



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 134 OF 2016

HARRISON NYENDE MUMIA.....PLAINTIFF

VERSUS

BERNARD OMONDI & ANOTHER.....DEFENDANTS

JUDGEMENT

Introduction

1. The Plaintiff filed this suit against the Defendants claiming the following reliefs:-

- a. An order that the Defendants do vacate and give vacant possession of land parcel number land reference 23187/113, Nairobi to the Plaintiff.*
- b. Mesne profits at the rate of Kshs.30,000/= per month with effect from September 2012 till possession is actually given to the Plaintiff .*
- c. Interest on (b) above at Court rates till payment in full.*
- d. Costs of this suit.*

2. The Defendants filed a defence to the Plaintiff's claim and raised a counter-claim in which they seek the following reliefs;-

- a. That the Plaintiff do surrender the original title ,free from all encumbrances, and execute a transfer in favour of the Defendants of all that property being land Reference Number 23187/113 Nairobi and provide all completion documents necessary for registration of the transfer in favour of the Defendants.*
- b. In default of the Plaintiff delivering the transfer, the Deputy Registrar of the Court be authorized to execute such transfer in favour of the Defendants.*
- c. The Plaintiff be condemned to pay the cost of the suit and the counter-claim.*

Plaintiff's Case

3. The Plaintiff who is an employee of the Central Bank of Kenya is the registered owner of LR No.23187/113 (suit property) in which a residential house is erected. The suit property is currently charged to the Central Bank of Kenya .On 2nd July 2012, the Plaintiff and the Defendants entered into a sale agreement in which the Plaintiff agreed to sell the suit property to the Defendants at a consideration of **Kshs.9,300,000/-**.

4. It was a term of the agreement that the Defendants were to pay a sum of **Kshs.1,000,000/=** on execution of the agreement, Ksh.690,000 not later than 30th August 2012 and the balance of Kshs.7,610,000/=was to be paid directly to the Central Bank of Kenya before the Completion date after the Plaintiff had provided evidence of what was owed to Central Bank of Kenya . The completion date was 30th June 2014.

5. It is the Plaintiff's evidence that after payment of Kshs.1,000,000/= , he orally agreed with the Defendants that they were to take possession and start paying him monthly rent of Kshs.30,000/= . It is his evidence that the Defendants paid him Kshs.690,000/= in lumpsum

being rent at the rate of Kshs.30,000/= per month.

6. On 10th May 2013, the Plaintiff wrote to J Louis Onguto Advocate seeking to withdraw from the agreement on the ground that the mother to his son had raised issues over the sale of the suit property. On 16th December 2013, the Plaintiff through his lawyers M/s S M Keyonzo Advocates wrote to the Defendants giving 21 days' notice to terminate the agreement. These two letters did not elicit any response from the Defendants prompting the Plaintiffs to file this suit .

Defendant's Case.

7. The Defendant's on their part agree that they entered into a sale agreement with the Plaintiff in respect of purchase of the suit property. They took possession and renovated the house where they live upto date. After paying Kshs.1,690,000/=in accordance with the agreement, the Plaintiff started showing signs of renegeing on the agreement . There is even a time he wanted to gain entry into the suit property by force leading to a criminal case, being filed against him for malicious damage to property.

8. The Plaintiff claimed that the mother to his son was objecting to the sale of the suit property. The Defendants were ready and willing to complete the agreement. They wrote to Central Bank of Kenya which advised them to make a professional undertaking for the balance of the purchase price before they could release completion documents but they later changed and withdrew their instruction on the ground that the Plaintiff had complained to them that they were dealing directly with the Central Bank without involving them.

9. The Defendants deny that the Ksh.690,000/= was for rent. They contend that the kshs.690,000/= was paid in accordance with the agreement and that they are not in breach of any terms of the agreement. The Defendants argue that the purported termination issued by the Plaintiff's lawyer was issued prematurely and that it did not comply with the agreement in that it did not specify any default on their part and is therefore null and void.

Analysis of evidence and issues for determination

10. I have carefully considered the evidence adduced by the Plaintiff as well as the evidence by the Defendants. I have also considered the submissions by the parties herein. The issues which emerge for determination are as follows:-

i. Whether the agreement for sale was rescinded

ii. Whether the agreement provided for payment of rent

iii. Who is in breach of the agreement

iv. Is the Plaintiff entitled to payment of mesne profits

v. Are the Defendants entitled to specific performance

Whether the agreement for sale was rescinded.

11. The Plaintiff argues that the agreement for sale was rescinded. In this argument, he points to his lawyer's letter of 16th December 2013 which gave 21 days notice for rescission of the agreement. If there was to be any rescission of the agreement, it had to be in accordance with clause 11 (d) of the agreement which provided that in case of default on the part of the Defendants, a 21 days notice had to be issued bringing to the attention of the Defendants the default which they are said to have been guilty of and requiring them to remedy the same.

12. A look at the letter of 16th December 2013 shows that there was no default on the part of the Defendant's mentioned. The notice was issued before the completion date. The Plaintiff's Advocates have conceded in their submissions that indeed there was no rescission of the agreement as envisaged in the agreement. In **Karanja Mbugua & another Vs Marybin Holdings Co Ltd (2014) eKLR** Justice Nyamweya quoted from Halsbury's Laws of England Volume 42, 4th Edition at Paragraph 242 which stated that the law of rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchasers conduct is such as to amount to a repudiation of the contract and the parties can be restored to their former position.

13. In the instant case, there is no evidence of any default on the part of the Defendants. The Defendants have been in possession and their conduct is not one which can amount to repudiation of the contract as to take the parties to their former position. I therefore find that there was no rescission of the contract.

Whether the contract provided for payment of rent

14. The Plaintiff tried to argue that the Kshs.690,000/= was for rent paid in lumpsome. There was no clause in the agreement for payment of any rent. The Kshs.690,000/- was payment which was in accordance with clause 3 (b) of the agreement . The Plaintiff tried to argue that the payment of Kshs.30,000/-per month was orally agreed between him and the Defendants and that he regretted having not put it in the agreement . The Plaintiff in his witness statement clearly stated that the Kshs.1,000,000/= and Kshs.690,000/= were paid by the Defendants in accordance with the terms of the agreement. He cannot therefore change and claim that there was agreement that the Defendants were to pay rent of Kshs.30,000/= per month. The law is clear that an oral agreement cannot be used to vary the terms of a written agreement unless such agreement is reduced into writing. I therefore find that there was no clause for payment of rent in the agreement.

Who is in breach of the agreement

15. The agreement provided that it was the Plaintiff who was to provide the amount owed to Central Bank of Kenya before the money could be paid to the Bank. The Plaintiff did not perform his part. The Defendants attempts to ascertain the amount due to the Bank were unsuccessful as the Plaintiff had complained that the Bank should not deal directly with the Defendants without involving him.

16. The Defendants had performed their part by paying Kshs.1000,000/= and Kshs.690,000/= in accordance with the agreement . It is the Plaintiff who did not meet his side of the bargain. I therefore find that it is the Plaintiff who was in breach of the agreement.

Is the Plaintiff entitled to mesne profits

17. Black's Law Dictionary defines mesne profits as “ *the profits of an estate received by a tenant in wrongful possession between two dates*”. In the instant case, the Defendants took possession by virtue of a sale agreement which did not provide for payment of rent. It has been conceded by the Plaintiff that there was no rescission of the agreement in accordance with the terms therein. This being the case, there is no basis for the Plaintiff to claim mesne profits. The Plaintiff has conceded that he is not entitled to mesne profits for the period between September 2012 to 30th June 2014. This is factually true but I hasten to add that the Defendants were newer tenants of the Plaintiff for that period.

18. In Rajan Shah t/a S Shah & Partners Vs Bipin P Shah (2016) eKLR, the Court of Appeal stated as follows:-

“Mesne profits are the rents and profits which a trespasser has or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated while a claim for mesne profits is always unliquidated, while a claim for mesne profits is always unliquidated. It follows therefore that a claim for mesne profits is in-appropriate when the occupier is still a tenant. It can only be maintained when his tenancy has been duly determined according to law and becomes a trespasser. In this respect, a tenant such as the Respondent, cannot properly be adjudged to be liable for mesne profits unless and until his tenancy has been duly determined according to law because the element of wrongful and tortious occupation is absent”.

19. The Plaintiff is not entitled to any mesne profits even after 30th June 2014. A contract can only be brought to a halt in accordance with the terms provided in it. The contract herein was not terminated and this much has been conceded by the Plaintiff. There is therefore no basis upon which the Plaintiff can claim that the contract lapsed or that he is entitled to mesne profits.

Are the Defendants entitled to specific performance?

20. The remedy of specific performance is an equitable remedy which is granted where it is demonstrated that the Plaintiff has done all that he was expected to do under the contract or that he is ready and willing to perform his part. In Gurdev Singh Birdi & Another Vs Abubakar

(1997) eKLR the Court of Appeal held as follows:-

“ It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury's Laws of England, fourth Edition a Plaintiff seeking the equitable remedy of specific performance of a contract must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication and which he ought to have performed at the date of the writ in the action...”.

21. In the instant case, the Defendants had paid Kshs.1000,000/= upon execution of the agreement. They made a further payment of Kshs.690,000/= . The balance of Kshs.7,610,000/= was to be paid directly to Central Bank of Kenya upon the Plaintiff ascertaining what was owed to the Bank. The Defendants have been ready and willing to do that but it is the Plaintiff who had not done his part as at the time he filed this suit. The Defendants went out of their way to try to ascertain what was owed to the Bank. This is a clear demonstration that they were ready to meet their side of the bargain. The Defendants are clearly entitled to an order of specific performance.

Conclusion.

22. From the analysis of the issues hereinabove, it is clear that the Plaintiff has failed to prove his case. The same is hereby dismissed with costs to the Defendants. On the other hand, the Defendants who are the Plaintiffs in the Counter-claim have proved their case on a balance of probabilities. I enter judgement for the Plaintiffs in the counter-claim against the Defendant in terms of prayers (a),(b) and (c) of the counter-claim dated 14th July 2015.

Dated, Signed and Delivered at *Nairobi* on this 24th day of *October 2019*.

E.O .OBAGA

JUDGE

In the Presence of:-

Mr Osewe for Mr Keyonzo for Plaintiff and M/s Mburu for Mr Nyawara for Defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE