



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**E.L.C. CASE NO. 1558 OF 2016 (O.S)**

**JACKSON MUTUA KINYUMU.....PLAINTIFF**

**VERSUS**

**LUCY MWIHAKI MANUEL.....1ST DEFENDANT**

**FAMILY BANK LIMITED.....2ND DEFENDANT**

**JUDGEMENT**

1. This dispute relates to Apartment No. C3, Kita Gardens Apartments in Kileleshwa erected on the parcel of land known as L.R. Number 209/3221 I.R. No. 116304/1 (“the Suit Property”). The Plaintiff agreed to sell the Suit Property to the 1<sup>st</sup> Defendant vide an agreement dated 10/9/2015 at the agreed price of Kshs. 19 Million. The deposit being 10% of the purchase price was paid to the Plaintiff and the balance was to be paid within 90 days.
2. The 2<sup>nd</sup> Defendant’s Advocates, M/s Kang’ethe and Mola Advocates gave a professional undertaking to the Plaintiff’s advocates on 3/12/2015 that it would hold the completion documents in trust for the Plaintiff and would not release them to any person except for purposes of registration of the transfer and charge at the Lands Office. If the registration of the transfer and charge was not done in 45 days, the documents were to be returned to the Plaintiff in the same condition they were in when they were delivered to these advocates.
3. Based on this undertaking, the documents of title were released to the Defendants’ advocates. The Suit Property was registered in the name of the 1<sup>st</sup> Defendant on 11/4/2016. The sale aborted. The 2<sup>nd</sup> Defendant did not remit the balance of the purchase price which was secured by the charge in its favour. The Plaintiff requested the 2<sup>nd</sup> Defendant to reverse the transaction and return the documents. On failing to do so, the Plaintiff brought the instant suit seeking an order that the sale of the Suit Property be deemed as rescinded; and the charge over the Suit Property be cancelled and the Defendants be directed to transfer the Suit Property to the Plaintiff. Further, the Plaintiff seeks to have the share in Kita Gardens Management Limited transferred back to him. He also seeks judgement for the loss of rental income at Kshs. 80,000/= per month from 1/1/2016 together with costs of the suit.
4. The Plaintiff produced copies of the letters dated 20/4/2016 and 20/5/2016 written by his advocates to the 1<sup>st</sup> Defendant’s requesting payment of the purchase price for the Suit Property and the completion notice of 10/10/2016 which sought the return of the title documents if the 1<sup>st</sup> Defendant did not fulfil her obligations under the sale agreement.
5. The 2<sup>nd</sup> Defendant wrote to the Plaintiff’s advocates on 27/11/2015 seeking the release of the original title documents to the Bank’s advocates to enable the advocates prepare and register the securities in relation to the banking facility the 2<sup>nd</sup> Defendant was to grant to the 1<sup>st</sup> Defendant.
6. M/s Kangethe and Mola Advocates wrote to the Plaintiff’s advocates on 3/12/2015 seeking the release of the completion documents. Paragraph 3 of the letter stated that Family Bank Limited, the 2<sup>nd</sup> Defendant would release the sum of Kshs. 17,100,000/= to the Plaintiff’s advocates within 14 days of receipt of the registered transfer and charge. Paragraph 4 of the letter stated that the Bank’s advocates would present for registration the transfer and charge simultaneously on condition that if either document were rejected then no instrument would be registered.
7. Certificate number 33 shows that the 1<sup>st</sup> Defendant was registered as the proprietor of one share of one thousand in Kita Gardens Management on 12/5/2016. The 1<sup>st</sup> Defendant’s address is given in the share certificate as 14 Haydock Close, Corby Northamptonshire NN18 8 QX England.
8. The 2<sup>nd</sup> Defendant’s Senior Legal Counsel, Anthony Ouma swore the Replying Affidavit which was filed on 3/2/2017 in opposition to

the suit. He denied that the 2<sup>nd</sup> Defendant had had any agreement with the Plaintiff over the Suit Property but admitted that the 1<sup>st</sup> Defendant had sought a banking facility from the 2<sup>nd</sup> Defendant to finance the purchase of the Suit Property. He depones that the 1<sup>st</sup> Defendant failed to meet her end of the bargain and the conditions set out in the Letter of Offer for the 2<sup>nd</sup> Defendant to grant her the banking facility. The 2<sup>nd</sup> Defendant denied taking possession of or control of the Suit Property.

9. At paragraph 19 of the Replying Affidavit, he deponed that the Plaintiff cannot purport to benefit from the failed transaction between the 2<sup>nd</sup> Defendant and “*its erstwhile would have been client*”, in reference to the 1<sup>st</sup> Defendant.

10. Directions were given on 25/4/2018 for parties to file written submissions on the suit after attempts to reach an out of court settlement failed to bear fruit. Parties filed submissions. The 2<sup>nd</sup> Defendant submitted that it has been unable to effect cancellation of the entries on the title because the Suit Property was transferred to the 1<sup>st</sup> Defendant. It submitted that it has always been willing to return the completion documents to the Plaintiff’s Advocates since the facility was never utilised but that the Plaintiff’s advocates have insisted that they will only accept the return of the documents if the entries registered against the title are removed and the Plaintiff’s title is reinstated to its original position.

11. The lease shows that the suit land was registered under the Government Lands Act and the Registration of Titles Act. The court has read and considered the submissions of both parties. There is nothing on the record to show that the 1<sup>st</sup> Defendant was ever served. From the address given in the share certificate and other documents produced in court, the 1<sup>st</sup> Defendant resides in the United Kingdom. The issue for determination is whether the court should grant the orders sought in the Originating Summons filed in court on 14/12/2016.

12. The copy of the lease for the Suit Property produced by the Plaintiff shows at entry number 2 that the Suit Property was transferred to the 1<sup>st</sup> Defendant on 11/4/2016 for Kshs. 19,000,000/=. Entry number 3 shows that a charge to Family Bank Limited was registered the same day for GBP 110,323/-. It is clear from the Replying Affidavit that the 2<sup>nd</sup> Defendant did not advance the loan sum to the 1<sup>st</sup> Defendant which she was to pay to the Plaintiff as the purchase price for the Suit Property; and which was the basis for the registration of the charge against the Suit Property in favour of the 2<sup>nd</sup> Defendant.

13. Section 36 of the Registration of Titles Act (RTA), under which the Suit Property was registered gave the land registrar the option to enter in the register and endorse on the grant or certificate a memorandum of the transfer of land, and deliver the grant or certificate endorsed to the transferee. Grants or certificates with such memorandum evidence title for purposes of the RTA. This mechanism was in lieu of the procedure set out by Section 35 in which the registrar could make out to the transferee a certificate to the land mentioned in the transfer. A charge against such land would be registered against the grant or certificate of title in line with Section 46 of the RTA.

14. On proof of the occurrence of an event upon which the money secured by a charge shall cease to be payable and upon proof that all arrears have been paid, satisfied or discharged, the land registrar is to make an entry in the register noting that the charge is discharged under Section 47 of RTA. The registrar then endorses on the grant evidencing the title of the land charged a memorandum of the date on which he made the entry on the register.

15. The transfer and charge were registered against the Suit Property pursuant to the provisions of the RTA. It is therefore not possible for the land registrar to remove the entries registered against the Suit Property and reinstate the Plaintiff’s title to its original position as the Plaintiff demanded of the 2<sup>nd</sup> Defendant.

16. The 1<sup>st</sup> Defendant failed to pay the full purchase price for the Suit Property and the Suit Property ought not to have been transferred to her. The Plaintiff rescinded the sale of the Suit Property. Copies of the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant and the charge were not produced in court for the court to appreciate their full tenor.

17. Having failed to advance the 1<sup>st</sup> Defendant the loan sum in respect of which the Suit Property was being offered as security to the 2<sup>nd</sup> Defendant, the court sees no basis for the continued state of affairs in which a charge over the Suit Property is registered and maintained in favour of the 2<sup>nd</sup> Defendant who is not owed any money by the Plaintiff.

18. The 2<sup>nd</sup> Defendant is directed to discharge at its expense, the charge it holds over the Suit Property within 14 days of the date of this judgement. The Chief Land Registrar is directed to transfer the Suit Property to the Plaintiff within 30 days of the date of registration of the discharge of charge by the 2<sup>nd</sup> Defendant or otherwise re-convey the Suit Property to the Plaintiff in accordance with the statute applicable to the suit land.

19. The court declines to award the Plaintiff the rental income claimed since the Plaintiff failed to prove that he had lost rental income from the Suit Property. The Plaintiff will have the costs of the suit to be borne by the 2<sup>nd</sup> Defendant.

Dated at Nairobi this 17<sup>th</sup> day of January 2019.

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. H. Kabita holding brief for Ms. Kyeli for the Plaintiff

Ms. L. Mokaya holding brief for Ms. Onsare for the 2<sup>nd</sup> Defendant

Ms. Eddel Barasa – Court Assistant

No appearance for the 1<sup>st</sup> Defendant