



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 789 OF 2003

NAOMI LINAH WERE.....1ST PLAINTIFF

CHRISTINA WERE.....2ND PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs, Naomi Linah Were and Christina Were, are mother and daughter. Through a further amended plaint dated 18/4/2017 and filed in court on 20/4/2017, they sought the following orders against the defendant:

- a) *Declaration that the plaintiffs are the lawful owners of the suit premises under the Tenant Purchase Scheme Agreement.*
- b) *An order that the defendant be held responsible for and or refunds the money the plaintiffs have been paying rent elsewhere since they were forcefully and unlawfully evicted out.*
- c) *The defendant to pay back and refund all the rent deposit of Kshs.99,000/= being the refundable deposit upon termination of the tenancy agreement as provided in the tenancy agreement entered between the defendant and the plaintiffs paid to it plus interest thereon at commercial lending rates, 10% deposit (Kshs. 850,000/=), Kshs. 633,100/= and 1000/= paid to it plus interest thereon at commercial lending rates from the eviction date until payment in full.*
- d) *A refund of Kshs. 760,000/= plus interest thereon being the rent paid by the plaintiffs in renting a house on LR No 12948 Mountain View 251 from the date of payment to date.*
- e) *General damages.*
- f) *Costs of this suit.*
- g) *Any other orders/ relief this honourable court may deem just and fit to grant.*

Plaintiff's Case

2. The case of the plaintiffs was that in May 1999, they rented the defendant's property, Land Reference 12948/78, situated at Mountain View, Nairobi, at a monthly rent of Kshs 49,500. At the commencement of the tenancy, they paid the defendant a refundable deposit of Kshs 99,000. In December 1999, they agreed to purchase the suit property at Kshs 8,500,000 under the defendant's tenant purchase scheme. They paid a deposit of Kshs 850,000 as part of purchase price. A further deposit of Kshs 633,100 was paid subsequent to that, making a total of Kshs 1,483,000. They contended that balance of the purchase price was to be realized by them from money which the estate of the late Professor Gideon Were was expecting from an insurance company but the insurance company failed to release the money on time. They averred that consequently, the defendant unlawfully terminated the sale and evicted them from the suit property. They contended that they were forced to look for alternative accommodation. Aggrieved, they brought this suit seeking the above orders.

Defendant's Case

3. The defendant filed a defence dated 4/9/2003, an amended defence dated 19/11/2003, and a further amended defence dated 27/4/2003. The case of the defendant was that there was no tenant purchase agreement between it and the plaintiffs as joint purchasers. They added that the material tenant purchase agreement was between the 2nd plaintiff and the defendant. They further contended that the 2nd plaintiff was subsequently unable to raise the agreed purchase price and voluntarily terminated the tenant purchase agreement. Subsequently, the suit property was sold and transferred to a third party. They further stated that the 2nd plaintiff voluntarily gave vacant possession of the suit property after she failed to raise balance of the purchase price.

Plaintiff's Evidence

4. The 2nd plaintiff testified on 13/3/2018 as PW1. She adopted her witness statement dated 18/9/2012 as her sworn evidence in chief. She stated that the 1st plaintiff was her mother. Her evidence was that in 1999 her family rented the suit property from the defendant at a monthly rent of Kshs 49,500 for a period of 11 months. In December 1999, the family decided to purchase the suit property under the defendant's tenant purchase scheme. Under the scheme, a 10% deposit was to be paid and the subsequent amounts were to be paid through monthly instalments.

5. Upon offering to purchase the suit property, they were given a tenant purchase agreement to be signed by four family members. Subsequently, it was decided that only one family member, herself, would sign the agreement, because the annual insurance premiums were going to be higher if the four family members executed the agreement. She subsequently signed an agreement for purchase of the suit property at Kshs 8,500,000 under the defendant's tenant purchase scheme. She duly paid the 10% deposit (Kshs 850,000). A further sum of Kshs 633,100 was also paid, making a total of Kshs 1,483,100. She had hoped to raise the rest of the monthly instalments (Kshs 107,000 per month) out of the insurance money payable to the estate of her late father, Prof Gideon Were. Unfortunately, the insurance money was not remitted on time. Consequently, she fell in rent arrears. She testified that through a letter dated 22/1/2001, she terminated the tenant purchase agreement and offered to pay to the defendant the arrears outstanding on the account by dint of her family's occupation of the suit property. She further testified that subsequent to her letter terminating the agreement, her mother wrote to the defendant rescinding the termination letter. PW1 further stated that her family stopped paying rent in November 1999 and that the family occupied the house upto September 2002.

Defendant's Evidence

6. The defendant called one witness, Carolyne Rakama – DW 1. She adopted, her witness statement as her sworn evidence in chief. She stated that she was the defendant's legal officer. Her testimony was that in 1999 the 1st plaintiff entered into a tenancy agreement with the defendant for 11 months at a monthly rent of Kshs 49,500. In December 1999 the 1st plaintiff and her children offered to purchase the suit property under the defendant's tenant purchase scheme. Subsequently, the 1st plaintiff's family nominated the 2nd plaintiff to enter into the contract. The 2nd plaintiff signed the tenant purchase agreement and paid a deposit Kshs 850,000. She subsequently paid a further sum of Kshs 633,100. She was however unable to pay the agreed monthly instalments of Kshs 107,000. Through a letter dated 22/11/2001, the 2nd plaintiff terminated voluntarily the tenant purchase agreement and committed herself to pay money which she owed the defendant by dint of her family's occupation of the suit property. She stated that the plaintiffs vacated the suit property in September 2002 with unpaid rent arrears of Kshs 2,388,700. It was her evidence that the money demanded by the plaintiffs cannot be refunded because they stayed in the house from January 2000 to September 2002 without paying rent. She added that monies paid by the 2nd plaintiff were offset against the rent arrears.

7. The plaintiffs filed their submissions on 16/11/2018. They submitted that the fact that there was a tenant purchase agreement can be inferred from the conduct of the defendant through correspondence and receipt of money. Reliance was placed on *Storer v Manchester City Council [1974] 1 W.L.R 1403*. It was also submitted that the defendant should not be allowed to withhold the deposit paid because it sold the property to someone else. It was further submitted that the plaintiffs are entitled to two month's deposit amounting to Kshs. 99,000/= as per the preceding tenancy agreement. The plaintiffs further submitted that they were entitled to Kshs. 760,000/= (Kshs.40, 000/= per month from 10th September 2002 to 1st April 2004) being the rent that they paid in different premises when they were unlawfully evicted by the defendant. Finally, it was submitted that the plaintiffs were entitled to general damages based on emotional stress and embarrassment because of the illegal actions of the defendants.

8. The defendant filed its submissions on 7/12/2018. It was submitted that there was no agreement between the plaintiffs and the defendant. Reliance was placed on *Leo Investment Ltd v Estuarine Estate Ltd ELC No. 2067 of 2007* where the plaintiff signed a sale agreement and forwarded a cheque for 10% deposit but the defendant did not execute the land sale agreement and it was held that there was no enforceable land sale contract. The defendant further submitted that the plaintiff was not entitled to a refund of the monies paid because she owed the defendant rent arrears in excess of Kshs 2,000,000. Reliance was placed on *Pyarally Popat Rajwani v David Roden [1982] eKLR*. It was further submitted that since the plaintiffs had defaulted in making monthly payments, their position reverted to that of a tenant. Reliance was placed on *Gabriel Njuguna Njoroge V David Lobongon Tioko [2017] eKLR*. It was further argued that the plaintiffs were not entitled to a refund of the rent they had paid in a different apartment because they terminated the tenant purchase agreement and voluntarily vacated the suit property.

Determination

9. I have considered the parties' respective pleadings, evidence and submissions. Four key issues fall for determination in this suit. The first issue is whether the plaintiffs, jointly or otherwise, are the lawful owners of the suit property pursuant to a tenant purchase agreement. The second issue is whether the defendant is liable to pay the plaintiffs, jointly or otherwise, the sums itemized in prayers (6), 6(a) and 6(b) of the further amended plaint dated 18/4/2017. The third issue is whether the defendant is liable to pay the plaintiffs, jointly or otherwise, general damages for breach of contract. The last issue is whether costs should be awarded in this suit. I will deal with the four issues in the order in which they have been framed.

10. As regards the first issue, PW 1 confirmed in her evidence in cross examination that the suit property was sold and is owned by a third party. Secondly, the plaintiffs did not tender evidence to the effect that they paid the agreed purchase price for the property. Thirdly, the tenant purchase agreement produced as Plaintiff Exhibit 7 was signed by only three out of the four proposed purchasers and it was neither witnessed nor certified. The said agreement was not executed by the defendant. What is not in contest is the fact that the 2nd plaintiff subsequently executed a tenant purchase agreement and forwarded it to the defendant. In her evidence, the 2nd plaintiff confirmed that through a letter dated 22/11/2001, she terminated the said tenant purchase agreement in the following terms:

Christina M Were

P O Box 10622

Nairobi

The Managing Trustee

National Social Security Fund

P O Box 30599

Nairobi

Attn Mr Kepha/Mr Kemoni

Dear Sirs

HOUSE NUMBER 78 MOUNTAIN VIEW

I refer to your telephone conversation held yesterday and my earlier letter and wish to request you to terminate the contract for house Number 78 Mountain View with effect from 31st December 2001.

Please advise us what the outstanding amount will be to enable us make suitable arrangements to pay.

Yours faithfully

Christina Were

11. I have considered the first issue in the context of the above evidence. It is clear that there are no evidential materials placed before the court to demonstrate that the plaintiffs jointly or otherwise paid purchase price for the suit property and consequently became owners of the suit property. To the contrary, the evidence before court reveals that the 1st plaintiff together with her three children wanted to purchase the suit property. To scale down on insurance premiums, they resolved to let the 2nd plaintiff alone enter into a contract with the defendant. The 2nd plaintiff failed to raise the agreed monthly instalments towards purchase price and subsequently terminated the contract in writing. She acknowledged that she owed the defendant money arising from her family's occupation of the suit property. The suit property was subsequently sold and transferred to a third party who is in possession. The third party is in possession.

12. In the absence of evidence of a sale contract between the two plaintiffs on one part and the defendant on the other part, there is no basis for claiming that the plaintiffs are owners of the suit property. Similarly, in the absence of evidence showing that the 2nd plaintiff paid purchase price as agreed between her and the defendant, there is no basis for the claim of ownership by the 2nd defendant. There is therefore no basis upon which this court would award the plaintiffs the suit property. My finding on the first issue therefore is that the plaintiffs have not proved their claim of ownership of the suit property.

13. The second issue is whether the plaintiffs are entitled to a refund of the monies itemized in the plaint. As observed, there is no evidence of contract between the two plaintiffs on one part and the defendant on the other part. Secondly, whereas the defendant acknowledges existence of a contract between it and the 2nd plaintiff alone, the 2nd plaintiff acknowledged that through her letter dated 22/11/2001 she communicated her inability to pay the purchase price and terminated the contract. She further offered to pay money which she owed the defendant by reason of her family's occupation of the suit property. In a myriad of correspondence placed before court by both parties, the plaintiffs acknowledged that they owed the defendant rent arrears. In the absence of evidence demonstrating that it is the defendant, and not the 2nd plaintiff, who owed the other money. I cannot condemn the defendant to pay the sums itemized in the plaint. I say so because at the time of terminating the agreement, the 2nd plaintiff acknowledged in writing that she was the one who owed the defendant money. Secondly, at the time of vacating the house in September 2002 the plaintiffs were in rent arrears of Kshs 2,388,700 and this fact was not controverted.

14. It is further observed that during cross examination, the 2nd plaintiff stated that they voluntarily moved out of the suit property. In my view, in the circumstances of this case, there is no proper basis for condemning the defendant to pay the plaintiff the rent which they paid to their subsequent landlord. It is therefore my finding that the defendant is not liable to pay the plaintiffs monies itemized in the plaint.

15. The third issue relates to the question as to whether the defendant is liable to pay damages for breach of contract. Damages would have been payable if the plaintiffs placed before the court a valid contract and proved breach of specific terms of the contract by the defendant. Regrettably, there was no evidence of breach of contract by the defendant. I therefore have no proper basis for awarding damages to the

plaintiffs in the circumstances of this case.

16. I would have awarded the defendant costs of this suit were it not for the fact that it withheld the material contract yet the said contract was a piece of evidence necessary for the prompt determination of the dispute in this suit. My view is that through their conduct, they contributed to the filing of this suit. Consequently, parties will bear their respective costs of the suit.

Disposal Order

17. My finding is that the plaintiffs have failed to prove their case on a balance of probabilities. Their suit is accordingly dismissed. There will be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019.

B M EBOSO

JUDGE

In the presence of:-

June Nafula - Court Clerk