



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CASE NO. 501 OF 2010

SUKHDEV SINGH LALY.....PLAINTIFF

VERSUS

GERALD RICHARD KAFEERO.....1ST DEFENDANT

MARY KAVOSA KAFEERO.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff agreed to sell the property known as land reference number No. 7741/337 situated in Forward Close, Kitisuru Nairobi (“the Suit Property”) to the Defendants at the agreed consideration of Kshs. 23,000,000/= sometime in November 2003. They agreed on the mode of payment of the consideration and further agreed that the Plaintiff would continue to collect rent from the tenant in the Suit Property until the Defendants paid the full purchase price. The Plaintiff claimed that he agreed to transfer the Suit Property to 1st Defendants before being paid the full purchase price to enable the Defendants use the title over the Suit Property to obtain a loan to pay the balance of the purchase price. The Plaintiff claimed that the Defendants did not pay the full purchase price as agreed leaving a balance of Kshs. 6,900,000/= outstanding.

2. The Plaintiff filed this suit seeking the revocation of the Defendants’ title and vacant possession of the Suit Property. He also sought to restrain the Defendants from dealing with the Suit Property and an order that the rent proceeds from the Suit Property of Kshs. 150,000/= per month should have been paid to him from January 2011 until the balance of the purchase price is paid, together with interest and general damages for breach of contract. He sought these orders in the Amended Plaint dated 3/4/2012.

3. In the Amended Defence and Counterclaim dated 24/4/2012, the Defendants who are husband and wife, denied the Plaintiff’s claim. They admitted that they entered into the sale agreement with the Plaintiff over the Suit Property but denied that the Plaintiff had suffered loss as he alleged. The Defendants computed the rent collected by the Plaintiff from October 2004 until December 2010 as Kshs. 10,140,000/=. They counterclaimed the sum of Kshs. 3,240,000/= which is the difference after deducting the balance of the purchase price of Kshs. 6,900,000/= from the rent the Plaintiff collected from the Suit Property from October 2004 to December 2010. The Defendants sought an order directing the Plaintiff to surrender the valuation report for stamp duty for the Suit Property together with the receipts issued on payment of the stamp duty and the approved architectural drawings. They further sought an injunction to restrain the Plaintiff from dealing with the suit land.

4. The Plaintiff gave evidence. His wife used to work with the 1st Defendant at UNEP and they therefore knew each other. The Defendants expressed interest to buy the Suit Property from the Plaintiff but they did not have sufficient funds. The 1st Defendant informed the Plaintiff that he qualified to take a loan of Kshs. 10,000,000/= as long as he used the Suit Property as security for the loan. The 1st Defendant paid a deposit of Kshs. 1,000,000/=. Parties entered into an agreement after executing the letter of agreement dated 20/11/2003. The Purchase price was agreed at Kshs. 23,000,000/=. The 1st Defendant informed the Plaintiff that he was going to sell a piece of land that he owned in Kampala to enable him pay the balance of the purchase price. The 1st Defendant kept reassuring the Plaintiff that he was resolving the problem with the Kampala property and would pay the balance of the purchase price when he took too long to complete the payments for the Suit Property.

5. The Plaintiff stated that throughout the period he maintained the Suit Property at his expense including relocating the hot water system; erecting a boundary wall on one side of the Suit Property due to security concerns voiced by a tenant; installing a new water tank to address the issue of water rationing and replacing the kitchen countertops. He stated that the Defendants did not settle the balance of the purchase price but went ahead to charge the Suit Property to secure another loan.

6. The Plaintiff urged the court to nullify the sale agreement due to the Defendant’s breach and restore the Suit Property to him together with the rent income collected by the Defendants. He also urged the court to award him the outstanding balance of Kshs. 6,900,000/=, the rent collected by the 1st Defendant together with interest on the unpaid purchase price from 28/2/2004.

7. The Plaintiff gave evidence and produced a copy of the sale agreement. He stated that the completion of the agreement was 120 days from the date of the execution of the agreement. He confirmed that he supplied the completion documents to the Defendants which was the basis for transferring the Suit Property to the Defendants. He stated that the Defendants paid Kshs. 16,100,000/= in total.

8. The 1st Defendant gave evidence. He stated that the completion did not take place until 20/7/2004. He stated that under clause 3a of the sale agreement, the Plaintiff was obliged to transfer the title to the Defendants within 21 days of the date of the sale agreement which term the 1st Defendant claimed the Plaintiff breached. The 1st Defendant further claimed that the Plaintiff misrepresented himself as the owner of the Suit Property to the American Embassy in Kenya when he entered into a lease with the Embassy over the Suit Property. The 1st Defendant maintained that there was no further agreement entitling the Plaintiff to the rent from the Suit Property which he collected until December 2010. He computed the rent paid from October 2004 to December 2010 which came to Kshs. 10,140,000/= and urged that if one deducts the outstanding balance of the purchase price of Kshs. 6,900,000/= from this sum, the difference is Kshs. 3,240,000/= which he counterclaimed from the Plaintiff. The 1st Defendant produced copies of the lease agreement that he entered into with the Embassy of the United States of America over the Suit Property on 1/1/2011, rates demand notes showing the Defendants as the registered owners and the acknowledgement of payment he made to the Plaintiff.

9. Only the Plaintiff filed submissions which the court has considered. The issue for the determination is whether the court should grant the orders sought by the Plaintiff or those sought by the Defendants in the counterclaim. It is not in dispute that parties entered into the sale agreement over the Suit Property in 2003 at the agreed consideration of Kshs. 23,000,000/=. It is also not in dispute that the Defendants paid the sum of Kshs. 16,100,000 leaving a balance of 6,900,000/=. The Plaintiff collected rent from the Suit Property until December 2010.

10. In order to determine the dispute, it is necessary to look at the terms of the sale agreement which bears no date but gives the year it was made as 2003. Clause 2a of the agreement acknowledged payment of Kshs. 1,000,000/= towards the purchase price. Under Clause 1b, the Defendants were supposed to pay Kshs. 8,000,000/= before 23/12/2003 and the final balance of 14,000,000/= was to be paid on or before 24/2/2004.

11. The sale was subject to the Law Society Conditions of Sale 1989 edition, where the conditions were not inconsistent with the sale agreement. The completion date was 120 days from the date of the agreement. Clause 7 stated that the property was sold subject to the existing tenancy. Clause 8 stated that the vendor would continue to receive rental income from the tenant until after the purchasers had paid the full purchase consideration. Clause 9 stated that the Suit Property was sold subject to subsisting lease agreements and rights of way. The agreement set out the special conditions and was executed by the Plaintiff and the Defendants.

12. The parties agreed to have the Suit Property transferred to the Defendants before they had paid the full purchase price in order for the Defendants to obtain a loan using the title over the suit land as security. The letter of agreement and the sale agreement both stipulated that the Plaintiff would continue to collect rent from the Suit Property until the purchase price was paid in full. The Defendants did not pay the balance of Kshs. 6,900,000/=. There was no agreement for the rent collected by the Plaintiff to be applied towards the payment of the purchase price. The Defendants did not prove that the Plaintiff breached the terms of the agreement.

13. The Plaintiff sought rescission of the contract of sale based on the Defendants' breach. Rescission can only happen where parties can be restored to their former position. The Plaintiff was paid Kshs. 16,100,000/= by the Defendants. He did not show that he was prepared to refund this sum to the Defendants. The sale agreement did not state that time was of the essence. The Plaintiff did not give notice to the Defendants making time of essence and therefore the Plaintiff cannot repudiate the contract on the grounds of the Defendants' delay in performing their obligations under the agreement. The Plaintiff could only have made time of the essence by fixing a reasonable time for performance by the Defendants before he could repudiate the contract.

14. Under the sale agreement, the Plaintiff was entitled to collect rent from the Suit Property until the Defendants paid the full purchase price. The Plaintiff did not lead evidence to prove the loss of business opportunities due to the Defendants' retention of the balance of the purchase price.

15. The court grants prayer (d) (i), (d) (ii), (e) of the Amended Plaint dated 3/4/2012. The counterclaim is dismissed. The Plaintiff will have the costs of the suit and the counterclaim.

Dated and delivered at Nairobi this 26th day of November 2019.

K.BOR

JUDGE

In the presence of:-

Stephen Ooko for the Plaintiff

Daniel Kamunda for the Defendants

Mr. V. Owuor - Court Assistant