



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 24 OF 2005

P & T HOUSING CO-OPERATIVE SOCIETY LTD PLAINTIFF

VERSUS

DIVISIONAL INTEGRATED DEVELOPEM

PROGRAMMES COMPANY LTD DEFENDANT

JUDGMENT

The plaintiff and defendant entered into a sale agreement on 11th July, 2002 relating to a parcel of land known as Mavoko Town Block 21/156 upon terms set therein. The defendant was the vendor while the plaintiff was the purchaser. Before completion the parties fell out leading to the present suit. In its amended plaint dated and filed on 28th February, 2005 the plaintiff stated that pursuant to the sale agreement it paid a sum of Kshs.7, 057,070/= towards the purchase of the said parcel of land. It however transpired that the defendant had no legal capacity to sell the land and that the defendant misled the plaintiff by false pretence that it owned the said parcel of land, yet it belonged to one Josphat Musyoka Nganga. The claim is therefore, for the sum paid plus costs and interest at court rates.

The claim was denied by the defendant who pleaded that it was not in breach of the agreement and blamed the plaintiff for the breach of the same. It was also the defendant's position that any money paid by the plaintiff to the defendant was a non-refundable deposit in the event of non-completion on the part of the plaintiff. The plaintiff called two witnesses while the defendant called one witness.

The agreement provided, in addition to other terms therein, that the vendor shall undertake to obtain the consent of the relevant Land Control Board of this transaction. There was also limit to the time within which the purchase price would be paid. It was also clear that the land as at the time the agreement was being executed, was registered in the name of Josphat Musyoka Nganga who had allegedly sold it to the defendant.

I have gone through the evidence adduced by the parties herein. It is true that the plaintiff did not complete payment of the purchase price within the stipulated period of time. It would appear that the defendant would be protected against any claim due to the breach on the part of the plaintiff. However, it is also clear from the evidence that clause 3 of the agreement which required the procurement of the Land Control Board by the defendant had not been complied with.

It also transpired during the hearing that the defendant had another agreement with the registered owner of this parcel of land dated 13th August, 1999, whose completion date was 6 months thereafter which would bring the date to 13th February, 2000 and not 1998 as set out in the submissions of the plaintiff.

Further, as at the time the defendant entered into the sale agreement with the plaintiff, it was not the owner of the land for the simple reason that it had not taken possession from the original registered owner, because the agreement between the two, that is the defendant and the registered owner, had not been completed. The agreement between the plaintiff and the defendant therefore cannot be true in the description of the defendant as “vendor” or that the registered owner had sold the land to it.

The question that begs an answer is therefore is whether the defendant had capacity to deal in the said parcel of land. The obvious answer is no, because he had no valid title to transfer. That being the case, permission of the registered owner to sell the land was necessary to give effect to the transaction between the plaintiff and defendant. This was lacking in this matter. There was no evidence that the defendant paid the registered owner any money or at all.

The title was never given to the plaintiff in accordance with the agreement neither was it produced in evidence during the trial. It is reasonable to conclude that it was still in the possession of the registered owner. The plaintiff /witnesses testified that when they went to view the land they were chased away by the registered owner. This may well be true because they had no right whatsoever to be there neither did the defendant have any authority to sell that land.

The defendant’s witness testified that he paid for the survey but the surveyor was never named and no deed plans were exhibited. The receipts of any payment in that regard were never produced. He also testified that about 1000 members of the plaintiff were transported to the parcel of land and every week 10 Nissan vehicles would go to the parcel of land. There is no evidence of any payment or registration numbers of any vehicles that were used. Any prudent businessman would keep such records. He also said that 40% of the money paid by the plaintiff was paid to the registered owner of the land. Again there was no evidence to that effect. In any case, the registered owner is not a party to the agreement between the plaintiff and the defendant and there can never be any breach of contract between the registered owner and the plaintiff.

The registered owner never came to the site. The defendant’s witnesses confirmed under cross examination that there was no agreement when the defendant purchased the land; he had no permission of the registered owner to sell the land and there was no no transfer executed by the owner to the defendant and that the defendant did not own land to sell to the plaintiff. He also admitted that there is no evidence that the defendant paid the registered owner, and the costs of sub division and other expenses were not included in the sale agreement.

What comes out in all this evidence is that, the agreement entered into between the parties was void, *ab initio* and could not be effected for the simple reason that the defendant had no capacity to deal in that land. Completion cannot be affected on such a contract as the defendant was not the vendor. The plaintiff was aware that the land was registered in the name of Josephat Musyoka Nganga; but the defendant described himself as the vendor and that the owner had sold the land to him. That was total mis- representation in the circumstances.

My assessment of the evidence is that the contract or agreement was not capable of execution because the defendant was not the owner and did not obtain the Land Control Board Consent. There is no doubt that the defendant received the money from the plaintiff, and considering the background of the transaction that payment was in respect of a parcel of land that the defendant could not deal in.

The end result is that the transaction having failed the plaintiff is entitled to the refund of the amount of money paid to the defendant in the failed transaction. Accordingly, there shall be judgment for the plaintiff in the sum of Kshs. 7,057,070/= plus costs and interest. The interest thereon shall run from the date of filing this suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd Day of February, 2017

A.MBOGHOLI MSAGHA

JUDGE