



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 378 OF 2012

MEYER ENTERPRISES.....1ST PLAINTIFF

UWE MANFRED MEYER.....2ND PLAINTIFF

-VERSUS-

CHAKA INVESTMENTS LTD.....DEFENDANT

J U D G E M E N T

1. The Plaintiffs filed the current suit on **12th June 2012** by way of a Complaint dated **24th May 2012**. The Plaintiffs seek for the following prayers:-

- a. *An order of specific performance to issue against the Defendant to perform its obligation under the agreement dated 28th November 2011.*
- b. *An order restraining the Defendant and its agents from disposing of and/or alienating the suit property without compensating the Plaintiffs.*
- c. *Kshs. 45,000,000 together with interest thereon at Court rates from date of filing suit until full and final payment.*
- d. *General damages*
- e. *Costs of this suit together with interest thereon at court rates.*

2. The facts of the case are as follows. The 1st Plaintiff and the Defendant entered into a lease agreement for a term of 10 years from 1st of June 2005. On or around the year 2010, the Defendant informed the Plaintiffs that the Plot L.R 1/383 was on sale and its sale would lead to the termination of lease held by the 1st Plaintiff.

3. The Defendant agreed that upon sale of the plot, the Plaintiffs would be paid Kshs. 45,000,000/= as compensation for termination of the Lease. On **12th September 2011**, the Defendant through its Advocate Millicah W. Thairu, informed the Plaintiffs that the 1st Plaintiff would have to surrender the Lease and vacate the property by 31st December 2011 and as compensation, be paid Kshs. 45,000,000/=. The Plaintiffs accepted the said terms of termination.

4. Subsequently, the Defendant requested the 1st Plaintiff to vacate on 31st January 2012 and agreed to pay in two instalments of Kshs. 20,000,000/= by 31st October 2011 and Kshs. 25,000,000/= by 30th November 2011. However, it is the Plaintiffs' contention that the Defendant failed to make any payments and this caused them considerable loss.

5. The Plaintiffs further aver that they entered into an agreement with the defendant on 28th November 2011. It was a term of this contract that the 2nd Plaintiff would sell the suit property and pay to the Defendant Kshs. 255,000,000/=. It was further agreed that all payments above Kshs. 255,000,000/= would be kept by the Plaintiffs as compensation for the termination of the Lease.

6. The 2nd Plaintiff identified a buyer for the transaction at Kshs. 305,000,000. It is the Plaintiffs' case that in breach of the above agreement, the Defendant failed to supply the 2nd Plaintiff with all the requisite documents to see the sale through.

7. It is the Plaintiff's case that the Defendant should honour its obligation under the said agreement and provide the 2nd Plaintiff with the necessary documents to facilitate the sale to the buyer identified. In the alternative, the Defendant should compensate the Plaintiffs for the termination of the lease as earlier agreed.

8. The Defendant challenged the Plaintiffs' suit by filing the Defence dated 18th June 2012 and filed in Court on 11th July 2012. It is the Defendant's case that by 5th October 2011, the 1st Plaintiff was aware that the Notice to vacate earlier issued was inoperative and therefore there was no need to vacate. With regard to the agreement dated 28th November 2011, it is the Defendant's position that it did not execute the same and therefore they are under no obligation to honour the agreement.

9. The hearing of the case commenced on 7th October 2014. Unfortunately, there was no appearance on the Defendant's side. The 2nd Plaintiff testified on his behalf and that of the 1st Plaintiff. In his testimony, the 2nd Plaintiff reiterated the contents of the Plaintiff bearing in mind that this was examination- in- chief.

ANALYSIS

10. I have considered the pleadings in this matter, the Plaintiff's submissions and the authorities cited. Having done so, I take the following view of the matter.

11. This is an action for breach of contract against the Defendant through which the Plaintiffs are seeking an order of specific performance and/or damages.

12. It is the Plaintiffs' case that the Defendant failed to honour the terms of the Notice of Termination which required it to pay the Plaintiffs a total of Kshs. 45,000,000 as compensation for termination. It is also the Plaintiffs' case that the Defendant breached the Contract dated 28th November 2011.

13. In response, it is the Defendant's case that by 5th October 2011, the 1st Plaintiff was aware that the Notice to vacate earlier issued was inoperative and therefore there was no need to vacate. Though the Defendant did not prosecute this matter, it is clear from the Court records that they had communicated to the Plaintiffs assuring them that the Lease was not being terminated. The Defendant further communicated that the Lease would run up to 30th May 2015 and therefore the issue of compensation on the termination of the Lease would not arise. (*See annexures "MSL 1" and "MSL 3" attached to the Defendant's Replying Affidavit*).

14. It is not in dispute that the Plaintiffs are still enjoying the lease. In that case, the issue of compensation for termination of the lease does not arise. The Plaintiffs cannot eat their cake and have it.

15. With regard to the agreement dated 28th November 2011, it is the Defendant's case that they did not execute the same. The Defendant did not defend the case, therefore that allegation is moot. That aside, I have perused the said agreement in which the 2nd Plaintiff was to sell the suit property for Kshs. 255,000,000/=. The 2nd Plaintiff was to keep any sums above the aforesaid amount as compensation for termination of the lease.

16. From the observations already made above it is clear that this agreement could not stand. The issue of compensation was no longer available, the Defendant having indicated to the Plaintiffs that the Lease would run up to 30th May 2015. This was expressed in a letter dated **10th April, 2012** from the Defendant's Advocates and addressed to the Plaintiffs' Advocates. The said letter came after the agreement dated 28th November 2011. This should have been enough notice to the Plaintiffs that the Defendant was no longer willing to sell the property and the agreement had failed.

17. Counsel for the Plaintiffs submits that the business of the 1st Plaintiff was greatly affected by the muted sale of the Defendant Company. It is further submitted that from 2010, when the Defendant first announced its intention of terminating the lease, the 1st Defendant could not make any structural investment in the plot because it was aware of the imminent change of ownership.

18. It is not clear how the business of the 1st Plaintiff has been affected and what substantial loss it has suffered. This allegation has not been substantiated. As already established above, the Notice of Termination lapsed and the 1st Plaintiff was notified by the Defendant that the lease would run up to 30th May 2015. It was therefore upon the Plaintiffs to cut its losses if any or continue to operate its business as usual.

19. In view of the foregoing, it is plain that the Plaintiff's have not proven their case on a balance of probability. It is trite law that he who alleges must prove. (*See section 107 of the Evidence Act.*)

20. In the upshot, the Plaintiffs' case is hereby dismissed. Each party to bear their own costs of the suit.

READ, DELIVERED AND DATED AT NAIROBI

THIS 6TH DAY OF FEBRUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Otieno for the Plaintiffs

No appearance for the Defendant

Teresia – Court Clerk