



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC NO. 159 OF 2013

ELIAS M. MUSYOKA.....PLAINTIFF

=VERSUS=

HALAL DEVELOPERS LIMITED.....1ST DEFENDANT

KRISHNA B SASSODIA.....2ND DEFENDANT

MRS. DHARAMA SASSODIA.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

JUDGEMENT

1. The dispute herein relates to L.R No. 209/10721/42 (suit property). The suit property on which a maisonette is erected known as house No. 42 was a sub-division of L.R No. 209/10721 which was owned by the 1st Defendant. On 5th February, 1992, the 1st Defendant entered into a Sale agreement with the 2nd and 3rd Defendants for the purchase of the suit property at a consideration of Kshs.1,150,000/=.

2. The main title was charged to investment & mortgages limited. The 2nd and 3rd Defendants were expected to raise part of the purchase price and the balance was to be secured through a charge over the suit property by Housing Finance Company of Kenya (HFCK). The 1st Defendant was not able to secure a partial discharge in respect of the suit property in time so that the title documents could be forwarded to HFCK to release the loan to the 2nd and 3rd Defendants. The loan which was to be given to 2nd and 3rd Defendants did not therefore go through but that notwithstanding the 2nd and 3rd Defendants who had paid a substantial amount of the purchase price were willing to complete the balance of the purchase price.

3. When the 1st Defendant threatened to cancel the sale transaction, the 2nd Defendant through his Advocates lodged a caveat against the title to the suit property. The 2nd and 3rd Defendants thereafter filed Nairobi HCCC No. 734 of 1996 seeking an order of cancellation of transfer between 1st Defendant and 2nd Defendants among other prayers including specific performance.

4. Unknown to the 2nd and 3rd Defendants, the 1st Defendant had purportedly entered into a sale agreement with the Plaintiff on 4th December, 1994 for the sale of the suit property at a consideration of Kshs. 2,000,000/=. The caveat which had been lodged against the title to the suit property had been fraudulently removed allegedly by the 2nd and 3rd Defendants and based on the fraudulent withdrawal, the suit property was transferred to the Plaintiff. When the 2nd and 3rd Defendants discovered that the caveat lodged by the 2nd Defendant had been removed and the suit property had been transferred to the Plaintiff, a consent was recorded in Court by the Advocate for Plaintiffs and the Defendants declaring the removal of the caveat null and void and cancelling the transfer between the 1st Defendant and the Plaintiff in this case who was the 2nd Defendant in Nairobi HCCC No. 734 of 1996.

5. The suit which had been filed by the 2nd and 3rd Defendants that is Nairobi HCCC No. 734 of 1996 was transferred to the Lower Court where it became Nairobi CMCC No. 7024 of 2004. In the meantime, the Plaintiff in this suit had filed Nairobi CMCC No. 1130 of 2004. An application was made vide Nairobi HC Misc 676 of 2004 seeking transfer and consolidation of Nairobi CMCC Numbers 7024 of 2004 and 1130 of 2004 to the High Court for hearing. The application was granted and the two suits were consolidated and transferred to the High Court for hearing. In the High Court, the two consolidated suits were registered under Nairobi HCCC No. 595 of 2004. When the Environment and Land Court was established, the High Court Case was transferred to the Court where it was registered as ELC No. 159 of 2013.

6. In Nairobi CMCC 1130 of 2004, the Plaintiff sought the following reliefs:-

- 1. A permanent injunction restraining the 1st and 2nd Defendants against disposal by sale or otherwise of the said premises until the determination of this suit.**
- 2 (a) A declaratory order that the sale agreement between the 3rd, 2nd and**
 - 2. (a) A declaratory order that the sale agreement between the 2nd and 3rd Defendants and the 1st Defendant is null and void and that the sale agreement between the Plaintiff and the 1st Defendant still subsists and is enforceable in favour of the Plaintiff.**
 - (b) A declaration that the consent order recorded on 26th May, 1997 before the Hon. Justice Hayanga in CMCC No. 7024 of 2004 (Formerly HCCC No. 734 of 1996) between the 2nd and 3rd and 4th Defendants and Defendant is null and void.**
 - (c) An order directing the 4th Defendant to enter the name of the Plaintiff in the register as the registered owner of the property.**
- 3. Specific Performance of the sale agreement between the Plaintiff and the 1st Defendant.**
- 4. An order that rent/mense profits to be paid by the 2nd and 3rd Defendants to the Plaintiff at the rate to be assessed by the Court for the period 1996 till the said 2nd and 3rd Defendants vacate the premises.**
- 5. An order of eviction against the 2nd and 3rd Defendants.**

IN THE ALTERNATIVE

- 6. An order that the 1st and 2nd Defendants do refund the entire purchase price of Kshs.2,000,000/= paid by the Plaintiff to him together with interest from the date of payment till date of full refund at commercial rates, to be determined by the Court.**

7. In Nairobi CMCC No. 7024 of 2004, the Plaintiffs seek the following reliefs:-

- (a) Specific Performance of the said agreement by duly executed and effectual conveyance in their favour;**
- (b) If the Court does not direct Specific Performance of the said agreement then IN THE ALTERNATIVE damages for breach of contract in lieu of or in addition to Specific Performance.**
- (c) IN THE FURTHER ALTERNATIVE to the foregoing rescission of the contract and repayment to the Plaintiff's of the deposit of Kshs.775,563/= paid thereunder with interest thereon at the rate of 19% from the 5th February, 1992 until payment in full and a declaration that the Plaintiffs are entitled to a lien on the said property for their deposit together with interest thereon and any damages and costs awarded on rescission.**
- (d) All necessary and consequential accounts directions and inquiries.**

PLAINTIFF'S CASE IN NAIROBI CMCC 1030 OF 2004

8. Following the consolidation and transfer of this case to the High Court, the Plaintiff filed a further amended plaint in which he named the Plaintiffs in Nairobi CMCC No. 7024 of 2004 as 2nd and 3rd Defendants respectively. He also named the Chief Land Registrar as 4th Defendant. The Plaintiff states that on 4th December, 1994 he entered into a sale agreement with the 1st Defendant in which he agreed to purchase the suit property at Kshs. 2,000,000/=. He paid Kshs. 2,000,000/= in cash and was issued with a receipt. A partial discharge in respect of the suit property was given. The 1st Defendant proceeded to have the suit property transferred to him.

9. When the Plaintiff went to take possession of the suit property, he found the 2nd and 3rd Defendants who were in possession. He told them that he was now the registered owner of the suit property. The 2nd Defendant asked him to give him time to move out of the suit property. When the Plaintiff visited the suit property the next time, he found that the 2nd Defendant had stationed Police Officers at the suit property. The 2nd Defendant informed him that he had obtained Court orders stopping any interference with the suit property.

10. The Plaintiff went to the Directors of the 1st Defendant who told him that they had sold him the suit property and that it was upon him to remove those who were occupying the property. The Plaintiff testified that he thereafter wrote to the 2nd and 3rd Defendants seeking payment of a monthly rent of Kshs.20,000/= from them. The 2nd and 3rd Defendants have never paid rent to him and they still occupy the suit property.

11. The Plaintiff contends that the 1st, 2nd and 3rd Defendants colluded to enter into a fraudulent consent which purported to nullify his title. He therefore argues that the 1st Defendant failed to give him a good title. He further contends that the 1st, 2nd and 3rd Defendants should be restrained from disposing of the suit property until he is refunded the purchase price with interest at commercial rates.

SECOND AND THIRD DEFENDANTS CASE AS REGARDS NAIROBI CMCC 1130 OF 2004

12. The 2nd and 3rd Defendants denied the averments in the Plaintiff's plaint. They contended that the purchase of the suit property by the Plaintiff was fraudulent in that the Plaintiff knew that the suit property was occupied but he went ahead to purchase it; that the caveat which had been lodged against the title by the 2nd Defendant had been removed fraudulently on false allegations that its removal was as a result of request by 2nd and 3rd Defendants and that the illegal removal of the caveat and the transfer have since been cancelled through a consent filed in Court in CMCC 7024 of 2004 [Formerly NBI HCCC 734 of 1996].

13. As at the time of hearing of this suit, the 2nd Defendant who was husband to the 3rd Defendant had died. He died on 21st January, 2013. The deceased is the one who had a power of attorney in respect of his wife who was residing out of the country. Upon the demise of the 2nd Defendant, her daughter Renudevi Sasodia was given a power of attorney to prosecute this suit on behalf of her mother who is the 3rd Defendant. Renudevi Sasodia testified that she and her husband had purchased House No. 41. They later sold it and she moved into the suit property where she stays with her children to date. She testified that her father and mother had purchased the suit property and there was no way the same property would have been sold to the Plaintiff when there was a caveat placed against the title and when her parents had been given possession. The 2nd and 3rd Defendants contend that if the Plaintiff has any claim, his claim is against the 1st Defendant which purported to sell the suit property to him when it was clear that the 2nd and 3rd Defendants had been given possession after paying a substantial amount of the purchase price.

PLAINTIFFS CASE IN NAIROBI CMCC 7024 OF 2004 (FORMERLY NBI HCCC NO. 734 OF 1996)

14. The Plaintiffs' case just as their defence in Nairobi CMCC No. 1130 of 2004 is that they purchased the suit property and paid a substantial deposit for it. The 1st Defendant gave them possession. They sought for the documents of title so that they could hand them to HFCK to register a charge so as to grant them a facility to enable them clear the balance. The 1st Defendant failed to give them the documents. This made HFCK not to give them any money. Despite HFCK not giving them the money anticipated, they were ready and willing to clear the balance so that the 1st Defendant could transfer the suit property to them.

15. As the 2nd and 3rd Plaintiffs were waiting for the 1st Defendant to give them the necessary documents, they discovered that the caveat which the 1st Plaintiff had lodged against the title had been removed. The removal was fraudulent in that their signatures were forged and used in a notice for withdrawal of the caveat. The illegal act was later rectified by the parties entering into a consent which reinstated it and cancelled the transfer in favour of the 2nd Defendant.

16. There is no evidence whether the Defendants ever filed a defence to the Plaintiff's claim in this suit. The absence of a defence may be because of the consent which was subsequently recorded in this suit which is being contested by the 2nd Defendant.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

17. I have carefully considered the Pleadings in the consolidated suits as well as the evidence adduced during the hearing. I have also considered the submissions by the parties herein. There are a number of issues which emerge for determination;

- 1. Whether the consent recorded in NBI CMCC No. 7024 of 2004 (Formerly HCCC 734 of 1996) should be set aside.***
- 2. Whether the caveat registered against the title to the suit property was removed fraudulently.***
- 3. Whether the transfer of the suit property from the 1st Defendant to the Plaintiff in NBI CMCC 1130 of 2004 was lawful.***
- 4. Whether the sale between the 1st Defendant and the 2nd and 3rd Defendants was lawful.***
- 5. Who between the Plaintiff in NBI CMCC No. 1130 of 2004 and the Plaintiffs in NBI CMCC No. 7024 of 2004 [Formerly NBI HCCC No. 734 of 1996] is entitled to an order of Specific Performance.***
- 6. Are the Plaintiffs in the consolidated suits entitled to the prayers sought in their respective claims.***
- 7. What order should be made on costs.***

Whether the consent recorded in NBI CMCC No. 7024 of 2004 [Formerly HCCC 734 of 1996] should be set aside

18. There is no contention that there was a consent recorded in NBI CMCC No. 7024 of 2004 [Formerly HCCC 734 of 1996]. This consent is said to have been recorded on 26th May, 1997 and was issued on 22nd July, 1997. The consent is said to have been recorded before Justice Hayanga on 26th May, 1997. The consent is said to have been recorded pursuant to an application for injunction under the then order XXXIX Rule 1, 2, 3 and 9 of the Old Civil Procedure Rules. Under the New Civil Procedure Rules, the Order is now Order 40. That application is said to have been supported by an affidavit of Krishnlal B. Sasodia sworn on 26th June, 1996 and the application was presented

to Court on 26th June, 1996. The consent is said to have been recorded in the presence of Counsel for the Plaintiff/Applicant and Counsel for the 1st, 2nd and 3rd Defendants/Respondents.

19. The contention of the Plaintiff herein is that he was not present when the consent was recorded and that the consent was fraudulently entered so as to defeat his interest in the suit property. I do not have the benefit of the original Court file in respect of NBI CMCC No. 7024 of 2004 [Formerly NBI HCCC No. 734 of 1996]. The only pleadings which I have are a copy of plaint in that suit filed on 22nd March, 1996 and an amended plaint filed in Court on 26th June, 1996. These copies were provided by Counsel for the Plaintiff in this case for purposes of showing the history of the current suit.

20. The Plaintiff may not have been present when the consent was recorded but the extracted order shows that his Advocate was present when the order was recorded. This consent was never challenged by the Plaintiff who was aware of it. The only time the Plaintiff attempted to challenge it was on 14th November, 2011 through his further amended plaint. This was after 14 years since the said consent was recorded. The Plaintiff was aware as at February, 2004 that the 1st Defendant had not given him a good title as he pleaded in paragraph 4 of his claim filed on 9th February, 2004. This is because he was aware that a consent had been filed and that consent had been endorsed on the title. The Plaintiff in the 2004 suit was only seeking an injunction against the 1st Defendant seeking to restrain the 1st Defendant from selling the suit property until he was refunded the purchase price.

21. The law is clear that a consent recorded in the presence and with the consent of Counsel is binding on all parties. In the case of Lazarus Kirech Vs Kisonio Arap Barno [2018]eKLR Justice Ombwayo quoted from Hiram Vs Kassam [1952] 19EARA 131 where it was held as follows:-

“Prima facie, any order made in the presence of and with the consent of Counsel is binding on all parties to the Proceedings or action, and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court, or if consent was given without sufficient material facts, or in general for a reason which would enable the Court to set aside an agreement.”

22. In the instant case, the Plaintiff does not deny that his Counsel was present when the consent was recorded. When the Plaintiff was sued in NBI CMCC No. 7024 of 2004 (Formerly HCCC NO. 734 of 1996) he became aware that a consent had been recorded in that case and that the consent had nullified the title which the 1st Defendant tried to give him. He did not challenge that consent recorded in 1997. The Plaintiff instead filed a case in 2004 in which he sought for injunction to restrain the 1st Defendant from selling the suit property until he was paid a refund of the purchase price. His challenge of the consent in the year 2011 is an afterthought.

23. There was no collusion in the recording of the consent. There are no grounds upon which the consent can be set aside.

Whether the caveat which the second Defendant recorded against the title to the suit property was removed fraudulently.

24. The 1st Defendant had sold the suit property to the 2nd and 3rd Defendants vide agreement dated 5th February, 1992. The 2nd and 3rd Defendants were granted possession. In 1993 when the 1st Defendant threatened to cancel the agreement, the 2nd Defendant caused a caveat to be registered against the title to the suit property. The caveat was duly entered as entry No. 90 on the title document. On 13th December, 1995 a Notice of Withdrawal of caveat was prepared and it was alleged that the same had been signed by the 2nd and 3rd Defendants. There is no way the 2nd and 3rd Defendants would have signed a Notice of Withdrawal of caveat when they were in the process of purchasing the suit property.

25. The caveat was removed by merely cancelling the entry and not by an entry in the title indicating that the caveat had been removed vide Notice of Withdrawal. The Notice of Withdrawal was purportedly signed by both the 2nd and 3rd Defendants. This is not possible because it is only the 2nd Defendant who caused the registration of the caveat and is the one who would have applied for its removal.

26. The entry on the register shows that the suit property was registered in the name of the Plaintiff on 29th December, 1995. The purported Notice of Withdrawal was presented to the Lands Office on 25th January, 1996 and stamped with the official stamp on that date. There is no way a Notice of Withdrawal of a caveat would have been presented on 25th January, 1996 when already the title had been registered in the Plaintiff's name on 29th December, 1995.

The schemers of the illegal Notice of Withdrawal tried to cover their moves by stamping on the Notice of Withdrawal that the Withdrawal Notice was received on 21st December, 1995 but this could not help as the date for presentation was clear and this may have been noticed because there is a line cancelling that stamp. It is therefore clear that the caveat by the 2nd Defendant was removed fraudulently.

Whether the transfer of the suit property into the Plaintiff's name was lawful

27. There was already a caveat which had been registered against title to the suit property. There is no way a transfer would have been effected without the caveat being removed in a lawful way. I have demonstrated in the preceding paragraphs while dealing with the issue of removal of caveat that the registration of title in the name of the Plaintiff was done on 29th December, 1995 while the Notice of Withdrawal of caveat was presented on 25th January, 1996. It would not have been possible to register title in the name of Plaintiff and then seek to purport to remove the caveat after registration.

The registration of the title in the name of the Plaintiff was done fraudulently.

Whether the sale between the 1st Defendant and the 2nd and 3rd Defendant was lawful

28. The 1st Defendant and the 2nd and 3rd Defendants had entered into a sale agreement on 5th December, 1992. The 2nd and 3rd Defendants were granted possession. The 2nd and 3rd Defendants paid Kshs.775,563/=. The 2nd and 3rd Defendants were willing to pay the balance through a loan they were to get from HFCK. It is the 1st Defendant who did not provide title documents to enable HFCK to register a charge over the suit property and grant the 2nd and 3rd Defendants a loan which they wanted to advance. Despite the failure by 1st Defendant to provide the documents required to enable the loan to be processed, the 2nd and 3rd Defendants were still willing to pay the balance of the purchase price. I therefore find that the sale agreement between the 1st Defendant and the 2nd and 3rd Defendants was lawful.

Who between the Plaintiff and the 2nd and 3rd Defendants is entitled to an order of Specific Performance.

29. The Plaintiff's title was cancelled pursuant to a consent which was recorded in Court. The reasons for cancellation were clear that the registration of the Plaintiff was fraudulent. In the original claim by the Plaintiff, the Plaintiff was asking for a refund of the purchase price. The Plaintiff is not the one who is in possession of the suit property. The suit property is in possession of the 2nd and 3rd Defendants who have been paying rates in respect of the same. Though the Plaintiff produced a receipt which shows that he paid Kshs.2,000,000/= to the 1st Defendant, he cannot be entitled to an order of Specific Performance of the agreement between him and the 1st Defendant. The purported agreement between the 1st Defendant and the Plaintiff came later than the one of the 2nd and 3rd Defendants.

30. The 2nd and 3rd Defendants have demonstrated that they paid Kshs.775,563 out of the purchase price of Kshs.1,150,000/=. The correspondence between the 2nd and 3rd Defendants show that the 2nd and 3rd Defendants were willing to clear the balance of the purchase price. On 31st March, 1995 the 1st Defendant wrote a letter to the 2nd Defendant seeking to confirm whether he was still interested in the purchase. The 2nd Defendant responded through his letter of 12th June, 1995 and indicated that he was still willing to proceed with the sale transaction.

31. The 1st Defendant engaged the 2nd Defendant until late in 1995 when it handed over the matter to their lawyers M/s Kaplan & Stratton who in their letter of 1st December, 1995 wrote to the lawyers of 2nd and 3rd Defendants intimating that the 1st Defendant was not going to proceed with the transaction. This letter did not amount to rescission of the agreement between the 1st Defendant and the 2nd and 3rd Defendants.

Infact on 19th September, 1995, the 1st Defendant had written a letter to the 2nd Defendant asking him to withdraw the caveat which he had lodged against the title to the suit property.

32. It is clear that the 2nd and 3rd Defendants were willing and ready to clear the balance were it not for the delay on the part of the 1st Defendant to give documents required by HFCK. I find that the 2nd and 3rd Defendants are entitled to an order of Specific Performance.

Are the Plaintiff and the 2nd and 3rd Defendants entitled to the prayers they seek in their respective claims.

33. From the analysis hereinabove, it is clear that the Plaintiff in CMCC No. 1130 of 2004 cannot be granted any of the reliefs claimed in paragraphs 1 to 5 of the further amended plaint dated 14th November, 2011. Neither the 1st nor the 2nd Respondent can be enjoined from what has been found to have been lawfully sold to the 2nd and 3rd Defendants. The sale between the 1st Defendant and 2nd and 3rd Defendants was lawful and there can be no declaration that the same is null and void.

34. The consent recorded in CMCC 7024 of 2004 [Formerly HCCC No. 734 of 1996] cannot be declared null and void as no grounds have been established to warrant its setting aside. No order of Specific Performance can be granted as demonstrated hereinabove. The 2nd and 3rd Defendants can neither be evicted from the suit property nor be ordered to pay mesne profits as they are occupying the suit premises lawfully.

35. The Plaintiff is in the alternative claiming a refund of the purchase price from the 1st and 2nd Defendants at commercial rates from the date he paid the purchase price until when the refund is paid in full. The Plaintiff testified that he paid in cash Kshs.2,000,000/= to the 1st Defendant. He produced a receipt issued by the 1st Defendant which shows that he paid Kshs.2,000,000/= on 4th December, 1994. Whereas the Plaintiff claims that he paid Kshs.2,000,000/= to the 1st Defendant in cash, the receipt which was issued shows that the two million was paid vide cheque No. 009346. The cheque is said to have been issued on 4th December, 1995 whereas the receipt was issued on 4th December, 1994.

36. The Plaintiff in his statement stated that the transaction was carried out by Kaplan & Stratton Advocates and that the Registration was done by the same Advocates and further that he collected the title from the Offices of Kaplan & Stratton. When the Plaintiff's previous lawyers wrote to Kaplan & Stratton asking for evidence of the transaction, M/s Kaplan & Stratton wrote back and indicated that their records did not show any payment made by the Plaintiff. The Plaintiff would not have paid in cash and then the receipt is issued that payment was made by cheque. The dates in the receipt allegedly issued by the 1st Defendant has two conflicting dates. The agreement where the amount of Kshs.2,000,000/= is said to have been acknowledged does not bear the stamp or seal of the 1st Defendant. It is clear that the receipt or even the agreement were made up for purposes of attempts to take away the suit property from the 2nd and 3rd Defendants.

37. Whereas the Plaintiff claims that the transaction was done by Kaplan & Stratton, there is no evidence that that was the case. The firm of Kaplan & Stratton were only involved in registration of the partial discharge. The Plaintiff has no basis of claiming any refund from the 2nd and 3rd Defendants. The Plaintiff has also not shown whether he paid any monies to the 1st Defendant. I therefore find that the Plaintiff can

neither claim refund from the 1st or 2nd Defendants.

38. The Plaintiffs in Nairobi CMCC 7024 of 2004 (Formerly NBI HCCC No. 734 of 1996) prayed for an order of Specific Performance and for Declaratory Orders. For the reasons given hereinabove, I find that the Plaintiffs in NBI CMCC 7024 of 2004 [Formerly NBI HCCC 734 of 1996] have proved their case on a balance of probabilities.

Final Orders

39. I now make the following final orders:-

- 1. The Plaintiff's suit in NB CMCC 1130 of 2004 against the Defendants is hereby dismissed with costs to the 3rd Defendant.**
- 2. An order of Specific Performance is granted in favour of the second Plaintiff in NBI CMCC No. 7024 of 2004 [Formerly NBI HCCC No. 734 of 1996].**
- 3. The 1st Defendant in NBI CMCC No. 7024 of 2004 [Formerly NBI HCCC No. 734 of 1996] shall transfer L.R No. 209/10721/42 into the 3rd Defendant's name or her duly appointed attorney within 90 days failing which the Deputy Registrar of this Court is hereby authorised to sign all documents necessary to effect transfer of L.R No. 209/10721/42 into the 3rd Defendant's name or her duly appointed attorney.**
- 4. A declaration is hereby given that the removal of a caveat which had been lodged by the 2nd Defendant (Now deceased) against title to L.R No. 209/10721/42 was illegal and fraudulent and therefore null and void.**
- 5. A declaration that the transfer of L.R No. 209/10721/42 which was registered in the name of the 2nd Defendant on 29th December, 1995 is invalid and therefore null and void and the same is hereby cancelled.**
- 6. The 2nd Defendant in NBI CMCC No. 7024 of 2004 [Formerly NBI HCCC No. 734 of 1996] shall pay costs of this suit to the 2nd Plaintiff.**

Dated, Signed and Delivered at Nairobi on this 10th day of April, 2019.

E .O.OBAGA

JUDGE

In the presence of Mr. Nzuva for Plaintiff and Mr. Odongo for 2nd and 3rd Defendants.

Court Assistant – Hilda

E .O.OBAGA

JUDGE

10.4.2019