



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 401 OF 2011

JOSIAH NYIKA MUIA PLAINTIFF

=VERSUS=

JAIRO ATENYA ASITIBA.....DEFENDANT

JUDGMENT

1. Through a plaint dated 8/8/2011, the plaintiff instituted this suit against the defendant. Subsequently, an amended plaint was filed on 27/12/2012. He sought the following verbatim orders against the defendant;

a) An order that the defendant be and is hereby permanently restrained by himself, his servants, agents or any persons claiming under him, from demanding and receiving monthly rents in respect of the plaintiff's property known as LR 12666/1 situated in Villa Imara Development Project, Imara Daima, Nairobi.

b) An order for vacant possession of the premises upon expiry of a one month notice duly served upon the tenants occupying the premises

c) Payment by the defendant to the plaintiff of the entire sum collected by the defendant as rent for the premises at the rate of Kshs 60,000 per month from the date of execution of the agreement until the handing over of vacant possession of the premises to the plaintiff.

d) Costs of this suit.

e) Interest on (b) and (c) above at court rates.

2. The plaintiff's case was that he entered into a sale agreement with the defendant for purchase of a parcel of land known as L R 12666/1 (**the suit property**) situated in Villa Imara Development Project, Imara Daima, Nairobi. The suit property comprised of a five bedroomed maisonette with a one-bedroomed extension. The suit property was sold with vacant possession. At the time of sale, the defendant had rented the suit property to tenants at Kshs 60,000 per month. The defendant continued receiving rent even after the plaintiff had paid him the full purchase price. The plaintiff subsequently issued a one month notice to the tenants in an attempt to take possession of the suit property but the defendant continued to demand and receive rent from the tenants. The defendant completely failed to give vacant possession, necessitating this suit.

3. The defendant filed a defence on 21/10/2011 denying the plaintiff's claim. His case was that he was to give the plaintiff an undeveloped parcel of land in Villa Imara Development Project, Imara Daima, Nairobi, in exchange for the plaintiff's plot. The transaction was not completed because the plaintiff did not honour his obligations under the agreement.

4. The case was heard on 22/1/2020. The plaintiff testified as PW1. He adopted his written statement dated 8/8/2011 as his sworn evidence-in-chief. His evidence was that, on 26/4/2011, he entered into a sale agreement with the defendant pursuant to which the defendant sold to him Land Reference Number 12666/1 at Kshs 3,800,000. The sale agreement was drawn by an advocate by the name Judith Kalinga. Upon final payment of the purchase price, the defendant surrendered his original letter of allotment to the plaintiff and the plaintiff was issued with a new allotment letter. He stated that he paid Kshs 15,000 for survey. He also paid and stand premium of Kshs 6,200 to the City Council. Prior to the sale, the defendant was renting the suit property to tenants for Kshs 60,000 per month. The defendant continued to demand and receive rent from the tenants, denying the plaintiff vacant possession. Aggrieved, he brought this suit. He produced a total of 8 exhibits, among them, the sale agreement.

5. The plaintiff filed written submissions on 5/3/2020 through the firm of Mbaluka & Company Advocates. Counsel framed four issues to be determined by this court: (a) whether there was a valid sale agreement between the plaintiff and the defendant; (b) whether the defendant was obligated to sell the property with vacant possession; (c) whether the plaintiff was entitled to the reliefs and prayers sought; (d) who should pay costs of this suit.

6. On the first issue, counsel submitted that the sale agreement between the parties had met the requirements of Section 3 of the Law of Contract Act. It was argued that the sale agreement was therefore valid and enforceable between the parties. Reliance was placed on the decision in **Solomon Ndegwa Kuria v Peter Nditu Gitau [2019] eKLR**. On the second issue, counsel submitted that clause 4 of the sale agreement stated that the suit property was sold with vacant possession and therefore, it was the defendant's obligation to grant the plaintiff actual possession after execution of the sale agreement and payment of the purchase price. Reliance was placed on the decision in **Gitonga Wambugu Kariuki & 2 others v Eliud Timothy Mwamunga [2018] eKLR**. It was further submitted that the plaintiff had legally acquired the suit property and therefore, he was entitled to the prayers sought. Arguing that costs follow the event, counsel urged the court to award the plaintiff costs of the suit. Reliance was placed on **Alto Homes Limited & another v Davis Nathan Chelogoi & 2 others [2018] eKLR**.

7. I have considered the pleadings, evidence and submissions placed before the court. The defendant filed a statement of defence contesting the plaintiff's claim but did not lead any evidence to support the defence. Two issues fall for determination in this suit. The first issue is whether, as against the defendant and his agents, the plaintiff is entitled to the prayers sought in the plaint. The second issue relates to costs of the suit.

8. The pleadings and sale agreement relied on by the plaintiff suggest that the suit property is surveyed and has Land Reference Number 12666/1. However, neither a copy of the title nor an official search were produced by the plaintiff. Notwithstanding this, in view of the fact that the defendant did not lead any evidence to controvert the plaintiff's claim and evidence, the court is satisfied that, as against the defendant, the plaintiff has proved his case on a balance of probabilities.

9. Prayer 2 relates to and is directed at tenants who are not parties to this suit. The court would not grant adverse orders against persons who are not parties to this suit. The plaintiff has the legal obligation of notifying the tenants to either vacate the premises or pay rent to him. Unless that is done and an appropriate action is brought by the plaintiff against the tenants, it would be irregular to issue adverse orders against the tenants at this point and in this suit.

10. The plaintiff seeks rent of Kshs 60,000 per month from the date of the agreement. This is a special damages claim. No conclusive evidence was tendered by the plaintiff to support the claim. At the very least, the plaintiff should have led evidence by a valuer to support that limb of the claim. For lack of evidence, that limb of the claim fails.

11. In light of the above findings, I hereby issue the following disposal orders in this suit:

a) The defendant together with his agents/servants are hereby permanently restrained from demanding or receiving monthly rents or any other rents in respect of the property known as Land Reference Number 12666/1 situated in Villa Imara Development Project, Imara Daima, Nairobi.

b) The plaintiff is at liberty to issue appropriate directions to any tenant(s) occupying the suit property relating to payment of rent and/or termination of tenancy.

c) The defendant shall bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of: -

Ms Miriam Kamunya for the Plaintiff

June Nafula - Court Clerk