



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 59 OF 2012

HORECE WANYAMA WAMOTOPLAINTIFF

VERSUS

SHEM NANGABO WEPUKHULU..... DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendant seeking the following prayers;

1. The Plaintiff's claim against the Defendant is for eviction order against the Defendant, his agent, servant, employee and any person acting through him from a portion of land measuring 2 1/2 acres comprised in L.R. No. E. Bukusu/S.Kanduyi/6821 and general damages for breach of contract.

2. Costs and interest

3. Any other relief the honourable court deems just to grant.

2. The Defendant has opposed the suit and filed his defence on 4th December 2012. In his statement of defence, he denied the entire Plaintiff's claim stating there was no definite time frame for paying for the house. He urged the court to dismiss the Plaintiff's suit with costs to him.

3. The parties then proceeded to tender evidence orally before court. The Plaintiff represented by Ms. Njalale advocate testified as the only witness for his case on 29th July 2014. He told the court that he is the registered owner of the suit parcel no. S.Kanduyi/6821 measuring 2 ½ acres. He entered into an agreement to sell this land to the Defendant on 21.1.2010 and the agreement was reduced into writing.

4. On the said date of 21.1.2010, the Defendant paid him Kshs. 360,000/= leaving a balance of Kshs. 750,000/= to be paid on or before 21.1.2011. The agreement was produced as pex. 1. On 21.1.2011, the Plaintiff says he was summoned by the Defendant's advocate. When he went to Mr. Bulimo advocates' office, he met the Defendant and they agreed to extend the time for completing payment of the balance from 21.1.2011 to 31.10.2011. On this date, the Defendant paid him a sum of Kshs. 100,000/=. The 2nd agreement was produced as pex. 2.

5. By the end of 31.10.2011, the Defendant had not paid the balance of Kshs 650000/=. The Plaintiff visited the Defendant at the suit property to demand this balance. Later they appeared before their District Commissioner where after discussion, the District Commissioner asked the Defendant to leave the land. He produced the D.C's letters as pex. 3 (a) and (b). On 22nd September 2012, the Plaintiff issued a demand notice through his advocates on record demanding payment. Again the Defendant failed to pay off the balance.

6. The Plaintiff's further testimony is that when they entered the agreement, the Defendant did not say he was expecting money from elsewhere. He asked the court to order the Defendant to leave the land for failing to pay the balance. He also prayed for costs of the suit.
7. The same date, the Defendant tendered his evidence and that of his two witnesses. He said he is a retired teacher. He agreed to purchase the suitland together with the house on it. According to him, he paid some money for the house although he did not see inside of it as the house was locked. That they agreed he would buy the house and land after he received his pension from the Government. That he is among the 52,000 teachers expecting their gratuity and he produced newspaper cuttings to prove that fact. The Defendant also produced a letter Dex. 3 dated 3.5.2001 showing he was a pensioner with effect from 1.09.1999.
8. DW2 – Rendall Muricho is the son to the Defendant. He knew the Plaintiff as he met him when they signed the 1st sale agreement. According to him, certain facts were not captured in the sale agreement. He doubted the sum of Kshs. 650,000/= was the real quotation/value for the house. He urged the court to order for the valuation of the house. According to DW2, the agreement was not signed properly as the Defendant had not seen the title deed for the house. He ended his testimony by saying it is the Plaintiff who gave them permission to occupy the house.
9. BETTY MWANASA NGOYA testified as DW3. She is the wife to the Defendant. She knows the Plaintiff sold the suit land to the Defendant. She said the Defendant had paid for the land and only the house remained to be paid for once the Defendant received his pension. She asked the court to give them time to enable the Defendant get his pension. Once they receive the pension, the Defendant will build her (DW3) a house as they do not require the Plaintiff's house anymore. The Defendant then closed his case.
10. Both parties filed written submissions which contained a summary of each of their cases. In summary, the Defendant admitted the sale agreement. According to his submissions, he has paid for the land in full and the balance outstanding is for the house. He is willing to surrender the house but not the land. He submits the Plaintiff is not entitled to the land and his suit ought to be dismissed with costs to him.
11. The Plaintiff on his part submitted the Defendant has admitted the existence of the sale agreement and that he is in breach. He urged the court to disregard the defendant's evidence that he will pay the balance of the purchase price upon receipt of the pension funds. He concluded that the Defendant is in occupation of the house/land unlawfully. That he had proved his case and this qualified for the orders sought.
12. I have analyzed the evidence tendered by both parties and find the only question for determination by this court is, whether the Defendant breached the terms of agreement entered into on 21.1.2010 therefore entitling the Plaintiff to vacant possession of the suit parcel E. Bukusu/S. Kanduyi/6821.
13. In the pleadings and evidence tendered, it is not in dispute the parties entered into a sale of land agreement. It is also not in dispute that the defendant is in possession of the suited property. In the initial sale agreement (pex. 1), the land was valued at Kshs. 460,000/= while the house on the land was valued at Kshs. 650,000/= giving a total value of Kshs.1,100,000 referred to as the purchase price. At the time of executing the agreement, it is recorded thus,

“That at the execution of this land, the purchaser is paying Kshs. 360,000/= and the balance of Kshs.750,000/= shall be cleared on or before 21.1.2011.”

Under the conditions paragraph 4, it states ***“That the parties have willingly agreed to be bound by this agreement.”***

Paragraph 5, ***“That any party in breach of this agreement to pay the aggrieved party twice the purchase price.”***

14. In the second agreement (pex2) which extended time within which to pay the balance from 21.1.2011 to 31.10.2011, the terms of the earlier agreement are recorded to apply. In both agreements, the Defendant did not say the payment of the balance was subject to him receiving his pension from the government. Neither did he say that he was only interested in buying the land and not the house.

16. The Defendant has not denied the Plaintiff served him with a demand notice before the commencement of this suit. He also did not request the Plaintiff to extend for him a further period within which to clear the outstanding balance. From his own evidence, the letter dated 1.4.1999 marked as No. 4 in his list of exhibits was telling him he was being retired have reached the retirement age. At the time he was entering the agreement in 2010, 10 years after his retirement, he ought to have indicated in their agreement that he would rely on the pension payments to offset the balance. It begs the question why he did not do so yet this were facts that were within his knowledge. It is a well principle of law that courts do not re-write contracts for parties. This principle enunciated in many judicial precedents such as the case of **Wallis vs Smith (1882)21 Ch D 243 at 246** (Par 633 *GV Odungas digest on Civil Case Law and Procedure*). He cannot therefore be allowed to rely on it due to his own indolence.

17. Other than the Defendant saying he is among the 52000 teachers waiting for their pension as reported in the daily local press (Dex. 6), he did not produce any single specific correspondence addressed to him to say his pension is outstanding and that payment is delayed. I do find that this line of defence doesn't hold any water.

18. The Defendant submitted that he is ready to leave the house but not the land. According to him, he had paid for the land in full. DW3 also stated in her evidence that they will leave the Plaintiff's land as soon as the Defendant gets his pension and constructs for her a house. This is mischief the Defendant is trying to use as a defence in re-writing the contract between him and the Plaintiff. In the sale agreement, both the house and the land were sold together. When the balance of Kshs. 650,000/= was indicated as outstanding, it was not specified as balance outstanding for the house. The Defendant cannot purport to create two sale agreements where only one existed. Assuming the house was sold separately, then the delay in offsetting the balance could be taken as intentional if the evidence adduced by the defence is analyzed.

19. The agreement provided for penalty in case of default. The defendant has not blamed the Plaintiff for any default in performing his part of bargain. It is the Defendant at fault. The Plaintiff did plead particulars of breach by the Defendant at paragraph 8 of his plaint. In the statement of defence filed the Defendant pleaded ***"Paragraph 8 of the Plaint is admitted and the Defendant states that there was no definite time for payment of the house."***

In the case law of **Njamunu vs Nyaga (1983) KLR 282** at holding no 8, the court said, ***"Before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract."***

20. In the contract the subject of this suit, time was made of essence when timelines was set for paying the balance. The Plaintiff duly served notice upon the Defendant to comply. The Defendant failed to comply and proceeded to admit the breach, he must be ready to suffer the penalty provided for in the agreement. However given the title documents are still in the name of the Plaintiff, the damages I award to the Plaintiff for breach will be equivalent to the monies already paid to him. The Defendant will not be refunded any sums of money he paid.

21. I do in conclusion find the Defendant is therefore occupying L.R. no E.Bukusu/S.Kanduyi/6821 together with the house therein illegally. He is ordered to surrender vacant possession within 60 days of the date of this judgment. In default, the Plaintiff is at liberty to evict him through lawful means. The Plaintiff is awarded costs of the suit.

DATED, SIGNED and DELIVERED this 13th day of May 2014.

A. OMOLLO

JUDGE.