.

5. The Defendant accuses the Plaintiff of failing to disclose at the time of execution of the agreement that the original title deed was unavailable and that the suit property had not been transferred to his name and hence he was incapable of transferring the title to the Defendant.

6. The Defendant further avers that the Plaintiff only got to be registered as the proprietor of the suit property on 7th August 2008 whereafter he voluntarily transferred title to the Defendant on 8th September 2008. The Defendant further asserts that the Plaintiff was paid the entire purchase price through his then Advocates and it is only upon receipt of the balance on 28th October 2009 that the original title deed was released to the Defendant.

7. Accordingly, the Defendant avers that by his conduct, misrepresentation and acquiescence, the Plaintiff is estopped from alleging that the Defendant was in breach of the sale agreement.

8. At the trial herein, the Plaintiff (PW1) testified as the sole witness in his case. The Defendant neither called a witness nor testified at the trial.

9. PW1-Feisal Awadh Idha is the Plaintiff. He testified that they did the agreement dated 16th May 2008 with the Defendant although he never met him. PW1 told the Court that both parties had their own separate Advocates. PW1 told the Court that he was selling the land at Kshs 4.5 Million and that Clause 6 of the agreement required completion of the payment to be done within 30 days.

10. PW1 testified that he was only paid a deposit and that his Advocate Mr. Sachdeva told him that the purchaser had not remitted the balance of the purchase price. PW1 further told the Court that he had received the title documents for the property in August 2008 and since this was after the initial 30 days had lapsed, they gave the purchaser another 30 days to make payment from 7th August 2008.

11. PW1 further testified that the Defendant failed to pay and that by a letter dated 29th September 2009, his Advocate recalled the documents that had been forwarded to Omondi Waweru Advocates who were acting for the Defendant. The documents were not remitted and at some point in time. PW1 realised that his Advocates were colluding with the purchaser to defraud him and he asked to be given back his file but they refused.

12. PW1 told the Court that the land was thereafter transferred to Milfan Developers Ltd by the Purchaser's Advocates. He had only been paid 10% of the purchase price which sum was used to process the title including payment of stamp duty and outstanding land rates.

13. On cross-examination, the Plaintiff denied that he had colluded with Omondi Waweru Advocates to defraud the Defendant. PW1 maintained that he has never received any money after he sub-divided the suit property. He had signed the transfer documents in advance and the land got registered in the Defendant's name before he could be paid.

14. PW1 conceded that the land was not in his name within the initial 30 days and that the agreement that the purchase price would be paid within 30 days after he obtained the title was only verbal. He further told the Court that he never sacked Sachdeva Advocates in writing but the correspondences showed they were engaged in fraudulent dealings. The matter was investigated by the Police and the Police know those who were involved in the fraud.

15. PW1 further told the Court that he does not know if the purchase price was forwarded to Sachdeva Advocates as he never saw any letter from them informing him about the payments. At the end of one year after the Agreements, the Defendant had not paid and PW1 had differed with Sachdeva Advocates.

Analysis and Determination

16. I have perused and considered the pleadings filed by the parties herein, the oral testimony of the Plaintiff and the evidence adduced herein. I have equally perused and considered the submissions filed herein by the Plaintiff's Learned Advocates on record. The Defendant neither testified nor called any evidence in support of his case.

17. The Plaintiff- Feisal Awadh Idha prays for an order rescinding a sale agreement executed by himself and the Defendant herein- William Kamiti Gathinji on 16th May 2008. In the alternative, the Plaintiff urges this Court to declare as null and void the said agreement and or to declare the same repudiated, rescinded and terminated.

18. In addition, the Plaintiff prays for an order cancelling the registration of the suit property in the name of the Defendant and a mandatory injunction to compel the Defendant to cancel the transfer and to have the same reverted to the Plaintiff. He also prays for an order of injunction restraining the Defendant from transferring, alienating, taking possession of and/or dealing in any way with the property. The Plaintiff also prays that he be awarded general damages for breach of contract.

19. By the said agreement, the Plaintiff agreed to sell the suit property measuring approximately 3.72 acres to Defendant at a consideration of Kshs 4,500,000/-. A perusal of the said agreement produced in evidence herein by the Plaintiff reveals that the Plaintiff was paid a sum of Kshs 450,000/- being the equivalent of a 10% deposit at the execution of the agreement. Clause 6 of the agreement provided thus:-

“6. The completion date shall be thirty (30) days from the date of signing hereof (“Completion Date”).

20. The agreement further shows that the Plaintiff's Advocates for the purposes of the agreement was Messrs Sachdeva & Company Advocates while the Defendant was represented by Messrs Omondi Waweru & Company Advocates. In respect to the completion thereof, Clause 7 of the agreement stipulated as follows:-

“7. Completion shall take place at the offices of Sachdeva & Company Advocates on the Completion Date or earlier whereupon Sachdeva & Company Advocates shall deliver to the Purchaser:

- i) Original title of the property (free of any encumbrance);***
- ii) The transfer of the Property (in triplicate) duly executed by the Vendor;***
- iii) All necessary consents to register the Instrument of Transfer;***
- iv) Pin Certificate, Identify Card and Passport size Photographs of the Vendor;***
- v) A duly completed form of valuation for stamp duty; and***
- vi) Rates clearance certificate valid for at least 30 days after the completion date.”***

21. As it turned out, the parties were unable for one reason or the other to conclude the purchase within the agreed completion date. According to the Defendant failed to complete the payment within the 30 days stipulated in the agreement. In his Statement of Defence filed herein the Defendant however accuses the Plaintiff of being responsible for the failure as it turned out that the Plaintiff did not have the original title deed in his name.

22. In his testimony before this Court, the Plaintiff indeed conceded that he did not get the title in his name until almost three months later on 7th August 2008. From the Replying Affidavit sworn and filed herein by the Plaintiff on 22nd August 2011 in opposition to an application filed by the Defendant, the Plaintiff reveals that at the time of execution of the agreement, he had purchased the suit property from one Kalpesh Vasuden Derani some months earlier and due to a delay in the land registry, the transfer into his name did not take place until the said 7th day of August 2008.

23. Despite this initial hiccup, it would appear that the parties nevertheless agreed to go on with the transaction. According to the Plaintiff, his Advocates then agreed verbally with the Defendant's Advocates to extend the period of completion by a further 30 days from the 7th of August 2008. There was however very little evidence of such an agreement and even less evidence of what happened next between the parties.

24. Apparently upon receipt of the title deed in the name of the Plaintiff, his advocates wrote to the Defendant's Advocates on 20th August 2008 forwarding the completion documents which Clause 7 of the agreement had stipulated would be handed over at the completion. It would also appear that the Defendant's Advocates then tried to make some further payment. However by a letter dated 21st October 2008, some two months after the suit property was registered in the name of the Plaintiff, his Advocates wrote to the Defendant's Advocates as follows:-

“Re: Sub-division No. 352/III/MN

Purchaser : William Kamiti Githinji

The above matter and your letter of 15th October 2008 refers.

We regret we are unable to receive your cheque for Kshs 2 million, hence the said cheque is returned herewith. Kindly note that this transaction stands cancelled and we reiterate that the original documents forwarded to you vide our letter of 20th August 2008 be returned back immediately as per your undertaking.

Urgently please return to us the documents forwarded vide our letter of 20th August 2008.”

25. For some reason, there was no response to this letter and those documents were not returned. Frustrated by the delay in returning of original documents, the Plaintiff chose to bypass his Advocates and went to see Messrs Omondi Waweru Advocates for the Defendant to ask for his documents. Interestingly, he did not come out from those offices with the documents. Instead, the Defendants Advocates told him they had cancelled the sale to the Defendant, and apparently salivating for the property themselves, offered him a sweet deal as captured in a letter addressed to him dated 21st October 2009 by one MN Waweru Advocate of the said Law Firm as follows:-

“RE: LR No. 352/III/MN

We refer to the above matter and confirm that having cancelled the sale to William Kamiti Githinji the property reverted to you.

As instructed we have embarked on a sub-division scheme on your behalf. The plots will each sale (sic) for Kshs 550,000/- out of which Kshs 50,000/- shall be the agent's commission.

To facilitate the success of the scheme the property shall be registered in the name of Milfan Developers Ltd. The Company will hold the property in trust for you and sale (sic) the plots on your behalf.

This letter serves as our professional undertaking to handle the transaction on your behalf as agreed.

We further undertake to furnish you with regular briefs on the scheme.”

26. How the said Law Firm could unilaterally cancel the transfer and have the title revert to the Plaintiff was as incomprehensible and puzzling as they come. As a layman however the Plaintiff appears to have believed them and proceeded thereafter to drop his Advocates then on record.

27. As it turned out, a month before the Law Firm offered the Plaintiff this sweet -heart deal, they had facilitated the transfer of the suit property to the Defendant on 8th September 2008. Thus when his Advocates tried to transfer the property to the said Milfan Developers Ltd, the Defendant turned around and, rightfully in a sense, accused his Advocates of colluding with the Plaintiff to fraudulently take away his property. As a result, the suit property has to-date remained in the name of the Defendant.

28. There was however no evidence that as at 8th September 2008 when the suit property was registered in his name, the Defendant had paid the purchase price as contemplated under Clauses 6 and 7 of the agreement between himself and the Plaintiff dated 16th May 2008. From an Affidavit sworn by himself and filed herein on 19th May 2011 in support of his application to set aside the Judgment earlier on obtained ex-parte by the Plaintiff, the Defendant avers at paragraphs 8 and 9 thereof as follows:-

8. That I paid the balance of the full purchase price of Kshs 4,050,000/- on 28th October 2009 and (was) issued with an official receipt. Annexed hereto marked "WKG4"(is) a copy of the official receipt by Sachdeva & Company Advocates then acting for the Plaintiff.

9. That the firm of Sachdeva & Company Advocates wrote to my then Advocates Omondi Waweru Advocates requesting them to release the original document of title to me. Annexed hereto marked "WKG5" (is) a copy of the said letter."

29. The said official receipt indeed purports to acknowledge receipt of the sum of Kshs 4,050,000/- from the Defendant towards the purchase of the suit property on 28th October 2009. The letter signed by one George Odull on behalf of Sachdeva & Company Advocates addressed to Omondi Waweru & Company Advocates is however dated 24th October 2009 and it reads as follows:-

RE: Plot No. 353/III/MN

The above matter refers.

We acknowledge receipt of the balance of the purchase price in this matter.

Kindly proceed to release the original document of title to your client the purchaser, which we note had already been registered in favour of your client."

30. Both the receipt and the letter are as fake and fraudulent as they can ever get. There is no way Sachdeva & Company would be writing acknowledging receipt of money on 24th October 2009 when their own receipt purports that the money was received some four(4) days later on 28th October 2009.

31. More significantly, the agreement provided that the completion would be within 30 days. By their letter dated 21st October 2008, they had not only rejected the Defendant's cheque of Kshs 2 million as coming too late in the day, they had stated unequivocally that the transaction stood cancelled and asked Messrs Omondi Waweru Advocates to return the original documents earlier on forwarded to them.

32. On whose behalf was this Law Firm then receiving the purchase price one year after they had stopped the transaction and after their client had by-passed them and gone to demand the original documents from the Defendant's Advocates?. Certainly not the Plaintiff herein. Indeed it beats logic why the Defendant would wait for a whole year after the suit was registered in his name to pay for the same.

33. Equally puzzling was how Messrs Omondi Waweru Advocates who had since adopted the Plaintiff as their client and purported to cancel the transfer would release the title documents to the Defendant after they had assured the Plaintiff in their letter dated 21st October 2009 that the sale had been cancelled.

34. In the premises, it was clear to me that the Defendant Purchaser had failed to pay the balance of the purchase price and that the Plaintiff Vendor was entitled to repudiate the agreement of sale dated 16th May 2008 for failure of performance.

35. As a result I do find that the Plaintiff is entitled to the remedies sought. Judgment is accordingly entered for the Plaintiff in terms of Prayers Nos. 2, 3, 4 and 5 of the Plaintiff. Nothing was however placed before me to support the prayer on general damages and prayer No. 6 of the Plaintiff is denied.

36. The Plaintiff shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 25th day of June, 2020.

J.O. OLOLA

JUDGE