



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL SUIT NO. 13 OF 2009

NEPTUNE CREDIT MANAGEMENT LIMITED.....1ST PLAINTIFF

BRYAN YONGO.....2ND PLAINTIFF

VERSUS

DR. JIGISHA P. JANI.....1ST DEFENDANT

JAYA SAILESH JANI.....2ND DEFENDANT

JUDGEMENT

1. The 1st Plaintiff claims a purchaser's interest over L.R. No. 7471/269 ("the Suit Property") registered in the names of the Defendants pursuant to a sale agreement dated 26/6/2008. The 2nd Plaintiff entered into an agreement dated 12/2/2008 with the 1st Defendant for the lease of the Suit Property. The Plaintiffs claim that the Defendants offered to sell the Suit Property to the Plaintiffs on or about 10/2/2008 at the price of Kshs. 45 million and that they accepted that offer which altered the lease agreement. They Plaintiffs took possession of the Suit Property and claim to have spent Kshs. 2.4 million to complete the house on the Suit Property. The Plaintiffs were required to pay monthly rent of Kshs. 150,000/= under the lease. The tenancy was riddled with a lot of acrimony over the payment of rent and threats of eviction and distress for rent. The Plaintiffs filed other cases in court over the dispute. At some point the Defendant instructed auctioneers to levy distress for unpaid rent. The Plaintiffs challenge the manner in which the auction was conducted.

2. The Plaintiffs aver that they have expended the sum of Kshs. 10 million furnishing the suit premises and Kshs. 800,000/= in landscaping the Suit Property and aver that they have suffered loss by the Defendants refusal to execute the sale agreement over the Suit Property. The Plaintiffs gave particulars of their assets valued at Kshs. 11,836,095/= which they claim were picked by the auctioneers on 4/9/2015 but were never returned.

3. The Plaintiffs seek a temporary injunction to restrain the Defendants from distressing or evicting the Plaintiffs from the Suit Property and an order of specific performance to compel the Defendants to deliver to the Plaintiffs the sale agreement over the Suit Property, search certificate, copy of title deed, clearance certificate and rates certificate. A permanent injunction is also sought to restrain the Defendants from alienating, charging, selling or otherwise disposing off the Suit Property or encumbering it. Further, the Plaintiffs seek a declaration that the sale agreement executed on 26/6/2008 is binding on the parties and that an order ought to issue compelling the 2nd Defendant to execute the sale agreement to enable due performance and completion of the sale of the Suit Property. The Plaintiffs seek the sum of Kshs. 11,836,095/= plus interest at commercial rates from 4/5/2015 until payment in full. These are the orders the Plaintiff seek in their Further Amended Plaint filed in court on 9/10/2018.

4. In their Amended Defence, Set-off and Counterclaim filed in court on 19/12/2018, the Defendants deny the Plaintiffs claim. They deny that the 1st Plaintiff has any valid or lawful purchaser's interest over the Suit Property or that the 2nd Plaintiff was the tenant of the Defendants. They denied that there was any valid or enforceable agreement for sale between the Plaintiffs and the Defendants in respect of the Suit Property. The Defendants admit that a lease agreement dated 12/2/2008 was executed between the 2nd Plaintiff and the 1st Defendant over the Suit Property. The lease was for two years at the monthly rent of Kshs. 150,000/= which was payable every 18th day of every month subject to the increase on the rent to Kshs. 165,000= in the second year. The Defendant admitted offering to sell the Suit Property to the 2nd Plaintiff for Kshs. 45 million vide the letter dated 13/2/2008 but maintained that the offer was for a limited period of time during which the deposit and the purchase price should have been paid and which the Plaintiffs failed to do. The Defendants denied that the offer for sale altered or novated the lease agreement.

5. The Defendants averred that the Suit Property was in a good habitable condition when the 2nd Plaintiff took possession and denied the Plaintiffs allegations contained in the Plaint. They stated that the 2nd Plaintiff inspected the Suit Property before signing the sale agreement and was satisfied about its condition before executing the lease agreement with the 1st Defendant. The Defendants maintained that the lease agreement specifically prohibited the Plaintiffs from making any alteration to the house on the Suit Property without first obtaining the 1st Defendant's prior written consent. They urged that no consent was sought by the 2nd Plaintiff and any alterations made by the Plaintiffs to the Suit Property were unauthorised and illegal hence Defendants are not liable to make good any claim for repairs by the Plaintiffs.

6. The Defendants averred that the Plaintiffs failed to comply with the letter of offer dated 13/2/2008 which was only valid for 90 days and which required the 2nd Plaintiff to pay a deposit of Kshs. 4.5 million. The Defendants maintained that no valid or enforceable sale agreement was signed by the parties. The Defendants further denied that any monies paid by the Plaintiffs in respect of rent were to be credited towards payment of the purchase price for the Suit Property as the Plaintiffs have alleged.
7. The Defendants gave the outstanding rent as at 14/2/2009 which stood at Kshs. 600,000/= and confirmed that they instructed auctioneers to levy distress against the Plaintiff to cover the rent due. They contended that the 2nd Plaintiff had persistently defaulted in the payment of rent even when he was ordered to pay rent by the court. The Defendants denied that any amount expended by the Plaintiffs on the Suit Property bestowed any proprietary rights over the Suit Property in the Plaintiff's favour. They urged that any deposit the Defendants were holding can only be used to restore the premises to their original state once the Plaintiffs move out or settle any outstanding rent. The Defendants denied that the Plaintiffs had paid a deposit of 10% of the agreed purchase price of 45 million.
8. The Defendants denied that Nathan Muhatia Pala trading as Muhatia Pala Auctioneers carried away all the items particularised by the Plaintiffs. They maintained that the auctioneers only carted away the proclaimed goods and that the auctioneer was subsequently forced to return the items to the Plaintiff by a gang calling itself "Sonko's Rescue Squad" in respect of which the auctioneer lodged a complaint with the Inspector General of the Kenya Police Service. The Defendants denied the claim that the Plaintiffs had suffered loss or damage in the sum of Kshs. 11,836,095/= as the Plaintiffs alleged.
9. In the Set-Off and Counterclaim, the Defendants aver that the Plaintiffs breached the terms of the lease by failing to pay the deposit for security; late or nonpayment of monthly rent; failing to pay utility bills and making alterations to the Suit Property without the Defendants' authority. The Defendants claim that they instructed their advocates to serve a notice terminating the lease dated 6/10/2009 but the 2nd Plaintiff refused to hand over vacate possession of the Suit Property to the 1st Defendant even after the lease had expired.
10. Parties recorded a consent in this suit on 19/4/2010 vide which the Plaintiffs were required to pay Kshs. 181,500/= every month to the Defendants by the 15th day. The Defendants urge that the Plaintiffs continued to breach the consent order recorded in court and defaulted in the payment of rent. The Defendants computed the amount owing from the Plaintiffs as being Kshs. 7,691,870/= as at 14/11/2018. The Defendants seek mesne profits at the rate of Kshs. 181,500/= per month with effect from 15/11/2018 until the Plaintiffs give vacant possession to the Defendants.
11. The Defendants seek a declaration that the lease agreement dated 12/2/2008 between the Plaintiffs and the Defendants was lawfully terminated with effect from 19/11/2008. They seek an order directing the Plaintiffs to vacate and deliver to the Plaintiffs physical possession of the Suit Property. They seek an order to evict the Plaintiffs from the Suit Property and that that order of eviction should be enforced by the Officer Commanding Gigiri Police Station. In the alternative, the Defendants seek that the Plaintiffs claim be set-off by the Defendants' claim against the Plaintiffs and that judgement be entered in favour of the Defendants for the amount found due and payable by the Defendants to the Plaintiffs. They also seek costs and interest.
12. The 2nd Plaintiff gave evidence. He stated that he entered into a lease agreement with the Defendants on or about 12/2/2008 which the 2nd Defendant did not execute. The Defendants offered to sell the Suit Property to him on 13/2/2008. He took possession of the Suit Property and based on the offer for sale, he claims he spent Kshs. 2.4 million to complete the house on the Suit Property which he claimed was newly constructed and had various incomplete works. On taking possession he claims he detected problems on the house and wrote to the Defendants who did not take any action. He stated that a sale agreement was executed between the Plaintiffs and the Defendants on 26/6/2008. The 2nd Defendant was away at the time and was to execute the sale agreement later and return it to the 2nd Plaintiff for finalisation of transaction.
13. The 2nd Plaintiff claims that he wrote to the Defendants when they purported to renege on their offer for sale and yet the Plaintiffs had already injected over 13 million shillings into the house based on the sale transaction and paid Kshs. 8,415,700/= for repairs. The Defendants' lawyers wrote to the Plaintiffs on 19/10/2008 threatening to evict them from the suit premises. They wrote another letter on 14/11/2008 reiterating their notice to vacate and requesting the Plaintiffs to pay the utility bills. The Plaintiffs wrote to the Defendants on 15/10/2008 requesting to have the sale agreement executed which did not happen.
14. Haki Traders went to the Plaintiffs' premises on 8/1/2009 and issued a proclamation demanding payment of Kshs. 561,362 which the Plaintiffs denied owing the Defendants. The 2nd Plaintiff averred that throughout their occupation of the Suit Property the Plaintiffs have been paying rent in advance to the Defendants in line with Clause 7 of the lease agreement. The Plaintiffs contend that the auctioneer did not give them notice before proclaiming their goods. The 2nd Plaintiff stated that the Defendants' refusal to execute the sale agreement caused the Plaintiffs to pay Kshs 181,400/= every month yet the Plaintiffs had the full purchase price and were only awaiting execution of the sale agreement. The Plaintiff's claim they had expended Kshs. 10 million furnishing the Suit Property and 800,000/= on landscaping. The Plaintiffs claimed they have always been ready and willing to complete the sale and faulted the Defendants for refusing to execute the sale agreement. The 2nd Plaintiff claimed that Muhatia Pala Auctioneers swept and carried away his properties in the Suit Property and that the court found in **Milimani CMCC No. Misc. Application No. 49 of 2015** that the distress for rent carried out on 4/11/2015 was illegal and directed the auctioneer to deliver up the 2nd Plaintiff's goods. He also stated that the Auctioneers Licensing Board found in **Disciplinary Cause No. 51 of 2015** that the auctioneer had acted in contempt of court and was fined.
15. The court has looked at the auctioneer's letter 8/7/2015. The 2nd Plaintiff stated that his property valued at Kshs. 11,836,095 has never been returned and that the Plaintiffs are entitled to sue for its value and to recover this from the Defendants. The 2nd Plaintiff produced copies of the court orders issued to him, the correspondence exchanged and the receipts showing the purchase price for the items he claims he lost when the distress for rent was levied together with the receipts showing the repairs he did on the Suit Property. He did not produce copies of the sale agreement and the lease he seeks to enforce.
16. He conceded on cross examination that the lease between him and the 1st Defendant was for two years with effect from 15/2/2008 and

that it had not been renewed. He confirmed that no schedule was attached to the lease agreement. He denied preparing the sale agreement and maintained that this was prepared by the Defendant. He confirmed that he was to continue paying rent for the Suit Property until he completed paying the full purchase price. He also confirmed that he had inspected the Suit Property before signing the lease in line with Clause 8 of the lease agreement. He did not produce evidence of the cheques for Kshs. 4.5 million that he claims he paid to the Defendants as a deposit for the Suit Property. He confirmed that he did not pay the balance of the purchase price and that the 2nd Defendant had not executed the sale agreement. He confirmed that the sale agreement was not witnessed. The bank statements he produced were for 2015 and not 2008 when he offered to purchase the Suit Property. He also confirmed that he did not seek the Defendant's approval before carrying out repairs on the Suit Property. The explanation he gave on why the sale agreement was not executed was that the 1st Defendant took it for execution by the 2nd Defendant but failed to give it back to the 1st Plaintiff.

17. The 1st Defendant gave evidence. He confirmed entering into a lease with the Plaintiffs in respect of the Suit Property for a term of two years from 15/2/2008 at the monthly rent of Kshs. 150,000/= for the first year and Kshs. 165,000/= for the second year. The rent was payable on or before the 18th of every month. The Plaintiffs were required to pay all utility bills and not make any alterations to the suit premises without the written consent of the Defendants. The Plaintiffs were required to pay a deposit for security of Kshs. 300,000/= He claimed that the Plaintiffs breached the lease agreement. He confirmed that they agreed to offer the Suit Property to the Plaintiff for purchase vide the letter dated 13/2/2008. The Plaintiffs were to pay a deposit of 10% of the purchase price on or before 15/3/2008 and the balance was to be paid within 90 days. He stated that the 2nd Plaintiff did not sign the letter of offer or pay the deposit. Another offer was made to the Plaintiffs on 28/6/2008 for the sale of the Suit Property to the Plaintiffs at the agreed sum of Kshs. 45 million. A deposit was to be paid by 30/6/2008 by banker's cheque and the balance of the purchase price was to be paid before 30/9/2008. This agreement was subject to the 2nd Plaintiff clearing the rent arrears and settling the utility bills up to the time of transfer.

18. The Plaintiff approached the 1st Defendant on 26/6/2008 with the sale agreement which he signed on the belief that the 2nd Plaintiff would honour his part and pay the deposit. No payment was received on 30/6/2008. The 1st Defendant produced a copy of the sale agreement. The 2nd Plaintiff sued the 1st Defendant and obtained a court order on 14/1/2009 allowing the 2nd Plaintiff to continue occupying the Suit Property as a tenant pending determination of whether there was a valid sale agreement or not. The Plaintiffs through their advocate's letter of 8/8/2009 expressed the Plaintiffs' renewed interest in purchasing the Suit Property. The Defendants made an offer for Kshs. 50 million. The Plaintiffs advocates wrote on 9/9/2009 countering this by offering Kshs. 45 million as the purchase price which was not acceptable to the Defendants.

19. The Defendants served a letter dated 28/7/2008 on the Plaintiffs outlining breaches of the lease and requesting the Plaintiffs to remedy the breaches which they failed to remedy. The Defendants' advocates served a notice on the Plaintiffs dated 19/8/2008 terminating the lease and requiring vacant possession of the Suit Property within three months. The 2nd Plaintiff refused to vacate the Suit Property and was said to be living in the premises even at the time this suit was heard. The Defendants informed the Plaintiffs through the letter dated 6/10/2009 that they did not wish to renew the lease after it expired on 14/2/2010. Even with this letter, the Plaintiffs did not hand over vacant possession of the Suit Property to the Defendants.

20. Parties recorded a consent in court on 19/4/2010 to the effect that the Plaintiffs would continue paying the monthly rent of Kshs. 181,500/= by the 5th day of every month. The Defendants claim that the Plaintiffs have perpetually defaulted in making the monthly rent payments ordered by the court. When the Defendants instructed Muhatia Pala Auctioneers to levy distress for rent, they claim that the 2nd Plaintiff used his political connections to thwart the process. The Defendants produced a copy of the auctioneer's letter dated 8/7/2015 complaining to the Inspector General of Police. The auctioneer states in that letter that after carting away the Plaintiffs' goods, Senator Mike Mbuvi Sonko and other politicians intervened and the lorries ferrying the goods attached were directed to return the goods to the 2nd Plaintiff's house.

21. Parties filed submissions which the court has considered. The main issues for determination are: firstly, whether there was a valid contract of sale between the Plaintiffs and the Defendant and if so, should the court order specific performance of the contract? Secondly, was the sale agreement novated by the lease agreement dated 12/2/2008? Thirdly, are the Plaintiffs in arrears on the payment of rent and was the lease between the Plaintiffs and the Defendants lawfully terminated? Lastly, should the court grant the orders sought by the Plaintiffs or those counterclaimed by the Defendants?

22. The Plaintiffs relied on an excerpt from Chitty on Contracts Vol 1 (General Principles), 2009 Edition pages 51, 54 and 82 in submitting that the inclination of the court should be to find the existence of a contract by looking at the conduct of the parties where it can be shown that the assumption of parties was that a contract would ultimately be agreed upon along the lines known to both parties, subject to variation that would ultimately appear in the contract. The Plaintiffs argue that the intention of the parties can be inferred from the Defendants' offer to sell the Suit Property to the Plaintiffs for Kshs. 45 Million made vide their letter dated 13/2/2008. The Plaintiffs claim they relied on this representation, took possession and went ahead to develop the Suit Property. The Plaintiffs claim that they were and still are ready and ready to complete the transaction.

23. It is not in dispute that the Plaintiffs failed to pay the deposit of Kshs. 4.5 Million, being 10% of the purchase price within the time stipulated in the Defendants' offer. The Plaintiffs placed a lot of reliance on the failure by the 2nd Defendant to execute and return the sale agreement. No evidence was placed before the court to show that the Plaintiffs were ready, willing and in a position to complete the sale transaction. All there was, was an offer by the Defendants to sell the Suit Property. There was no acceptance, payment or other performance of the contract. Mere intention to purchase land expressed in a sale agreement without taking any steps to conclude the sale transaction by paying the agreed consideration is insufficient to confer proprietary interests over the Suit Property on the Plaintiffs. The court does not think the offer by the Defendants to purchase the Suit Property was intended to last for 11 years on the same terms as the Plaintiffs expected. In any event, the terms of the sale of the Suit Property had not been agreed and settled, and no consideration was paid by the Plaintiffs.

24. The 2nd Plaintiff claimed that he took possession of the Suit Property based on the offer for sale made by the Defendants. He claims he redeveloped and redesigned the Suit Property making it prime and unique. The Plaintiffs took possession based on the lease agreement and were required to pay the rent and deposit. There is evidence that they did pay rent. It is highly unlikely that the Plaintiffs were given

possession based on the sale agreement which is dated June 2008. The 1st Plaintiff took possession in February 2008.

25. The lease prohibited the Plaintiffs from carrying out renovations without first obtaining the Defendants' written consent. The Plaintiffs submitted that being *consensus ad idem*, they went ahead to inject stupendous sums of money on the improvement and completion of the suit premises. The Plaintiffs did not lead evidence on which part of the suit premises was incomplete that they had to complete at considerable cost. A prudent person would not expend huge resources on renovating or remodeling a house when he has not paid the full purchase price.

26. The Plaintiffs claim that the lease agreement was extinguished and novated by the sale agreement dated 26/6/2008. The Plaintiffs claimed the sale agreement created a new contractual duty on the Defendants to sell the Suit Property to the Plaintiffs. The Plaintiffs relied on the case of **Commerce Bank Limited v Kukopesha Limited [2008] eKLR** in which the court defined novation as where a new contract substitutes the old one either between the same parties or different parties, the consideration being the discharge of the old contract. Where the new contract modifies the old contract between the same parties it is a variation. Novation would require a subsequent binding contract and the consent of all parties.

27. In this case, there was no binding contract entered into by the parties subsequently after the lease agreement. The Plaintiffs and Defendants never agreed to discharge the lease agreement in consideration of the proposed sale of the Suit Property. The court notes that the Defendants made two offers to sell the Suit Property to the Plaintiffs at Kshs. 45 Million in February and June 2008. In 2009 they offered to sell the Suit Property to the Plaintiffs at Kshs. 50 Million which the Plaintiffs did not accept and maintained that the price was Kshs. 45 Million. The Defendants informed the Plaintiffs that the offer for the sale of the Suit Property had lapsed vide the letter of 6/10/2009. The court finds that there was no novation in this case since there was no rescission of the lease agreement and substitution of that agreement by the sale agreement which was never performed by the parties.

28. The court has looked at the receipts produced by the Plaintiffs on account of the goods they claim Muhatia and Pala Auctioneers carted away. It has also looked at the cost of the repairs the 2nd Plaintiff claims to have undertaken on the suit premises. They include charges for mowing the lawn, gardening, painting the house and the exterior, some of which are dated 2009 and 2010. The 2nd Plaintiff moved into the suit premises in February 2008 and was expected to obtain the Defendants' approval before carrying out any alterations or changing the condition of the suit premises pursuant to clause 2.14 of the lease. Clause 2.5 obligated the 2nd Plaintiff to keep the interior of the house in a good state of repair and condition.

29. The court has looked at the auctioneers' letter dated 6/7/2015 stating that the Plaintiffs' goods were released when the former Senator of Nairobi intervened while he was levying distress for rent. The 2nd Plaintiff does not deny that there was such intervention, he only disputes the number of people hired by the auctioneer in that exercise. No inventory was produced to show the goods carried away by the auctioneer and those returned after the intervention by the politicians. In the circumstances, it is difficult to ascertain if some of the Plaintiffs goods were not returned as the Plaintiffs allege. The auctioneer claims that during that exercise is when the 2nd Plaintiff made payment of the rent arrears to the Defendants.

30. The Plaintiffs did not deny owing the Defendants rent, they submitted that the agreed price was Kshs. 45 Million and that the Defendants have been receiving rent. They urged that if the rent revenue is considered in light of the agreed price then the Defendants did not suffer any loss. The court is of the view that the Plaintiffs were bound to pay rent to the Defendants on a monthly basis after the lease expired in February 2010 as they became periodic tenants. Further, at no point did the parties agree that the purchase price for the Suit Property would be settled through the monthly rent paid by the Plaintiffs. The draft sale agreement the Plaintiffs relied on set out the timelines for payment of the purchase price. The court finds that the Defendants have proved their claim against the Plaintiffs for the rent arrears.

31. The Plaintiffs have failed to prove their claim on a balance of probabilities, it is dismissed with costs to the Defendants. The court enters judgement for the Defendants in terms of prayers (a), (b), (c), (d) and (e) of the 1st and 2nd Defendants' Amended Defence, Set-off and Counterclaim dated 29th November 2018. The Defendants are awarded the costs of the Counterclaim.

Dated and delivered at Nairobi this 18th day of March 2019

K.BOR

JUDGE

In the presence of:-

Mr. T. Liko and Mr. K. Juma for Plaintiffs

Mr. S. Sarvia or the Defendants

Mr.V. Owuor-Court Assistant