



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL CASE 16 OF 2011

ABDUL RAHIM DAWOOD.....APPLICANT

VERSUS

MARITHA KITHIRU1ST DEFENDANT
STEPHEN M'TWAMWARI2ND DEFENDANT
MARGARET M. NKUENE.....3RD DEFENDANT

J U D G M E N T

The plaintiff ABDUL RAHIM DAWOOD, through a plaint dated 10th February, 2011 sued the three defendants seeking for judgment against the defendants jointly and severally for:

a. Eviction of the defendants from Land Parcel No.NTIMA/IGOKI/6761.

b. Liquidated damages for breach of Agreement dated 8th September, 2009.

c. costs and interests.

That the defendants were served with copies of the plaint and summons to enter appearance by licensed Court process Serve one Joseph MburuKungu on 28th February, 2011 at 1.00p.m upon the 1st defendant who accepted the service on her behalf and that of the 3rd defendant but declined to sign the process server's return copy.

That on the same day at around 3.30p.m the process server served the 2nd defendant at Makutano market in Meru County who accepted service but declined to sign the return copy. That at the time of service the 1st and 2nd defendant were pointed to the process server by the plaintiff's agent one Mutembei who was well known to them.

On 13th April, 2011 the plaintiff's Counsel filed a request for judgment dated 31st March, 2011. That interlocutory judgment was thereafter entered against 1st and 2nd defendants on 27th April, 2011. Subsequently the suit was set down for formal proof on 28th May, 2012.

The plaintiff gave evidence and called no witness. Plaintiff introduced himself as a Councillor of Commercial Ward, Meru Municipality and a businessman at Makutano, in Meru. The plaintiff stated that he is the proprietor of NTIMA/IGOKI/6761 measuring 0.015hectares. The plaintiff produced copy of the

title deed after court had seen the original title deed, as exhibit No.1. The title deed show that the plaintiff is the registered proprietor having been registered as such on 27.1.2005 following sub-division of the original title NTIMA/IGOKI/3901.

The plaintiff in his evidence stated that the original land was NTIMA/IGOKI/3901 which he had purchased in the year 2003 and he had the same subsequently subdivided in 2005 creating titles No.NTIMA/IGOKI/6761 and NTIMA/IGOKI/6762. The plaintiff averred that he had purchased NTIMA/IGOKI/3901 from the late NAAMAN MWIRICHIA and immediately took possession of part of NTIMA/IGOKI/3901 as the other part was occupied by the vendor's licencees being his brother's children and wife.

The plaintiff averred that he had entered into an agreement with the licencees and had agreed with them to remain on the land for 6years from 8th May,2003 to 8th May,2009. He averred the licencees are the three defendants. That the agreement between the plaintiff and the defendant was in writing. That after 6years had lapsed the defendant did not vacate as agreed. The plaintiff stated that he had the original agreement and wished to produce the same. The agreement was produced as plaintiff Exhibit No.2. The plaintiff stated that it was a term of the agreement that the plaintiff was to pay to the defendants Kshs.3million for their developments on the land. That on the execution of the agreement the plaintiff paid to the defendants Kshs.20,000/= leaving a balance of Kshs.2,980,000/- which was to be paid upon delivery of vacant possession of the land within 90days. The plaintiff stated in spite of the agreed time having lapsed and also having paid the amount agreed the defendants have ignored and/or refused to deliver vacant possession.

The plaintiff stated that he served the defendants with demand notice dated 23rd August, 2010. The plaintiff produced copy of the demand notice as exhibit No.3. He concluded by praying for orders of eviction with damages for breach of contract. He also sought for security at the time of eviction. He also stated that he is willing to pay the defendants Kshs.2,980,000/- so long as the developments on the suit portion are not interfered with.

The plaintiff's Counsel after conclusion of the plaintiff's evidence sought for time to file written submissions. I have considered the plaint, plaintiff's evidence and submissions by the plaintiff's Counsel and the main issues for determination in this suit are as follows:-

- i. Whether the plaintiff is sole proprietor of NTIMA/IGOKI/6761 and whether he is solely entitled to sole occupation of the same?***
- ii. Whether there is an agreement between the plaintiff and the defendants to deliver vacant possession of NTIMA/IGOKI/6761 and/on what terms?***
- iii. Whether the plaintiff is entitled to vacant possession and if so under what terms should the defendant be ordered to be evicted from the suit land***
- iv. Whether the plaintiff is entitled to damages?***

The first issue for consideration is whether the plaintiff is sole proprietor of NTIMA/IGOKI/6761. According to plaintiff's exhibit No.1 the registered proprietor is ABDUL RAHIM DAWOOD, the plaintiff. He was registered as a proprietor on 27th January,2005 and title issued to him on 10th February,2005. The plaintiff have shown that the title was subdivided from his original land NTIMA/IGOKI/3901. There is no evidence challenging the plaintiff's title.The agreement produced as plaintiff's exhibit NO.2 duly executed by the plaintiff and the defendants attests to the plaintiff's ownership of the land and the defendants have acknowledged the initial owner of the land was NAAMAN MWIRICHIA now deceased and that they were his licencees. In view of the foregoing and in view of the land certificate issued to the plaintiff the first issue is resolved in favour of the plaintiff. I find that the plaintiff is the sole proprietor of NTIMA/IGOKI/6761 and solely entitled to occupation and enjoyment of the same.

The second issue is whether there is an agreement between the plaintiff and the defendant to deliver vacant possession of NTIMA/IGOKI/6761 and on what terms. The plaintiff and defendants made an agreement dated 8th September, 2009. The agreement was produced as plaintiff's exhibit No.2 which agreement inter alia provided:-

“AND WHEREAS under a Memorandum of Understanding between the previous registered proprietor, one NAAMAN MWIRICHIA now deceased, who was the licencees’ paternal uncle, the owner herein undertook to allow the licencees herein to continue to enjoy user of the structures the said licencees were occupying on the subject land for a period of six(6) years with effect from the date of sale of the parcel, then known as NTIMA/IGOKI/3901 which upon sub-division was renumbered NTIMA/IGOKI/6761.

2. to enable the licencees effect this delivery of vacant possession to him, the owner shall pay a sum of Kenya Shillings Twenty Thousand(Kshs.20,000) whereof the licencees respectively acknowledge by appending their respective hands against this clause.

3. The agreed value of the developments is the sum of Kenya Shillings Three Million(3,000,000) only.

4. After payment is tendered under Clause 2 above, the balance outstanding, in the sum of Kenya Shillings Two Million, Nine Hundred and Eighty Thousand(Kshs.2,980,000/-) shall be due and payable in lumpsum in liquid funds at completion.....

7. Completion shall be preceded by delivery by the licencees to the owner of full vacant possession of the premises. Upon delivery and on the same day as vacant possession is delivered, the owner shall pay the balance reserved under Clause 4 above.”

The agreement produced by the plaintiff as exhibit NO.2 confirms existence of the agreement between the plaintiff and the defendants in which the defendants committed themselves to deliver vacant possession by 8th September, 2009. The plaintiff had agreed to pay to the defendants Kshs.3,000,000/- for their developments and paid Kshs.20,000/- leaving a balance of Kshs.2,980,000/- which was to be paid to the defendants upon delivery of vacant possession and leaving all developments on NTIMA/IGOKI/6761 intact. I therefore find and hold there was an agreement between the plaintiff and the defendants to deliver vacant possession with all their development and be paid Kshs.3million by 8/9/2009.

On the third issue the period agreed upon by both the plaintiff and the defendants having lapsed the plaintiff is entitled to vacant possession with all defendant's developments intact so as to have defendants paid the agreed balance of Kshs.2,980,000/- and if the defendants are not willing to be paid Kshs.2,980,000/=being balance of the agreed value for their development they are at liberty to remove all their developments as they vacate from NTIMA/IGOKI/6761.

The last issue for determination is whether the plaintiff is entitled to any damages. The plaintiff did not during the hearing of the suit lead any evidence on damages which he purports to have incurred for the breach of the contract. The plaintiff did not even refer to any specific provision of the contract between himself and the defendants which would have justified him to seek damages. Damages were not mitigated at all and I find that the plaintiff is not entitled to any damages.

In the circumstances of this case, I enter judgment in favour of the plaintiff jointly and severally against the 1st and the 2nd defendants against whom interlocutory judgment was entered but not against the 3rd defendant against whom no interlocutory judgment was entered. I therefore enter judgment jointly and severally against 1st and 2nd defendant in favour of the plaintiff as follows:-

a. The defendants do deliver vacant possession of land No.NTIMA/IGOKI/6761 to the plaintiff within the next sixt(60)days from today and if they leave the developments therein intact the plaintiff to compensate the defendants by depositing balance of the agreement value of development of Kshs.2,980,000/- with court within the next seven(7) days from the date the defendants would deliver

vacant possession in default execution to issue.

b. Damages Kshs. Nil

c. costs of the suit to the plaintiff.

DATED, SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF JULY, 2012.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

Mr. Omayo for the plaintiff

N/A for the defendants.

J. A. MAKAU

JUDGE