



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

ELC NO 208 OF 2014

MAISHA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

MOHAMED HASSANALI ALIMOHAMED JAMMOHAMED....1ST DEFENDANT

FARHANA MOHAMED HASSANALI2ND DEFENDANT

J U D G M E N T

1. The plaintiff in the instant suit relying on a letter of offer dated 13th November 2012 (“**the agreement to sell**”) made by the 1st and 2nd defendants agents to the plaintiff to sell to the plaintiff land parcel LR No.1338/29 (hereinafter referred to as (“**the suit property**”)) has sued the defendants claiming breach of that agreement to sell. The plaintiff seeks from the defendants jointly and severally the following orders :-

- (a) Specific performance of the agreement dated 13th November 2012.**
- (b) Damages for the defendants breach of the agreement.**
- (c) Costs of the suit.**
- (d) Any further or other relief that the Honourable court may deem just and fit to grant.**

2. The defendants in their statement of defence admitted they made the letter of offer dated 13th November 2012 but denied they were in any way in breach of the offer terms.

3. The defendants averred that it was the plaintiff who failed to honour the terms of the offer. The defendants contended the letter of offer did not constitute an agreement for sale as no formal agreement for sale was executed between the parties. The defendants further averred that the terms of the offer were express and specific and were not varied. The offer letter provided for a purchase price of Kshs.52,500,000/= and a 10% deposit of kshs5,250,000/= was paid by the plaintiff on acceptance of the terms of the offer and the balance was payable on competition that the letter of offer provided was to be within 30 days of the acceptance of the offer. The defendants contended the plaintiff did not honour the offer term relating to the completion of the transaction.

4. During the hearing before me on 28th November 2018 Rajeshwar Sahi (PW1) testified on behalf of the plaintiff. He adopted as his evidence the contents of the witness statement he had made on 25th February 2014 and further relied on the bundle of documents as per the list dated 25th February 2014 which were admitted in evidence as “ PEX 1-11”. The plaintiff’s evidence was simply that the letter of offer accepted by the plaintiff constituted an agreement of sale. It was the plaintiff’s evidence that they were ready able and willing to complete the transaction save for the defendants action of backing out of the transaction. The plaintiff stated the defendants delayed in forwarding essential documents to enable the formal sale agreement to be completed and executed by the parties. The plaintiff agreed that the correspondence exchanged between the parties respective advocates basically related to the draft agreement that the parties wished to have perfected before execution. The witness stated that although the plaintiff’s advocate eventually approved the draft agreement with amendments, the defendant’s advocates never faired and /or engrossed the agreement to have the same formalized. In his evidence PW1 stated that the party intended to be bound by the agreement was Maisha Investments Limited and the defendants.

5. The 1st defendant (DW1) testified on behalf of the defendants. His evidence was simple and direct that it was indeed true that they had made an offer to sell that suit property to the plaintiff in terms of the letter of offer dated 13th November 2012 but the plaintiff failed to honour the terms of the offer. The 1st defendant denied that any formal agreements of sale came into being as no formal agreement of sale was signed by the parties. He lamented that the plaintiff delayed in approving the draft sale agreement which had been remitted to his

advocates soon after the acceptance of the offer on 15th November 2012. The 1st defendant emphasized that the completion date as per the letter of offer was within 30 days of the acceptance of the offer and he stated that he had explained to PW1 the urgency of the transaction that necessitated the sale to be completed within 30 days as provided on the letter of offer. The 1st defendant stated they were ready to complete the transaction had the balance been paid as provided in the letter of offer. The 1st defendant contended that as no agreement had been entered into with the plaintiff, there was no agreement capable of being specifically performed as sought by the plaintiff. The defendant stated that when the offer to sell the suit property lapsed they offered to refund the deposit of Kshs5,250,000/= paid by the plaintiff but the plaintiff declined to accept the refund and failed to furnish details of their bank account to enable the refund to be remitted.

6. The parties filed their final written submissions as directed. The plaintiff's submissions were filed on 17/12/2018 and the defendants submissions were filed on 21st December 2018. Having carefully reviewed the pleadings, the evidence and the parties written submissions the following are the issues that arise for determination.

i. Whether the letter of offer dated 13th November 2012 constituted an agreement for the sale of the suit property capable of being specifically enforced?

ii. If the answer to (i) is in the affirmative whether there was breach of the agreement by the defendants?

iii. Whether the plaintiff is entitled to the reliefs sought?

iv. Who bears the costs of the suit?

7. The plaintiff has submitted that the letter of offer dated 13th November 2012 and the acceptance thereof of the terms by the plaintiff constituted a binding agreement of sale between the plaintiff and the defendants. The defendants however hold a different view that the letter of offer remained just an offer which was not concretized into a formal agreement of sale that could bind the parties. The letter of offer is not contested and the issue is whether the terms constituted an enforceable contract without more. The letter of offer was not expressed to be subject to contract and therefore the court cannot read too much in the correspondences exchanged between the parties relating to the formalization of an agreement of sale. Without the benefit of an executed sale agreement between the parties, the court only has the letter of offer to consider to determine whether the terms thereof, were capable of being specifically enforced.

8. The Law of contract Act Cap 23 of the Laws of Kenya under section 3 (3) provides what constitutes a contract for disposition of an interest in land that can found an action. Section 3(3) of the Act provides :-

(3) 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

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

9. The requirement that a contract effecting any disposition of an interest in land must be in writing and executed by the parties to the contract is further fortified by section 44 of the Land Registration Act 2012, which provides as follows: -

44. (1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.

(2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person's signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.

10. The defendants citing the above legal provisions have submitted that the letter of offer dated 13th November 2012 was not a contract in writing within the meaning of section 3(3) of the Law of contract Act as it did not incorporate all the terms that the parties had agreed to and further the same was not executed by the parties who were intended to be bound by the contract. The letter of offer was only signed by PW1 on behalf of the plaintiff company as the purchaser and by DW1 Mr. Hassanali on behalf of the vendors. The plaintiff company could only sign the offer /agreement by affixing its common seal which would further have required the directors to witness. There was no seal affixed on the offer letter and therefore the plaintiff cannot be said to have executed the offer so that the same could bind it. PW1 could in the circumstances signed the offer on behalf of the plaintiff to signify the intentions of the plaintiff to enter into a contract but the offer letter was not such contract. The acceptance of the offer by PW1 on behalf of the plaintiff only served to have the property the subject of the sale withdrawn from the market pending the fulfillment of the terms of the offer.

11. The offer letter provided the sale price as Kshs52,500,000/= which was to be paid as follows:-

1. Deposit of Kshs5,250,000/- was to be paid to Hassconsult Limited or be held as stakeholders, upon acceptance of the

offer.

2. The balance of Kshs47,250,000 was to be paid upon completion to Hassconsult Limited . Completion of the transaction was expressly provided to be:-

“within thirty (30) days of signing of the acceptance of the offer”.

12. It is not disputed that by the contemplated date of completion which was on 12th December 2012, the balance of the purchase price had not been paid and neither had any formal agreement for sale been executed by the parties. What is clear and apparent is that by the time the period provided for completion under the offer letter expired the parties were still engaged in correspondences regarding the approval of the draft sale agreement. The end result was that no formal agreement was executed. The offer letter was express in its terms and it is clear that the plaintiff did not fulfill all the terms and specifically the term providing for completion. The letter of offer as observed earlier was not subjected to the signing of a formal agreement for sale and hence the parties indulgence in correspondence relating to perfection of the agreement for sale cannot be called in aid to draw the inference that the completion period was extended by the conduct of the parties. The wording of the offer letter was such that the transaction and specifically the balance of the purchase price had to be paid within 30 days of the acceptance of the offer. The purchaser did not seek any extension of the period and that on expiry of the 30 days the offer lapsed and any party could at that point walk out of the arrangement without any consequences. The defendants vide their advocates letter of 11th January 2013 and 21st January 2013 made it clear that since the transaction had not been completed within 30 days as provided they would refund the deposit that the plaintiff had placed signifying they had opted out of the contemplated transaction.

13. The plaintiff has vehemently submitted that the letter of offer dated 13th November 2012 executed by the parties constituted a binding agreement for sale for the suit property arguing that the parties were clearly identified and the description of the property properly set out and the terms of the sale were agreed between the parties. The plaintiff thus argued there was no ambiguity or uncertainty of the purport of the letter of offer. Responding to the defendants contention that the letter of offer was not executed in terms of section 3(3) of the Law of Contract Act and hence unenforceable as a contract, the plaintiff argued there was no legal requirement for a letter of offer to be executed in the presence of any attesting witnesses. The plaintiff further argued that want of attestation could not render the letter of offer void.

14. With respect, I think the plaintiff's counsel misconstrued the purport and intent of section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya. The plain meaning of this provision is that for a party to found an action (suit) on a contract relating to a disposition of an interest in land such contract must satisfy all the requirement set out under section 3(3) of the Act. Such contract must be in writing, should be signed by all the parties to it and the signature of each party signing must be attested by a witness who is present when the contract was signed by such party. The letter of offer did not satisfy these requirements. There is no contest that the letter of offer contemplated that there would be a disposition of an interest in land by way transfer of the interest in the suit property from the defendants to the plaintiff. In those circumstances the contract sought to be enforced by the plaintiff against the defendants must be such contract as is demonstrated to have complied with the mandatory provisions of Section 3(3) of the Law of Contract Act.

15. In the case of *Metra Investments Ltd Vs Gakweli Mohamed Wawaka, Nairobi Milimani HCCC No. 54 of 2006* referred to the Court by the defendants Ransley, J stated as follows:-

“As the case is presented there is no evidence that an agreement in writing exists signed by both parties and witnesses as is required by Section 3(3) of the Law of Contract Act. In the absence of such agreement the Section is clear that no suit shall be brought for the disposition of an interest in land. The applicant does not appear therefore to have a prima facie case with a probability of success. The relief formerly available under the doctrine of part performance no longer exists”.

16. I agree with the learned Judge's exposition of the law as relates to the application of Section 3(3) of the Law of Contract Act. In the present matter, the letter of offer relied upon by the plaintiff was not appropriately signed by the plaintiff or even the defendants as to institute a binding document on the justices. It was merely an expression of intention to contract and to the extent the formal contract which would have bound the parties was never signed, the offer letter was incapable of being enforced. An enforceable contract in particular for sale of land would have required the plaintiff to have executed the same under seal and for both defendants who were joint owners to have each signed the agreement unless either of them had donated a power of attorney to the other in regard to the transaction.

17. Arising from my foregoing discussion and analysis it is patently clear that there was no valid and enforceable agreement of sale between the parties that was capable of being enforced by way of specific performance. The letter of offer of 13th November, 2012 did not yield an agreement that could be enforced. As the correspondence between the parties illustrate they were engrossed in an exercise to perfect the agreement of sale that never came to be. The plaintiff should have been put on guard by the time provided under the offer letter for completion of 30 days. The offer letter was time specific that completion by payment of the balance of the purchase price had to be within 30 days. If the plaintiff desired to keep the transaction alive it appears to me his available option was to tender the balance of the purchase price to the plaintiff and thereafter to pursue the completion documents. The plaintiff was a victim of the offer that he agreed to and with hindsight should perhaps have negotiated more flexible or friendly offer terms. On the terms of offer agreed the defendants were properly in order to back off the deal at the time they signified their intention to do so.

18. Having determined that there was no valid agreement for sale between the plaintiff and the defendants capable of being enforced, the other issues are rendered mute. If there is no valid contract there can be no breach. Equally if there is no breach proved, there cannot be proof of loss and or damage.

19. In the instant case there is clear and uncontroverted evidence that a deposit of Ksh5,250,000/= paid pursuant to the letter of offer on behalf of the plaintiff in fulfillment of a term of the letter of offer. When the deal fell through, there is also evidence that the defendants made an offer to refund the deposit paid. As the offer did not materialize as envisaged to a sale it was the proper thing to do for the defendant to make a refund of the deposit to the party who placed it. As the offer lapsed on expiry of the 30 days provided for completion and there was no provision made for default to complete, the parties in the circumstances ought to have been returned to their positions prior to signing the

letter of offer. The defendants would not be entitled to keep the deposit as that would be unjust enrichment as they cannot keep the money and the land, the transaction having aborted.

20. The final result is that I find and hold that the plaintiff has failed to prove its case on a balance of probabilities and cannot therefore be entitled to the reliefs sought. I dismiss the plaintiff's suit as against the defendants and notwithstanding there was no claim for refund of the deposit paid, having declined to make an order for specific performance I direct that the deposit of Ksh 5,250,000/= be refunded by the defendants to the plaintiff and/or as directed by the plaintiff within 21 days from the date of this judgment. For the avoidance of any doubt the refund will be made free of any interest. In determining the refund will be without any interest, I have considered that the defendants had made an offer for refund of the deposit shortly after the lapse of the period provided for completion under the letter of offer which was not taken by the plaintiff.

21. On the issue of costs, I have considered the circumstances of this matter and I have taken note that the plaintiff has not had the use of the money placed as deposit for a considerable length of time and further that the defendant's land has equally been encumbered by the caveat lodged by the plaintiff. In those circumstances in exercise of my discretion, I order that each party bears their own costs of the suit.

22. It is so ordered.

Judgment dated and signed at Nakuru this 4th day of October 2019

J. M. MUTUNGI

JUDGE

Judgment delivered at Nairobi this 30th day of October 2019.

S. OKONG'O

JUDGE