



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 473 OF 2013

SAMUEL BOGONKO KEENGWE.....1ST PLAINTIFF

ZIPPORAH B. BOGONKO.....2ND PLAINTIFF

=VERSUS=

ENOCK NYANDIKA OROKO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 25th January 2013 the plaintiffs have sued the defendant seeking:-

(a) A declaration that the defendant is not entitled to rescind the agreement.

(b) An order of permanent injunction restraining the defendant whether by himself, his servants, agents, representatives and/or employees or anyone claiming under him howsoever from breaching the sale agreement and/or wasting the suit property.

(c) An order for specific performance directed at the defendant to cause to be transferred the suit property land title Ruiru/Kui Block 8/1234 and in default thereof the Deputy Registrar of this court be directed to execute all necessary documents to facilitate the transfer thereof in favour of the plaintiffs.

(d) The plaintiffs pay the balance of the purchase price in the sum of Kshs.170,000/- to the defendant and if the defendant refuses to accept receipt thereof, the plaintiffs be allowed to deposit the same in court.

(e) Costs of this suit.

(f) Any other relief the court deems fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance and filed a statement of defence and counter claim dated 1st July 2013. In his counterclaim he sought against the plaintiffs:-

(a) That the plaintiffs' suit be dismissed with costs.

(b) Judgment be entered in favour of the defendant for unconditional release of title deed for LR No. Ruiru/Kiu Block 8/1234.

(c) Accounts be taken and settled as regards monies lent by the 1st plaintiff to the defendant.

(d) Costs for the counterclaim.

3. PW1 Samuel Bogonko Keengwe the 1st plaintiff, told the court that the defendant approached him for a loan of Kshs 3 Million as he had a patient. He told him he could only afford Kshs.900,000 which he advanced the defendant. Later the defendant was unable to repay the money. The defendant then suggested he sells his Plot Ruiru/Kiu Block 8/1234 so that he could refund the money. The defendant showed him a copy of the title for the suit property and said he was selling it for Kshs.1.2 Million. After two weeks the defendant told him he had gotten an offer but agreed to sell to the 1st plaintiff for Kshs.1.5 Million. The defendant then took the plaintiff to the said property. They agreed that the 1st plaintiff pays an extra Kshs.430,000 together with the earlier amount advanced to cater for the purchase price.

4. The defendant then signed the application for consent to transfer and the transfer forms. To facilitate the transfer the defendant gave the plaintiff the original title KRA PIN certificate and passport photos. The balance of Kshs.170,000 was to be paid upon consent to transfer was

realised. He produced the acknowledgement of receipt of Kshs.430,000 as exhibit P2, the letter of authority as exhibit P2 and the application for consent to the Land Control Board consent as exhibit P3. The original title deed was produced as exhibit P4. A letter dated 4th January 2012 where the defendant acknowledges a receipt of a total of Kshs 1,330,000 was produced as exhibit P5. He said the consent could not be granted because the defendant placed a caution. He prays that the prayers in the plaint be allowed.

5. DW1, Enoc Nyandika Orok, the defendant told the court he knew PW1 in 1998. He further stated that the PW1 was in the business of lending money. He first borrowed from the 1st plaintiff Kshs.60,000 which was to be paid at interest of 40%. Later in October 2012 he needed Kshs.500,000 which the 1st plaintiff advanced him. He offered the title deed for the said property as security. He also wrote blank post dated cheques of Kshs 700,000. He denied that the 1st plaintiff advanced him Kshs.900,000. He also denied receiving Kshs.430,000 on 4th January 2012. He denied signing any application for consent to transfer forms. He further stated that he wrote a letter dated 8th August 2012 demanding the original title deed from the 1st plaintiff and sought 150 days to refund the cash. He denied that he agreed to sell the suit property to the plaintiff at Kshs.1.5 Million. He maintained that he owes the plaintiff Kshs.500,000/- He prays that the plaintiffs' suit be dismissed with costs and his counterclaim be allowed.

6. I have considered the pleadings, the evidence on record and the exhibits produced. I have also considered the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether or not the 1st plaintiff and the defendant entered into a formal written agreement with specific terms and conditions of sale of the suit property and if so, what was the agreed purchase price?

(ii) Whether or not the plaintiffs other business dealings with the defendant blur, negate or seek to annul any inference of sale or purchase of the subject property.

(iii) Did the defendant sign his part of the transfer forms for consent in favour of the customer other than the plaintiffs and did the 1st plaintiff come into possession of the original title of the suit property for the purpose of facilitating the sale through his professional capacity?

(iv) Does the defendant owe the 1st plaintiff Kshs.500,000.

(v) Are the plaintiffs entitled to the relief sought.

(vi) Is the defendant entitled to the reliefs sought in the counterclaim.

(vii) Who should bear costs?

7. In addition to the oral testimony the parties filed oral submissions.

The plaintiffs' submissions

8. By a letter dated 8th August 2012 (Exhibit D2) the defendant signified that he had agreed to sell to the plaintiffs the suit property pursuant to the plaintiffs' proposal which agreement he was now negating and therefore seeking to refund the amount so far paid within a period of 150 days. It can be discerned from the said letter that there was an agreement of minds between the parties as to the sale of the suit property, the defendant having received part of the purchase price from the plaintiffs.

9. The plaintiffs produced exhibits P1 to P5, which are consistent in expressing the intention of the parties in so far as the sale of the suit property to the plaintiffs was concerned. The defendant admitted that he signed the transfer forms and land control board consent under duress. There was an offer and acceptance for the sale of the suit property herein that constituted an agreement with implied terms. The plaintiffs have satisfied the conditions for grant of the orders for specific performance of the sale transaction between the defendant and them.

10. The defendant is not entitled to any prayers sought in the counterclaim. There is no dispute as to the amount so far paid. They have put forward the cases of **Bakshish Singh vs Panafric Hotel Ltd CA Civ Appeal No. 5 of 1984** and **Thomas Openda vs Petr Martin Ahn CA Civil Appeal No. 42 of 1981**. The pray that the plaintiffs be found to have proved their case on a balance of probabilities and deserving of the reliefs sought in the plaint.

The Defendant's submissions

11. From the plaintiffs' exhibit P1-P5 the purported purchase/sale is not explicated by the parties and the ingredients of an intended sale or actualized sale are not defined on the said documents. The 1st plaintiff is inviting the court to partake in writing the agreement for the parties herein.

12. The competing monetary claims and engagements between the parties did not crystalize into a sale agreement capable of enforcement by the court. The defendant has never met the 2nd plaintiff who is the 1st plaintiff's wife. The 1st plaintiff has introduced his wife into this matter to confuse issues between advocate client relationship and other engagements like the lending of cash business which the 1st plaintiff was engaged in the same law firm.

13. No consent of the Land Control Board was obtained within the time frame required by the law. The defendant has demonstrated

intention to refund the money advanced to him by the 1st plaintiff upon taking of accounts and on set off as the case may be. The plaintiffs have no purchaser's claim in the said property. He prays that the plaintiffs' suit be dismissed with costs and his counterclaim be allowed.

14. He has put forward the cases of: **Hosea Ayoyi Mombo vs Tongola Repher Mombo [2018] eKLR; Ngobit Estate Limited vs Violet Mabel Carnegie [1982] eKLR; Kakal Properties Development Limited vs Tafazz H. Maloo & Others [1993] eKLR and Thrift Homes Limited vs Kays Investment Limited [2015] eKLR.**

15. I have given due consideration to the rival submissions. There is no doubt that the 1st plaintiff and the defendant knew each other before 2011. There is also no doubt that the 1st plaintiff had advanced certain monies to the defendant some of which he refunded. It is the plaintiffs' case that the defendant agreed to sell to him the suit property at a purchase price of Kshs.1,500,000/-. He produced as exhibits, among others Exhibit P2 a letter for authorization of transfer of the suit property and exhibit P3 application for consent to the land control board.

16. Curiously, what is missing is the sale agreement. It is not lost to the court that the 1st plaintiff is an Advocate of the High Court of Kenya, in private practice. Section (3) of the Law of Contract Act, provides that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) The contract upon which the suit is founded:

(i) is in writing;

(ii) is signed by all the parties thereto, and

(iii) incorporates all the terms which the parties have expressly agreed in one document; and

(iv) the signatures of each party signing has been attested by a witness who is present when the contract was signed by such party”.

From the foregoing it is safe to say that nothing could have been easier than for the 1st plaintiff to reduce the agreement for sale/purchase of LR No. Ruiru/Kiu Block 8/1234 into writing. There is no such sale agreement. The plaintiffs' documents produced as exhibit P1 – P5 do not meet the requirements set out in Section 3 (3) of the Laws of Contract Act (Cap 23).

17. As there is no sale agreement in writing, the court cannot tell what was the purchase price. The plaintiffs have not proved that the defendant agreed to sell the suit property at Kshs.1,500,000. In the case of **Thrift Homes Limited vs Kays Investment Limited [2015] eKLR**, the court stated that ***“specific performance like any other equitable remedy is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from defect; such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid on unenforceable”***

I agree with the defence counsel submission that competing monetary claims and engagements between the parties herein did not crystallize to sale agreement capable of enforcement by the court. So in conclusion, the answer to issue number (i) is that no sale agreement was entered into by the parties.

18. It follows therefore that the answer to issue number (ii) is no. The 1st plaintiff other business dealings with the defendant do not give rise to a sale or purchase of the suit property. The 1st plaintiff admitted on cross examination that he had no document to show that he had advanced to the defendant Kshs.900,000/- He said he is relying on the letter dated 4th February 2012 from the defendant in which the (defendant) was admitting he had been paid Kshs.1,330,000 as part of the purchase price. The question still remains, why was the agreement not reduced into writing?

19. In his evidence the defendant explained the circumstances under which he gave the 1st plaintiff the original title to the suit property. He needed to sell the suit property in order to take his ailing mother for treatment in India. Upon advertising the property for sale he found a buyer whom he took to the 1st plaintiff so that he could do the sale agreement. It is at this point that the 1st plaintiff developed interest on the suit property and dismissed the said buyer. The defendant also told the court the title deed was held by the 1st plaintiff as security for the monies advanced.

20. The defendant told the court that he signed the transfer forms under duress as his mother was ailing and he needed money to take her for treatment. As stated earlier no sale agreement was executed between the parties hence the transfer form would not entitle the plaintiff any claim to the suit property. I also note that no consent to transfer from the Land Control Board was given within the required time frame as required by law. The 1st plaintiff admitted that his application to the Land Control Board was rejected because the defendant had lodged a caution. The suit property is still registered in the name of the defendant. The defendant avers that he has never met or dealt with the 2nd plaintiff. The defendant admits that he owes the 1st plaintiff Kshs.500,000 which he is willing and ready to refund. It was not meant for the purchase of the suit property. The basic ingredients of contract are missing.

21. In conclusion, I find that the plaintiffs have failed to prove their case on a balance of probabilities as against the defendant and therefore not entitled to the reliefs sought. On the other hand, I find that the defendant succeeds in his counterclaim. The upshot of the matter is that the plaintiffs' suit is dismissed. I enter Judgment in favour of the defendant in his counterclaim as follows:-

(a) That the 1st plaintiff do unconditionally release the title deed of LR NO. Ruiru/Kiu Block 8/1234 to the defendant forthwith.

(b) The defendant do refund to the 1st plaintiff Kshs.500,000/- with interest as agreed between the parties. In the alternative accounts be taken and settled as regards monies lent by the 1st plaintiff to the defendant.

(c) Each party to bear his/their own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 9TH day of APRIL 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the 1st & 2nd Plaintiffs

.....Advocate for the Defendant

.....Court Assistant