REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 3102 of 1991

PETER GACHU MUGI..... PLAINTIFF

Versus

NAIROBI CITY COMMISSION *& ANOTHER*.....DEFENDANTS

JUDGMENT

By this suit filed on 18th June, 1991, the plaintiff prays for orders restraining the defendants from repossessing or dealing with plot No. D2110B, Dandora and for general damages for trespass to and/or loss of rental income from the said suit premises of which the plaintiff claims to be the lawful owner as tenant purchaser from the defendants.. However by defenses filed on 12th February, 1993 and 4th January, 1993, the defendants contended that the suit plot had been lawfully alienated to the 2nd defendant as the plaintiff had breached the terms of allocation of suit plot to him by the 1st defendant. On account of the above the court was required by the parties to determine the following issues:-

(1) Had the 1st defendant legally repossessed the plot, if so, what was the value of the said plot together with the developments at the time of the repossession? (2) Is there any further payment that the plaintiff made to the 1st defendant after repossession, if so of how much and should the same be refunded to the plaintiff together with the value of the developments of the plot?

(3) If repossession by the 1st defendant of the plot was illegal, is the plaintiff entitled to damages for breach thereof?

(4) Who is now entitled to retain the plot together with the developments - is it the plaintiff or the 2nd defendant?

(5) Is the 2nd defendant a bonfide purchaser for value without notice of fraud, if not, is he a trespasser, and is he therefore liable to pay the plaintiff damages for trespass?

(6) Should relief to the plaintiff be by way of specific performance or is in the alternative relief by way of damages an adequate relief.

Further, prior to the hearing of the suit, the plaintiff withdrew the case against the 2nd defendant. The hearing therefore proceeded against the 1st defendant only.

On the pleadings and the evidence adduced at the hearing it is common ground that the suit plot was at all material times the property of the defendant and had entered into a tenant/purchase agreement with the plaintiff for sale of a lease hold interest therein to him by monthly installments. According to P.W.I, who is the plaintiff himself he was allocated the suit plot on 25th May, 1981 pursuant to an application which he had made to the defendant on 11th April, 1976. In the application he had been found to be capable of paying Shs. 400/= per month towards any loan given to him.

When he was initially allocated the suit plot, the plaintiff was to pay Shs. 177/= per month, but later increased to Shs. 210/= and Shs. 387/- per month. He was also issued with a card for payment. By 15th May, 1987 he had made a number of payments towards a loan which the defendant had given him of Shs. 3200/= to enable him to construct on the suit plot. However in 1990, he was injured and hospitalized. He was therefore unable to keep up with the repayments and the suit plot was repossessed and sold to the second defendant, who is now not a party to the suit as he was then in arrears of Shs. 8255/- but he had paid Shs. 40,000/= toward the purchase. He however produced some receipts which could not total Shs. 40,000/= and stated that some had been lost. He also testified that by the time the suit plot was allocated to the 2nd defendant he had carried out substantial construction work amounting to above Shs. 216,614/50. He could not produce any document to support the above allegation as the contractor who was doing the work for him used not to sign for payments made to him for work and materials. According to him the minimum price at which the suit plot including the developments made by him could be sold should have been Shs. 256214/=. According to him the plot was not lawfully allocated to the 2nd defendant and that when he left hospital the defendants officer had told him to continue paying for the plot and had in fact paid a further Shs. 5500/= but later stated that the plot had already been allocated to the 2nd Defendant. He therefore asked for damages at the market value of the suit plot plus interest at bank rates.

In cross examination, the plaintiff agreed that he had signed an agreement with the defendant accepting all the terms thereof. He also agreed that he was supposed to pay monthly but would sometimes receive bills demanding 2 or 3 months payment in arrears. He therefore accepted being in arrears with some payments 2 or 3 months and that when he took possession of the suit premises, the council had put up a toilet, Kitchen and a shower room. However at the time of repossession, it had 2 rooms measuring 12' x 10' feet. Finally he stated that he had not claimed for refund of the moneys paid but for the plot. P.W.II, Mr. Mwangi confirmed what the plaintiff stated as regards the amounts spent on construction work. He said the money used on construction work was produced by the plaintiff. In his view the materials cost was 217,614/50 including cost of stones, cement and transport. He further stated that he had put up a perimeter fence plus the floor slab. He confirmed that he used not to issue receipts for the moneys received from the plaintiff as they were brothers and trusted each other. In cross- examination he stated that he could not produce any receipt from the people he had purchased goods and services.

The defendant called one witness, D.W.I, Mr. Richard Thuo Kamau, the Senior Accounts Officer, in the Housing Department of the defendant. He stated that the plaintiff was allocated the suit plot after signing an agreement dated 25th May, 1981. The Council had put up to some students on the plot a kitchen toilet and shower room.

According to the agreement, the allottees were to develop the plots based on the plan provided by the defendant. They were to follow the plan and if they deviated, the structure became illegal. The council also provided a material loan of Shs. 3/200/= payable at interest 8.5% per annum. The agreement entitled the defendant to repossess the plot if payments were in arrears for 2 months.

In the present case the witness stated that the witness had been in arrears and had been issued with notices. As he did not heed the notices, the plot was repossessed under clause 10(b) of the agreement. It then proceeded to reallocate the suit plot to the 2nd defendant as it had not been applied for and had accumulated arrears of Shs. 14,445/-. The 2nd defendant paid for it. The agreement did not have a provision for refund of amounts paid to the council by allottees. The witness stated that he was not aware of the developments which may have been carried out on the plot as that can only be confirmed by the site Engineer, who should have signed the plaintiffs' record book. If any construction was carried out without the supervision of the Engineer, then such work was illegal and the defendant had no responsibility for same. Further, as the claim includes some work done after demolition of the council's structure, it was the witness's view that the work was illegal and cannot be compensated for by the council. Consequently the suit should be dismissed with costs.

In cross-examination, the witnesses agreed that the witness had made some payments before the repossession. He however doubted if Shs, 40,000/= had been made by the time as the sum of Shs. 14,400/- would not have been outstanding by then. According to him the full amount for the plot was

about Shs. 28,800/= and as he was having arrears of Shs. 14,400/= then he still had not paid Shs. 14,400/=. Receipt of Shs. 5500/= by the council after repossession was conceded and that a refund of this figure was due to the plaintiff. The witness agreed that the council had a reserve price on the suit plot but could not say how it was reached. In his view the balance of Shs. 72,000/= after deducting arrears did not belong to the plaintiff but the council.

In reexamination, the witness stated that the scheme was not for sale of the plot to the allot tees. He however stated that subsequent allot tees were outright purchasers and that Shs. 107,000/= included the value of the plot and that clause 10(b) entitled the council to terminate the tenancy. Shs. 107,100/= was the witnesses testimony that in the event of repossession, the plot would cease to belong to the allot tee and the council could do whatever it liked with it.

The parties chose to put in written submission with the permission of the court. Mr. Muguku for the plaintiff submitted that the allocation was on condition that the plaintiff paid Shs. 600/= out of which Shs. 400/= would be a down payment towards purchase and shs. 200/= for water deposit. The plaintiff was also to pay Shs. 177/= per month as installment towards purchase of the plot. Consequently, although he does not pay so, Mr. Muguku's view would appear to be that the developer on complying with the letter of allotment became entitled to the plot and if he is deprived of it, then he is entitled to the damages for trespass, loss of rental income and market value of the plot.. In his view the plaintiff was entitled to a refund of all payments made to the defendant amounting to Shs. 23,554/= for which he held receipts plus the sum of Shs, 5,500/= paid to the defendant after repossession. It was also his view that the defendant should refund the sum of Shs. 217,614/50 which the plaintiff had spent on the construction work plus the sum of Shs. 107,000/= which was the value of the plot less the sum of shs. 14,440/= which the plaintiff was still owing to the defendant at the date of repossession. He also submitted that the plaintiff was entitled to interest at the rate of 25% per annum.

On the other hand. Mr. Kinyua was of the view that the project •was a site and service scheme. The appellant however fell into arrears in paying for the plot and the defendant was entitled to repossess the plot and deal with it as it deemed fit. In the same breath, he stated that the defendant was entitled to recover unpaid rent although the plaintiff was supposed to be paying for the ownership of the lease under a site and service scheme.

On payments allegedly made by the plaintiff towards development of the plot, he submitted that no single receipt had been produced nor had a valuation report been produced to show the amount which may have been spent by the plaintiff on the plot. In the council's view therefore the expenditure had not been proved nor had loss of rental income been proved. Further, it was the defendant's counsel's view that as the defendant had not completed paying for the plot, he was not entitled to the value thereof and had no claim towards the Shs. 10 7,000/- paid by the 2nd defendant as he is not entitled to benefit from his own default in not paying the agreed installments.

As can be seen, the main issue to be determined herein is whether the transaction termed site and service scheme is a lease or purchase of the subject matter by installments? If it is a lease, then the plaintiff would not be entitled to the value of the plot but if it is a purchase by installments then he would be entitled to the value unless the agreement stipulates to the contrary. In both cases if the developments on the plot were with consent of the owner of the plot, then in equity, the plaintiff would be entitled to compensation for the developments.

Keeping the above in view, it is regretted that the agreement between the parties appears not to have been all that clear. It starts by saying that out of the payment of Shs. 600/=, Shs. 400/= is a deposit for the plot and Shs. 200/= is for services.

Clause 2(a) and (b) of the terms and conditions attached to the allocation stipulate that the plot is to be leased to the plaintiff for 50 years from the date when plot was handed over but if the. Allot tee does not construct at least one room on the plot within 18 months, the offer would be withdrawn and plot given to someone else. Clause (3) restricts transfers until after 5 years. Clause 4, 5 and 6 relate to the manner the buildings and the defendants structures on the plot are to be treated and paid for by the allottee. Clause 7

however states that the allot tee would be charged annual rent by the defendant for the plot, while clause 8(a) and (b) relates to monthly charges for services and repayment of materials loan and that if the repayment of the above are in arrears for 2 months, the defendant would be entitled to commence "repossession procedure". Finally in Claus 10(b) and (c), it is provided that the lease of the premises could be terminated at any time by giving one months notice. In addition, it is in evidence by D.W.I, the defendants accountant, that at the date of the termination of lease, the plaintiff owed Shs. 14,440/= out of a total of Shs. 28,440/= which he should have paid to complete the purchase price of the leasehold interest in the plot.

Taking all the above into view, it would appear that the intention of the agreement was to enable the allottees to own the plots in question subject to the conditions set out therein. It would therefore appear that once an allottee complied with the conditions of the allotment, he acquired ownership. In fact he could, alienate same until after 5 years and if this were not so, then he could, have been given such a right by clause 3 of the agreement. The agreement would not have had to refer to "eviction procedure" in clause 8(b) of the agreement nor would there be need for the agreement to show that on issue of the lease, the defendant would "charge the plot to secure payment of monies mentioned in paragraph 7", to refer to paragraph 10(a) of the agreement or to annual rent in paragraph 7 thereof It is therefore my finding that the transaction was one of sale of property and not a tenancy. The plaintiff had therefore acquired an owner's interest subject to the loans which he had been granted by the defendant which would have been charged on his title on the issue of the title. The plaintiff is as such entitled to claim damages arising from the re-sale of the plot herein.

The counsel for the plaintiff submitted that, the plaintiff should be paid the sum of money which he paid after the plot had been repossessed, the value of the plot less whatever was still due to the defendant towards its purchase, the amounts paid to the defendant towards purchase and the sum of Shs. 217,614/50 which the plaintiff had spent on the plot plus interest at 25% with effect from the time the plot was repossessed. The defendant only-

conceded the sum of Shs. 5500/= contending that the other sums were not recoverable as the plaintiff was a tenant and the structures were illegal, in the absence of an approval by the defendants engineers I agree that the sum of Shs. 5500/= should be awarded to the plaintiff as it was paid after the plot had been repossessed. As I have found that the plaintiff was in possession of the plot as owner and not as a tenant, he is entitled to the value of the suit premises. Mr. Muguku stated that this was over Shs. 200,000/= but I have no evidence in this regard on which I can base my judgment. There is however evidence that the defendant had valued the same at Shs. 107,000/= at which price he sold it to the 2nd defendant. This being the best evidence on the value of the plot, I award that sum to the plaintiff less the sum of shs, 14,400/= which the plaintiff still owed the defendant on the purchase of the plot. The amount due to the plaintiff in this regard is therefore Shs. 92,560/=.

As regards payments made to the defendant by the plaintiff, I find that they were partly for services and partly towards purchase of the plot and the plaintiff was duly credited with same leaving a balance of Shs. 14,440/= still due to the defendant towards purchase of the plot. It would therefore be duplicating the amounts due to the plaintiff if I were to make an order for refund of the amounts paid by him to the defendant.

As regards the expenses spent on the development on the plot, I find that the plaintiff was unable to produce evidence to proof the expenditure. As special damages must be strictly proved, I find that the plaintiff did not establish that he actually spent the high figure of Shs. 217,000/-. It is also not clear if the valuation of Shs. 107,000/- did not issue the improvements which had been carried out by the plaintiff. Like the claim for refund of sums paid to the defendant, I find that I would easily be duplicating compensation if I allow this claim, in the absence of clear evidence. I therefore decline this claim. I also decline the claim for interest at 2 5% as there was no contract or usage to this effect shown to the court. The award of damages must therefore be subject to the usual court rates.

In the circumstances, I hereby award to the plaintiff against the defendant the sum of Shs. 97,560/= as damages plus costs and interest thereon at court rates. The damages to carry interest from the date of the

filing of the suit but the costs to carry interest from the date of this judgment. Orders accordingly.

Dated at Nairobi this 11th day of March, 1998

G. P. MBITO

JUDGE