



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1039 OF 2016

VICTOR MUTABARI MBAABU.....PLAINTIFF

- VERSUS-

SAMMY WAGURA KARANJA.....1ST DEFENDANT

KIRIMI LILIAN KAGENDO.....2ND DEFENDANT

JUDGMENT

On 21st March, 2016, the plaintiff and the 1st defendant entered into an agreement of sale of the same date under which the 1st defendant agreed to sell and the plaintiff agreed to purchase all that parcel of land known as L.R. No. Nairobi/Block 76/155 together with all the developments thereon (hereinafter referred to only as “the suit property”) at a consideration of Kshs. 10,000,000/= on terms and conditions that were contained in the said agreement. It was a term of the said agreement that the plaintiff would obtain a loan from Ecobank Kenya Limited (hereinafter referred to as “the financier” where the context so permits) to settle the purchase price for the suit property. It was a further term of the said agreement that the said purchase price for the suit property would be paid within 14 days of registration of the transfer of the suit property in favour of the plaintiff and a charge in favour of the financier.

At the time the plaintiff entered into the said agreement of sale with the 1st defendant, the suit property was charged to Equity Bank Ltd. by the 1st defendant. Equity Bank Ltd. (hereinafter referred to only as “Equity Bank”) agreed to discharge the charge it had over the suit property on receipt of an undertaking from the plaintiff’s and the financier’s advocates that it would be paid the loan amount that was due to it from the 1st defendant that was secured by the said charge. The said undertaking was given by the plaintiff’s and the financier’s advocates. Equity Bank thereafter released the original title for the suit property together with a discharge of charge so that the transfer in favour of the plaintiff and a charge in favour of the financier could be registered against the title of the property. After the release of the said documents by Equity Bank, the 1st defendant executed a transfer in favour of the plaintiff and a charge in favour of the financier in respect of the suit property.

At all material times, the 1st defendant was married to the 2nd defendant. Their marriage was subsisting when the 1st defendant entered into the said agreement of sale with the plaintiff in respect of the suit property. When the 1st defendant was entering into the said agreement of sale with the plaintiff, the 1st defendant misrepresented to the plaintiff that he was not married and as such he did not require spousal consent to sell the suit property.

After the suit property was sold, transferred to the plaintiff and charged to the financier, the 1st defendant refused to hand over possession of the property to the plaintiff. The 2nd defendant then came up and claimed that the suit property was her matrimonial home and that the same was sold and transferred to the plaintiff fraudulently without her consent. The 2nd defendant demanded the cancellation of the transfer of the suit property to the plaintiff and the subsequent charge of the property by the plaintiff to the financier. The plaintiff agreed to reverse the transaction as demanded by the 2nd defendant on condition that the 1st defendant would meet the costs incurred by the plaintiff in the whole process. The 1st defendant denied that it was liable to indemnify the plaintiff for the loss and damage that was to be occasioned by the cancellation of the sale transaction.

The plaintiff brought this suit on 26th August, 2016 seeking the following reliefs:

- i. An order for the rectification of the register in respect of the suit property by cancellation of the entries relating to the transfer and charge of the property in favour of the plaintiff and the financier respectively and the restoration of the name of the 1st defendant as the owner of the suit property and the charge in favour of Equity Bank so that the status of the property reverts to the position it was prior to, the discharge of charge in favour of Equity Bank, transfer of the property in favour of the plaintiff and registration of a charge in favour of the financier.

- ii. That the Land Registrar releases the original title for the suit property after the cancellation of the new entries and restoration of the old entries aforesaid to Equity Bank.
- iii. That the defendants jointly and severally do indemnify the plaintiff fully for all loss and damage incurred in connection with the cancelled transaction.
- iv. That the defendants jointly and severally do pay to the plaintiff: -
 - a. Kshs. 963,858/= being the costs directly incurred by the plaintiff in the transaction.
 - b. All the costs attendant to the rectification and restoration of the register.
 - c. General damages for breach and wrongful inducement of breach of contract.
 - d. Costs of the suit and interest.

On 14th September, 2016, the parties entered into a consent the effect of which was to have judgment entered in favour of the plaintiff in terms of prayers (1), (2) and 3 of the plaint dated 25th August, 2016. The only issue that remained for determination after that consent was whether the defendants were liable to indemnify the plaintiff for the loss and damage incurred as a result of the cancellation of the sale transaction between the plaintiff and the 1st defendant and if so, the extent and quantum of such indemnity.

The defendants filed a joint statement of defence on 15th November, 2016. The defendants averred that when the plaintiff and the 1st defendant entered into the agreement of sale dated 21st March, 2016 in respect of the suit property, the interest of the 2nd defendant in the suit property was not taken into account and her consent was not obtained. The defendants averred that when the 1st defendant entered into the said agreement of sale, he was not represented by an advocate and as such he was not advised of the 2nd defendant's interest in the suit property which interest he was not aware of. The defendants averred further that the plaintiff breached the said agreement of sale by failing to complete the sale on 21st June, 2016 which was the completion date. The defendants averred further that plaintiff's advocates who prepared the agreement of sale and instrument of transfer failed to explain to the 1st defendant the meaning of and/or implication of spousal consent.

The defendants denied that the 1st defendant was guilty of misrepresentation and that the defendants had colluded to defraud the plaintiff. The defendants denied that the plaintiff was entitled to the reliefs sought against the defendants in the plaint.

When the suit came up for hearing on 13th June, 2019, the defendants did not show up in court. Mr. Ndurumo advocate who was representing the defendants appeared in court shortly before the hearing commenced and told the court that he did not wish to participate in the hearing because his firm no longer had instructions to act for the defendants in the matter. The court allowed Mr. Ndurumo to leave the court room in case he wished to do so which he did. The hearing of the suit proceeded in the defendants' absence.

In his testimony, the plaintiff told the court that he purchased the suit property from the 1st defendant and that the transaction was cancelled and the entries in the register of the property reversed when the 2nd defendant claimed that the suit property was her matrimonial home and that it was sold without her knowledge. The plaintiff stated that an order was made in this suit cancelling the transaction and reverting the suit property to the name of the 1st defendant. The plaintiff stated that his claim against the defendants was for the loss incurred as a result of the cancellation of the sale transaction and damages for breach of contract. The plaintiff adopted his witness statement filed in court on 26th August, 2016 as part of his evidence in chief and produced the documents attached to his bundle of documents and further bundle of documents (index) filed in court on 26th August, 2016 and 10th May, 2019 respectively as exhibits. The plaintiff stated that he had set out in paragraph 18 of the plaint the particulars of the direct costs that he incurred in the transaction in the form of government fees, legal costs and valuation fees. He stated that the receipts in support of the payments of the said charges were contained in the bundle of documents that he produced as exhibits 1 and 2 except for two (2) payments that were made by M-pesa to the 1st defendant and the valuer in the sum of Kshs. 100,000/= and Kshs. 25,000/= respectively for which he had produced M-pesa statements. He stated that he paid Kshs. 100,000/= to the 1st defendant so that he could vacate the suit property.

The plaintiff stated that he was claiming damages for breach of contract because the contract between him and the 1st defendant failed as a result of the 1st defendant's fault. He stated that he had intended to settle on the suit property and that the 1st defendant was aware of that fact. The plaintiff urged the court to grant him prayers 4 and 5 in the plaint.

After the plaintiff closed his case, the court marked the defendants' case as closed and directed the parties to make closing submissions in writing. The parties did not file submissions within the time that was set by the court and even after the time was extended for them to do so. I have considered the evidence tendered by the plaintiff in support of his case against the defendants. The evidence by the plaintiff was not controverted since the defendants did not give evidence at the trial in their defence. The plaintiff has proved that when he was entering into the agreement of sale of the suit property with the 1st defendant on 21st March, 2016, the 1st defendant misrepresented to him that he was not married and as such spousal consent was not necessary. It is not disputed that when the 1st defendant entered into the said agreement of sale, he was married to the 2nd defendant. It is also not disputed that when the 1st defendant misrepresented that he was not married, he was aware that the plaintiff would rely on that misrepresentation. The plaintiff has proved that he relied on the 1st defendant's said misrepresentation to his detriment.

It is not disputed that since the 1st defendant was married to the 2nd defendant and the two were living on the suit property as their

matrimonial home, consent of the 2nd defendant had to be obtained before the suit property could be sold and transferred to the plaintiff by the 1st defendant. Since no such consent was obtained, the whole transaction was void and had to be cancelled. The plaintiff has proved that the sale transaction between the plaintiff and the 1st defendant was cancelled and that all the entries that had been made in the register of the suit property pursuant to the said transaction were reversed. The reversal of the transaction entailed; the cancellation of the transfer of the suit property in favour of the plaintiff, the discharge of charge in favour of the plaintiff's financier, Ecobank Ltd., the restoration of the property to the name of the 1st defendant and reinstatement of the charge in favour of Equity Bank Ltd. on the title. The plaintiff has proved that he incurred costs in the purchase of the suit property through a loan from Ecobank Ltd. to which the property was charged. The plaintiff has also proved that he incurred further costs in undoing the transaction and reverting the property to its status before the sale of the property to him. The plaintiff has also proved that the transaction was cancelled as a result of the 1st defendant's misrepresentation of his marital status. It is my finding from the foregoing that the plaintiff suffered loss and damage as a result of the 1st defendant's misrepresentation and that the 1st defendant is liable to indemnify the plaintiff for the same.

The plaintiff has claimed both special and general damages. With regard to special damages, I have perused the receipts and other material placed before the court by the plaintiff in proof the costs claimed from the defendants. It is my finding that out of the plaintiff's claim of Kshs. 963,858/= for the costs incurred in the transaction, only a sum of Kshs. 963,225/- has been proved. For land rent, the receipt that was tendered in evidence in proof of payment is for Kshs. 723/- only while the plaintiff has claimed Kshs. 1350/ under that head of claim. For searches, the receipt produced in proof of payment is for Kshs. 500/- and not Kshs. 5000/- that has been claimed. The said sum of Kshs. 963,225/- that has been proved by the plaintiff constitute direct loss suffered by the plaintiff a result of the 1st defendant's misrepresentation. I find the 1st defendant liable for the same.

The plaintiff had also claimed what the plaintiff referred to as "All the costs attendant to the rectification and restoration of the register." In my view, such costs are in the nature of special damages and as such the same had to be specifically pleaded with the necessary particulars and strictly proved. A part from the sum of Kshs. 963,858/- that I have referred to above that was pleaded and particularized, the plaintiff did not plead any other special damages. Due to the foregoing, I will make no award under that claim for "All the costs attendant to the rectification and restoration of the register."

With regard to the claim for general damages for breach of contract, I am of the view that since the contract between the parties was void for lack of spousal consent, it could not be performed. The 1st defendant cannot therefore be said to have breached the same. The 1st defendant in my view is only liable to the plaintiff for the special damages suffered by the plaintiff as a result of his misrepresentation that resulted in the parties entering into a void contract. I have already found the 1st defendant liable to pay to the plaintiff Kshs. 963,225/- as special damages. I find no basis for the plaintiff's claim for general damages. As against the 2nd defendant, it is not clear why she was made a party to the suit. The plaintiff has not established any wrong doing on the part of the 2nd defendant. In the circumstances, I find the case against the 2nd defendant not proved.

In conclusion I hereby make the following orders:

1. Judgement is entered for the plaintiff against the 1st defendant for:
 - i. Kshs. 963,225/= being special damages together with interest at court rates from the date hereof until payment in full.
 - ii. Costs of the suit.
2. The suit against the 2nd defendant is dismissed with each party bearing its own cost.

Dated and Delivered at Nairobi this 22nd Day of October, 2020

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mate h/b for Mr. Kairaria for the Plaintiff

N/A for the 1st and 2nd Defendants

Ms. C.Nyokabi-Court Assistant