



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 499 OF 2018

(Formerly HCCC NO. 499 OF 2005)

MERLIN MANAGEMENT.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES.....DEFENDANT

JUDGEMENT

1. The Plaintiff offered to purchase 50 acres of land from the Defendant near Karen Shopping Centre being land reference number 20587 (the Suit Property) at Kshs. 205,000,000/= on 5/8/2005. The Plaintiff claimed that the Defendant accepted his offer on 10/8/2005 on condition that 10% of the purchase price was paid on execution of the contract which was to be completed within a year. The Defendant declined the Plaintiff's offer on 19/8/2005 and refused to execute the formal agreement. The Plaintiff filed this suit. While the suit was pending, the Defendant sold the Suit Property to Lancaster Limited on 4/12/2007 for Kshs. 205,000,000/=.

2. Through the amended plaint filed in court on 6/10/2009, the Plaintiff sought a declaration that a valid and enforceable contract existed between it and the Defendant in respect of the Suit Property and that the transfer of the Suit Property by the Defendant to Lancaster Limited was undertaken *pendente lite*. The Plaintiff also sought general damages and costs of the suit.

3. The Defendant denied the Plaintiffs claim in the amended defence filed on 19/1/2010 and averred that it made a mere invitation to treat which was not binding on either party. The Defendant averred that it rejected the Plaintiff's counter offer when the Plaintiff was unable to adhere to the stipulations of the Defendant's offer regarding the payment of the purchase price. The Defendant maintained that it did not enter into any contract with the Plaintiff for it to claim specific performance and denied that the Plaintiff had any legal right over the Suit Property. It added that it had the right to dispose of the Suit Property to the highest and willing bidder. The Defendant added that there was no court order restraining it from transferring the Suit Property to another buyer.

4. Robert William Githui gave evidence for the Plaintiff. He stated that the Defendant invited offers from the public for the purchase of various properties in Nairobi through an advertisement in *The Standard* of 24/2/2005. The Plaintiff offered to purchase 50 acres near Karen Shopping Centre being L.R No. 20587 for Kshs. 205,000,000/= on 5/8/2005. He claimed that the Defendant accepted the offer through its letter of 10/8/2005 on condition that a deposit of 10% was paid on the signing of the sale agreement and the balance paid within a year. The Defendant vide its letter of 16/8/2005 required the Plaintiff to pay the deposit within 7 days yet at the time there was no draft agreement or written memorandum to satisfy the requirements of the Contract Act.

5. The Plaintiff wrote to the Defendant on 18/8/2005 requesting it to initiate the preparation of the sale agreement over the Suit Property. To the Plaintiff's surprise, the Defendant declined its offer on 19/8/2005. The Plaintiff claimed that it was ready, able and willing to pay the deposit of 10% of the purchase price and the balance in 12 months. The Plaintiff filed suit against the Defendant on 9/9/2005 after issuing a demand notice through its advocates. The Defendant was served with the summons dated 24/9/2005 together with a penal notice notifying the Defendant not to transfer or deal with the Suit Property.

6. Towards the end of 2007 the Defendant sold the Suit Property to Lancaster Limited which had placed a caveat on the suit land on 14/9/2005. The transfer in favour of Lancaster Limited was registered on 4/12/2007. Lancaster Limited bought the land at the same purchase price the Plaintiff was to have paid. The Plaintiff averred that it would have been in a position to complete the sale in 24 months let alone the 12 months that it had agreed with the Defendant. The Plaintiff stated that the Defendant fraudulently, illegally and without the authority of the court transferred the Suit Property to Lancaster Limited thereby affecting its rights. The Plaintiff added that the Defendant's action defied the authority and dignity of the court as envisaged by the doctrine of *lis pendens*. The witness stated that the value of the Suit Property stood at Kshs. 4,000,000,000/= as at October 2018.

7. The witness produced various documents including copies of the Defendant's advertisement for sale of the land; the Defendant's letter dated 10/8/2005 which stated that the completion of the sale would be within a year and not 2 years as the Plaintiff had requested; a copy of the Plaintiff's letter dated 11/8/2005 which confirmed the conditions of the Defendant's letter of 10/8/2009 except for the completion, for which it requested 18 months instead of 12; and the Defendant's letter of 16/8/2005 which stated that completion of the sale would be within 12 months and not 18 months requested by the Plaintiff and that the balance of the purchase price was to be made in 12 equal instalments.

8. The letter dated 16/8/2005 stated that if the terms were acceptable, the Plaintiff was to arrange to pay Kshs. 20,500,000/= being 10% deposit of the purchase price as a sign of commitment within 7 days. The Plaintiff responded on 18/8/2005 confirming that the completion would be within 12 months. The letter went further to state that the deposit of 10% of the purchase price was to be paid at the execution of the agreement after which the purchaser's advocates would give a professional undertaking to pay the balance of the purchase price within the completion period. The letter pointed out that the issue of having to pay in equal instalments had not been agreed upon. The Plaintiff also produced a copy of the certificate of title for the Suit Property together with the Defendant's letter dated 19/8/2005 in which the Defendant stated that it was declining the Plaintiff's offer because the Plaintiff had indicated in its letter of 18/8/2005 that it was unable to pay the balance of the sale price in 12 equal instalments.

9. He also produced a copy of the demand letter sent by its advocate; the search showing the transfer of the Suit Property to Lancaster Limited on 4/12/2007 and a copy of the transfer registered in favour of Lancaster Limited.

10. Caroline Rakama Odera gave evidence for the defence. She confirmed that the Plaintiff made an offer to purchase the Suit Property through its letter of 5/8/2005. She stated that the Defendant made a counter offer and referred to the correspondence exchanged between the parties. She stated that the Defendant declined the Plaintiff's offer through its letter dated 19/8/2005 because the conditions suggested by the Plaintiff were not acceptable to it. She maintained that the negotiations fell through and no contract was entered into. She stated that there was no court order stopping the transfer of the Suit Property to any other party.

11. She produced a copy of the Plaintiff's offer dated 5/8/2005 which gave various conditions including copies of deed plans being availed, plans indicating access to the sewer lines and beacons being identified. Upon confirmation of these conditions, the Plaintiff indicated that it was willing to enter into an agreement for sale under which it would pay 10% of the purchase price in the following words "*on 90 days from date of assigned sales agreement duly registered. Balance of 90% two years three months from date of assigned sales agreement dully registered.*"

12. Parties filed submissions which the court has read and considered. The issue for determination is whether the Plaintiff has proved its claim for the court to grant the reliefs it seeks.

13. The Plaintiff urged the court to extract the intention and conduct of the parties from the correspondence exchanged and the surrounding circumstances. It urged the court to grant a declaration that there was an enforceable contract in respect of the Suit Property between the Plaintiff and the Defendant. The Plaintiff contended that the Defendant had no right to dangle the offer for sale with impunity in front of a serious intended buyer and added that the Defendant should have to put on hold the rights to sell the land pending trial of this case. It urged that the Defendant should be directed to specifically perform the contract in favour of the serious intended purchaser.

14. The Plaintiff relied on the doctrine *lis pendens* based on Section 52 of the Indian Transfer of Property Act and urged the court to grant the prayers it sought as well as compensatory damages to restore to the Plaintiff what it lost.

15. The Defendant submitted that the correspondence exchanged by the parties were part of the negotiations and that there was no agreement entered into. The Defendant relied on the case of **NIC Bank Limited v Victor Ochieng Oloo [2018] eKLR** on the elements of a valid contract, which are offer, acceptance and consideration. The acceptance should be unconditional, unequivocal and absolute. The Defendant submitted that it began negotiations with Lancaster Investments Limited for the slae of the Suit Property way back in August 2005 when it advertised the suit land for sale and various entities expressed interest in the land. When it could not agree with the Plaintiff, the Defendant proceeded to negotiate with the other parties who had expressed interest in the land and eventually sold the Suit Property to Lancaster Limited. The Defendant submitted that it cannot therefore be said to have infringed the doctrine of *lis pendens*. It urged the court to dismiss the suit with costs to it.

16. There was no contract entered into between the Plaintiff and the Defendant for the sale of the Suit Property. The correspondence exchanged show that the parties were still negotiating the terms of the sale and had not reached an agreement over the mode of payment of the purchase price. No sale agreement was executed and the Plaintiff did not make any payment for the Suit Property. There is no contract capable of enforcement by the court.

17. The Plaintiff has failed to prove its case on a balance of probabilities, it is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 13th day of December 2019.

K. BOR

JUDGE

In the presence of: -

Mr. Gichuki Waigwa for the Plaintiff

Mr. Kelvin Mbogo for the Defendant

