



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2953 OF 1991

AGEMBO DULO.....PLAINTIFF

VERSUS

MICHAEL O. MAKALWALA.....DEFENDANT

J U D G M E N T

The plaintiff is the registered proprietor of all that parcel of land known as L.R. No. 209/2498 situate at Ralph Bunch Road in Nairobi.

On 13th January, 1988 the parties herein executed a document headed heads of Agreement with a view to have a joint venture for the purpose of developing flats on the said plaintiffs property.

Going by the Amended plaint dated 1st July, 1993 under the terms of the said Heads of agreement, the plaintiff's contribution to the construction of the said flats was to be the land on which they were to be built while the defendant was to provide all the finances to build the flats.

Some of the terms contained in the Heads of Agreement (Ext2) have been set out in the plaint but I do not deem it necessary to repeat the same in this judgment save to observe that a formal joint venture Agreement was anticipated by the parties herein. Although both parties were residing in the United Kingdom, a Limited Liability Company was to be incorporated in Kenya in the name of Dalmak Fairdeal Limited with a nominal capital of Ksh.2000/- with each party holding 50% shares.

Upon incorporation of the company aforesaid the plaintiff would transfer to it the suit property free from all encumbrances.

There is no dispute that the joint venture Agreement was never drawn or executed and that the anticipated limited liability company was never registered. If they were the parties would have said so in their pleadings. They have not.

The foregoing notwithstanding, the defendant is said to have started development on the suit premises. This the plaintiff says in his pleadings was premature and without his authority and or permission. In any case it was without any of the conditions stipulated in the Heads of Agreement being met.

Be that as it may, the construction did not take place as stipulated as the contractor stopped work due to lack of finances and was eventually evicted from the suit premises by the defendant who is said to have taken over the suit premises.

The plaintiff then sought and found another financier who he named as Job Omino in his evidence but this new financier ran short of funds and was denied access to the suit property by the defendant. As a

result the plaintiff says he has suffered loss and damage.

It is the plaintiff's case that the said document called Heads of agreement was not finding but if it were, the same would be unenforceable on grounds of frustration and/or repudiation the defendant having acted in a manner inconsistent with the intention of the parties. The reliefs sought by the plaintiff are:

- (a) A permanent injunction restraining the defendant, his representatives or agents from entering, wasting vandalising building, erecting on, developing, interfering or in any way alienating L.R. 209/2498, or being on the said property or residing thereon.
- (b) An order for vacant possession.
- (c) An order for eviction of the strangers or trespassers squatting on the said property.
- (d) General damages
- (e) A declaration that the document of Heads of Agreement between the plaintiff and the defendant dated 13th January, 1988 is not an enforceable agreement in law and is null and void.
- (f) Costs and interest of the suit.
- (g) A declaration that the plaintiff is the sole proprietor and has exclusive rights over Title Number L.R. 209/2498
- (h) Any other relief that this court may deem fit and proper to grant

The defendant denied the plaintiffs claim and raised a counterclaim. In the defence it was pleaded that on or about the month of January 1988 the defendant and the plaintiff entered into a formal Joint venture agreement for the purpose of developing flats on L.R. 209/2498 and not that they agreed to enter into a joint agreement as alleged in paragraph 4 of the plaint.

The defendant further admitted paragraph 5 of the plaint and stated that further to the terms of the said agreement he commenced development of the said property and had, as at the time of filing the defence invested upwards of Ksh. six million (Kshs. 6,000,000/-)

The defence further states upon the plaintiff giving the said property as his contribution to the joint venture he ceased to have exclusive title to the said property and the same became the property of the joint venture and he is therefore estopped from asserting exclusive title to the property. He blamed the plaintiff for demolishing the building thus causing wanton waste on the property.

In his counterclaim the defendant retraces the document of Heads of Agreement and says the plaintiff was to transfer the title to the joint names of the plaintiff and the defendant or to a joint venture company. He has performed part of the agreement in that he has commenced construction of the flats and has so far invested over Ksh. 6 million. He therefore claims specific performance of the said agreement and the plaintiff be ordered to execute a proper conveyance of the said property to the joint names of the parties or to the joint venture company.

The plaintiff gave evidence in support of his pleadings and called for other witnesses. He and the said witnesses were subjected to cross examination by the learned counsel for the defendant. The record will show that on several occasions before and after the commencement of the trial the suit was either taken out or adjourned at the instance of the defence. I believe the court was bent on giving an opportunity to the defendant to be heard. He did not attend the trial. There is an entry on 26th July, 1994 that shows that the defendant had given a power of attorney to one George Okilo. This man also did not attend the trial. I believe the court has given enough indulgence to the defendant in this matter.

This case shall not be decided on the non-attendance of the defendant but on the evidence adduced.

Several documents were produced in the trial and as the defendant was represented by counsel I believe the contents thereof must have been brought to the attention of the defendant in the course of the trial. The implementation of the terms of the Heads of agreement was dependant on the formation of the limited liability company Dulmark Fairdeal Limited. This can be discerned from the tenor and context of the Heads of Agreement (Ext2). The Limited liability company aforesaid was never formed two firms of lawyers. M/s Lewis Spikin Solicitors in England and M/s Kaplan & Stratton in Kenya. The failure was attributed to the defendant and two letters -Ext 3 "A" & 3 "B" are a pointer to that direction.

Further to the foregoing, clause 9 of the heads of Agreement envisaged the formation of a "Joint Venture agreement to be prepared by Messrs Kaplan & Stratton and subject to the agreement of the parties". This was never prepared.

I have come to the finding that ext 2 is not capable of enforcement and is not therefore binding on the parties. In any case, it is the defendant who stands to be blamed for the failure of the Heads of Agreement. He failed to respond to correspondence and even after the project had been commissioned and the contractor moved on site, he did not perform his obligation to provide funds therefor.

The evidence of the plaintiff, the contractor and the quantity surveyor has not been shaken even under intense cross-examination. The project was abandoned for lack of funding. The contractor was evicted by the defendant and the defendant took over the suit premises. The learned counsel for the defendant tried his best to exonerate the defendant from blame. But whatever suggestions he made begged for answers not from the plaintiff's evidence and that of the other witnesses but from the defendant. In the end the evidence of the plaintiff and his witnesses remained uncontroverted.

There is no evidence to support the defendant's counterclaim. I have already found that the Heads of Agreement was incapable of performance. There is no evidence that the defendant is entitled to the transfer of the suit property as a co-owner. It was pleaded that he spent over Kshs. 6 million on the project. There is no evidence to that effect.

It will also be recalled that the defendant lodged a caveat against the suit property claiming a "chargee's interest" Ext 22. This was removed subsequently following an application on behalf of the plaintiff - Ext. 23. The defendant did not claim beneficial ownership in the caveat. He cannot now claim any interest in the form of a co-owner.

Accordingly, the counterclaim is hereby dismissed with costs. It was conceded that between January, to December, 1988 the defendant was in possession of the suit premises with the permission of the plaintiff. However it is submitted that he had no colour of right to enter the property thereafter and when he did so on 26th April, 1989 he was a trespasser and continues to be. With respect I agree.

From May, 1989 to December 1996 when pw4 took over the collection of rents, the premises on the ground attracted a monthly rent of Kshs. 50,000/- on the average. Ext. 15 A to D confirms this. The plaintiff did not receive a single cent from this and his claim is justified. The total adds up to Kshs. 4,555,000/-.

While the defendant was in control of the premises, a bill of Kshs. 235,313,85 was incurred in respect of electricity consumption. The plaintiff will have to meet this and the claim for refund is also justified.

Had the project been completed as scheduled, the total rent receivable as at ext. 24 was complied, was kshs. 29,987,136/-. The failure of the project was attributable to the defendant and the plaintiff is entitled to loss of profit in that regard.

The plaintiff would have been entitled to 50% of the said rent which is Ksh. 14,9893,568/-. I have subjected this sum to 14% taxation leaving a balance of Ksh. 12,893,568/-.

And so in the end the plaintiff's suit against the defendant succeeds in terms of prayers (a) (b) (c) (e) (f) and (g) of the plaint. The plaintiff shall be entitled to Ksh. 4,555,000/- in terms of rent from May, 1989 to

December, 1996; Kshs. 235,313.85 due and payable for the electricity bill and Kshs. 12,893,568 loss of profit/income. The plaintiff shall also have the costs of the suit and interest at court rates.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of October, 1998.

A. MBOGHOLI MSAGHA

JUDGE