



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL& ADMIRALTY DIVISION
CIVIL SUIT NO.375 OF 2015

REINDER HOLDINGS LTD.....PLAINTIFF

VERSUS

JOSHUA OGOLA OMINO.....DEFENDANT

J U D G M E N T

[1] This suit was filed on 30th July 2015 by the Plaintiff, Reinder holdings Ltd against the Defendant Joshua Ogola Omino for the following reliefs:

- (1) A declaration against the Defendant that he is in breach of the memorandum of Agreement entered into between the parties dated 4th September, 2013.
- (2) Special damages of Kshs.100 million against the defendant, being the current value of the **Land Parcel No. C.R. 26771** for having caused the plaintiff's property to be sold by **Victoria Finance Ltd.**
- (3) General damages against the Defendant for depriving the Plaintiff of the use of its property.
- (4) Interest on (2) and (3) above.
- (5) Costs of this suit and interest at court rates.
- (6) Such other or further orders as may meet the ends of justice in the case.

[2] The plaintiffs cause of action is that while it was the registered proprietor of **Land Parcel No. CR 26771** at all times material to this suit, the Defendant, through misrepresentations and deliberate falsehoods, obtained the title documents to the aforesaid property (hereinafter, “ the suit property”) and proceeded to charge the same to a Financier, **Victoria Finance Limited** in return for a loan.

[3] That the defendant having failed to service the loan, which was applied wholly for his sole benefit, the charged property was sold in realization of the Financier's Statutory Power of Sale. Thereupon, the parties entered into a **Memorandum of Agreement** pursuant to which the Defendant undertook various obligations as a way of compensating the Plaintiff for the loss of its property. One of the obligations was for the defendant to pay the Plaintiff **Kshs. 35,000,000** within **120 days**, failing which the defendant

would be constrained to pay the market value of the 10 acre property at the rate of **Kshs 10 million per acre**. In the alternative, the parties agreed that the Defendant would transfer similar property of the same size within the same locality to the Plaintiff **within 120 days** from the date of execution of the **Memorandum of Agreement**.

[4] The Plaintiff averred that the Defendant failed to honour the express term of their Agreement as per the particulars set out in paragraph 8 of the plaint, namely:

- (a) Refusal and/or failure by the defendant to cause the registration of a Discharge of Charge in respect of the property contrary to the **Memorandum of Agreement**.
- (b) Failure to cause the discharge of **Charge** over the Plaintiff's property thereby causing the property to be sold off by **Victoria Finance Ltd** in settlement of his loan account.
- (c) Refusal and/or failure by the defendant to get a buyer to purchase the Plaintiff's property.
- (d) Refusal and/or failure to cause a transfer of a similar property in the same area to the Plaintiff.
- (e) Failure and/or refusal to complete its obligations under the **Memorandum of Agreement** within 120 days from the date of its execution.

[5] Upon the filing of the Plaintiff, Summons to enter appearance were issued on **3rd August 2015** and the record confirms that the same was duly served upon the Defendant. There is on record an Affidavit of service sworn by **Hezron Ochieng** on **20th April 2015** to that effect. Attached to that affidavit is a copy of the Summons to Enter Appearance which was duly signed and dated on the reverse thereof by the defendant, in acknowledgment of service.

[6] It was upon the foregoing that a Request for Interlocutory Judgment was made and granted on **4th October 2015**. Thereafter, the Plaintiff wrote to the Court the letter dated **8th January 2016** intimating that it had abandoned prayers (1) and (3) in his Plaint, opting instead to pursue the special damages of **Kshs. 100 million** together with interest thereon and the costs of the suit. The Plaintiff, in the same vein requested for a Decree to issue in terms. Thus, on the **25th January 2016** the matter was placed before the Deputy Registrar who after noting the contents of the letter aforementioned gave orders as follows:

“Contents of the letter dated 8/1/2016 noted. A decree is hereby issued as requested.”

[7] A decree was thus issued dated **29th January 2016**, and an application for execution made. Warrants of Attachment and Sale followed suit, and the record shows that execution had commenced as at **25th April 2016** when an application was made before me under Certificate of urgency for a premises break-in order. Upon perusal of the file, I noted that final Judgment had not been entered and that it was imperative that the matter listed for formal proof. It was apparent from the record that the execution process had been prematurely activated. Directions were thus given that the matter be listed for formal proof.

[8] On the **1st July 2016**, the Plaintiff adduced evidence in proof the special damages claimed by calling two witnesses. **PW1 Sammy Boit arap Kogo** adopted and reiterated his witness statement that was filed herein along with the Paint. He is one of the Directors of the Plaintiff. He stated that the defendant was his friend and that upon discovering that the Plaintiff's title deed for the suit property was missing from his **Langata Road office**, he went to **Mombasa** and carried out a search at the Lands Registry and discovered that the title for the property, which is situated in **Malindi**, had been charged by the defendant and his wife, **Susan Waithera**, to **Victoria Finance Ltd** for a loan of **Kshs 15 million**, and that the same had been sold for **Kshs. 23 million** by the Financier in exercise of its statutory power of Sale. He promptly reported the matter to Langata Police Station and investigations were instituted into the complaint. In the course thereof the Defendant was questioned, and that while investigations were ongoing, the Defendant filed a Petition before the Constitutional Court for the police to be restrained from

continuing with the investigations.

[9] It was the testimony of PW1 that upon the dismissal of the Petition the Defendant approached him and offered to compensate the Plaintiff in an out of court settlement arrangement. It was upon such negotiations that the **Memorandum of Agreement** dated **4th September 2013** was made in which the Defendant agreed to pay **Kshs. 35 Million** within **120 days**, and that in default he would pay the market value of the suit property agreed at **Kshs 100 million**. PW1 concluded that it was because the defendant did not keep his word that the instant suit was filed. He pointed out that the Defendant was duly served and had the liberty to defend this suit but did not.

In support of PW1's testimony the Plaintiff called **Samuel Kanyeki Ngare** as PW2 in addition to producing the following documents:

- (1) A copy of the title for the suit property (**PEXh.1**);
- (2) Copy of the Charge and Transfer (**PEXh. 2 & 3**);
- (3) Memorandum of Sale dated 27th May 2011 (**PEXh.4**);
- (4) A report from Langat Police Station dated 3rd July 2013 (**PEXh.5**);
- (5) A copy of the Judgment of the Constitutional Court in High Court Constitutional Petition No. 77 of 2014 (**PEXh. 6**); and
- (6) The memorandum of agreement dated 4th September 2013 (**PEXh. 7**).

[10] On the basis of the foregoing uncontroverted evidence adduced herein by the Plaintiff, I am satisfied that the Plaintiff has specifically proved that it is entitled to the sum of **Kshs 100 million** claimed herein by way of special damages. Accordingly judgment is hereby entered in its favour in the aforesaid sum together with interest and costs as prayed in paragraphs 2 and 5 of the Plaintiff.

Orders accordingly.

SIGNED, DATED AND DELIVERED at NAIROBI this 2nd DAY OF SEPTEMBER, 2016.

.....

OLGA SEWE

JUDGE