



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 531 OF 2013

DAUDI SAMUEL SUMBA.....1ST PLAINTIFF

TRUPHOSA AKINYI KWAKA.....2ND PLAINTIFF

=VERSUS=

PENTONVILLE HOLDINGS LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiffs have filed this suit against the defendant seeking:-

(a) Kshs.1,650,000 together with interest and costs.

(b) Any other or further relief that this honourable court may deem fit to grant.

(c) Costs of the suit plus interest.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance on the 22nd May 2013 and filed a statement dated 5th June 2013.

3. PW1 Daudi Samuel Sumba the 1st plaintiff herein told the court that he paid a deposit of Kshs.1,650,000/- for purchase of a house No. 17 at Trident Park Langata erected in LR No. 209/18570, Nairobi hereinafter referred to as ("the suit property"). It is also his case that the defendant knowingly and wilfully concealed the existence of the defect in the defendant's title to the suit property. Further there was doubt as to whether the defendant had a good title to convey to the plaintiffs hence the contract for the purchase and sale of the suit property was voidable and ought to be set aside. He adopted the contents of his witness statement as part of his evidence in chief. He prays that the prayers in the plaint be granted.

4. The defendant called one witness. DW1 Elka Kwamboka Motonya, the Company Secretary of the defendant told the court that she was relying on her witness statement dated 11th June 2013. She also relied on the defendant's list of documents. She confirmed that the plaintiffs entered into an agreement to purchase a unit at Trident Park Langata. The agreement is dated 19th June 2012. The plaintiffs were to pay a 10% deposit. The balance of 20% was to be paid within 60 days and rest was to be paid on completion. She told the court that the plaintiff paid the 10% deposit but did not pay the 20% within 60 days. Several demands were sent to the plaintiffs but they did not respond. The defendant's advocates finally served them with a notice dated 31st January 2013 informing them of the defendant's right to retain the 10% deposit. She further told the court that the plaintiffs had raised queries as to the date of the title which read 99 years lease with effect from 1st November 1910. The plaintiffs were informed through their advocates that the title would be rectified by the ministry of lands. She maintained that the property being offered for sale was the same property described in the Letter of Offer. She denied that the defendant misrepresented to the plaintiffs that they had a valid title. She maintained that the defendant had all the approvals to undertake the developments. That the rescission of the contract by the defendant was proper. She prayed that the plaintiff's suit be dismissed with costs to the defendant.

5. At the end of the trial the parties tendered written submissions.

The plaintiff's submissions

6. By a Letter of Offer dated 19th June 2012 the defendant offered to the plaintiffs the suit property for purchase. The plaintiffs accepted the offer on 29th June 2012 and paid the Kshs.1,650,000 being the 10% deposit. On 7th August 2012, the defendant delivered to the plaintiffs the Draft Agreement for sale together with a copy of the title. There was a defect on the title, specifically in regard to the commencement date of the lease hold term of 99 years which was stipulated as 1st November 1910. Correspondences were exchanged on the subject of the

defect in the title. By a letter dated 31st January 2013 the defendant purported to rescind the contract and retain the deposit of Kshs.1,650,000 hence necessitating this suit.

7. The plaintiffs signed the letter of offer because they believed that the defendant held a good title to the property without defect. There was a defect of title with regard to the commencement date of the leasehold term of the defendant's interest in the property which goes to the root of the title, materially affecting the defendant's interest in the suit property.

8. The National Environmental Management Authority issued an Environmental Impact Assessment Licence for the LR No. 209/10532, while the defendant offered for sale was LR NO. 209/18570. The defendant did not avail the Environmental Impact Assessment Licence for the development. They have put forward the case of **Rigmall Developments Limited vs Halil [1987] 3AII ER 170**.

The defendant had a duty to disclose defects in the title to the plaintiffs. The defendant was aware of the existing defects on the title and the Environmental Impact Assessment Licence and breached its duty to disclose the defects of title to the plaintiffs.

9. The defendant had failed to make a full and frank disclosure of the existence of the defect of title and the Environmental Impact Assessment Licence which it had knowledge of. The defendant knowingly and purposefully concealed the existence of the defects when it offered the suit property for sale to the plaintiffs and accepted the deposit of Kshs.1,650,000. This failure to disclose constitutes misrepresentation. The plaintiffs' advocates raised objection to the title, specifically with regards to the defects of title. The objections raised on the Environmental Impact Assessment Licence dated 8th June 2009 were never answered by the defendant. They pray that the prayers in the plaint be granted.

The Defendant's submissions

10. The error on the Grant was brought to the defendant's attention after 60 days had elapsed since execution of the Letter of Offer. The 2nd instalment of the purchase price was already due and owing. Before construction of the apartments on the suit property all requisite approvals were duly acquired. The original property was initially leased to Omnivore Limited vide Grant IR No. 54900 for a period of 99 years from 1st November 1986. Afterwards it was subdivided into two plots namely LR NO. 209/18569 and LR NO 209/18568. However new titles were not issued until 2010. The defendant acquired rights to deal with the original property on execution of the Power of Attorney. The defendant's title was acquired regularly, the grant IR NO. 132424 is conclusive proof of its lease over the suit property. A typographical error on the title deed does not make it defective. The plaintiffs have not tendered any evidence to show that the grant contains any encumbrance which makes the defendant unable to transfer or deal with it. The typographical error was not resultant of the defendant's negligence but that of the Registrar, who issued the grant. The allegation for breach of the Law Society conditions of sale was never pleaded in the plaint. Parties are bound by their pleadings. They have put forward the case of **Raila Amolo Odinga & Another vs IEBC & 2 Others [2017] eKLR**. The Law Society of Kenya conditions of sale do not apply to the Letter of Offer. It has relied in the case of **Mukika Chai Dzombo vs Coast Development Authority [2014] eKLR**.

It is the purchaser's duty to conduct due diligence and inform himself on all the relevant aspects concerning the property he seeks to purchase. It has relied on **Halsbury's Laws of England, 4th Edition, Volume 42**. The typographical error on the grant was on the face of the title and hence recognizable. It was the plaintiffs' duty to bring it to the attention of the defendant as part of due diligence.

11. By the time the Environmental Impact Assessment Licence was obtained in 2009, the titles to the sub-divisions, one of which was the suit property had not yet been registered by the Registrar. The defendant exercised full disclosure. The plaintiffs have not satisfied the required standard of proof for fraudulent misrepresentation. It has relied on the case of **Derry vs Peek LR 14 App case 337, [1889] UKHL1**. The Letter of Offer has never been declared void. The plaintiffs admitted failure to pay the 2nd instalment within 60 days of execution entitled the defendant to forfeit the deposit paid as per the terms of the contract. It has also put forward the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another Civil Appeal No. 95 of 1999 [2001] KLR 112**. The plaintiffs remained bound by clause 6 of the Letter of Offer to pay Kshs.3,300,000/- within 60 days of execution.

12. The plaintiffs are estopped from claiming the reliefs sought in the plaint. The plaintiffs have breached the Letter of Offer and cannot approach this court to absolve them from their liability. The interest in damages should accrue from the date of judgment. It relied on the case of **Supermarine Handling Services Ltd vs Kenya Revenue Authority [2010] eKLR**. The plaintiffs have failed to prove that the defendant fraudulently misrepresented that it held a valid leasehold over the suit property and their case ought to be dismissed with costs to the defendant.

13. I have considered the pleadings, the evidence on record, the written submissions of counsel and the authorities cited.

14. The issues for determination are:-

(i) Whether the defendant had a good title in respect of LR 209/18570 (the suit property)

(ii) Whether there was misrepresentation by the defendant.

(iii) Whether the plaintiff breached the terms of the letter of offer.

(iv) Whether the defendant was entitled to serve the rescission notice to rescind the contract and retain the deposit in the sum of Kshs.1,650,000.

(v) Art he plaintiffs entitled to a refund of the deposit paid to the defendant?

15. It is not in doubt that the plaintiff raised questions pertaining to the title. The copy of the title forwarded to the plaintiff's advocates states that it is a 99 years lease with effect from 1st November 1910. This would mean that at the time of signing the agreement the title was not valid. The explanation given by the defendant was that it was a typographical error which would be rectified by the Ministry of Lands. I find that this error was a material defect in the title. It cannot be said that the defendant had a good title in respect of LR NO. 209/18570 (**"the suit property"**).

16. When cross examined by Ms Migiro for the plaintiffs, the defence witness, Elka Motanya admitted that it was the obligation of the defendant to show the buyer that it had a good title/legal interest to convey. I agree with the plaintiffs' counsel submission that the plaintiff would not have purchased the suit property had they been properly notified of the defects which defects are material. I find that the defendant misrepresented to the plaintiffs that they had a good title to pass. It should also be noted that while they undertook to rectify the error no timelines were given.

17. Misrepresentation is a false statement of fact made by a party to the contract which is one of the causes which induces the other party to enter into a contract. The burden of proving that the plaintiffs' had actual knowledge that the error was typographical and were not deceived by the misrepresentation lies on the defendant.

18. I find that the plaintiffs cannot be faulted for failing to pay the purchase price because they had not been assured that the title in possession by the defendant was a good title. The defendant was not entitled to rescind the contract and retain the deposit of the purchase price. The plaintiffs have demonstrated that they did not breach any of the conditions of the contract and are entitled to a refund of the deposit.

19. In the case of **Highway Furniture Mart Ltd vs Permanent Secretary Office of the President & Another [2006] eKLR**, it was held that:-

"The justification for an award of interest or principal sum is to compensate a plaintiff for the deprivation of any money or specific goods through the wrong act of the defendant".

In the case of **Francis Kamau Ichatha vs Housing Finance Company of Kenya Limited [2015] eKLR**. Hon. Justice G. V. Odunga awarded interest from the date of filing of the suit till payment in full. I am guided by the above authorities.

20. I accordingly find that the plaintiffs have proved their case as against the defendant on a balance of probabilities. I enter judgment in their favour as against the defendant for a refund of Kshs.1,650,000 together with interest from the date of filing until payment in full. The plaintiffs shall have costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 31ST day of JULY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Migiro for the Plaintiff

Mr. Hans Ochoe for Mr. Shah for the Defendant

Kajuju - Court Assistant