



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 721 OF 2007

NIZAR HUDANI..... PLAINTIFF

VERSUS

ELIZABETH MUGURE MUKUNYA.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH DEFENDANT

VIJAY MORJARIA and HITESH MORJARIA.....5TH DEFENDANT

FIDELITY COMMERCIAL BANK LIMITED.....6TH DEFENDANT

JUDGEMENT

1. The Plaintiff entered into an agreement with the 1st Defendant on 17/7/2006 for the purchase of L.R. No. 7785/793 (“the Suit Property”) owned by the 1st Defendant at the agreed consideration of Kshs. 6.8 million. The completion date was defined as 90 days from the receipt of title and discharge. The Plaintiff paid a deposit of 10% of the purchase price to the 1st Defendant’s advocate as agreed. He was to pay the outstanding amount of charge to Co-operative Bank to redeem the title or alternatively, the purchaser’s advocate was to give an undertaking to the Bank to pay the outstanding amount of the charge.
2. The agreement stipulated that on payment of the purchase price to the Vendor’s advocate, and upon receipt of discharge of charge from the Cooperative Bank and the title, the vendor’s advocate was to forward the duly executed transfer forms together with the title, consent to transfer, rates and land rent clearance certificate to the purchaser’s advocates.
3. Clause 5.1 (c) of the agreement stipulated that the property was sold subject to a charge to the Co-operative Bank for a sum of Kshs. 4.5 million and subject to the Bank confirmation of any interest due. The Law Society Conditions of Sale (1989 edition) were to apply to the agreement where they were not inconsistent with the agreement.
4. After paying the deposit to the vendor, the parties did not complete the sale. The chargee, Co-operative Bank of Kenya sold the Suit Property to the 5th Defendant who in turn charged it to the 6th Defendant. The Plaintiff does not seek any relief against the 3rd and 4th Defendants.
5. The Plaintiff in his Further Amended Plaint filed in court on 23/7/2014 seeks an order directing the 1st Defendant to perform her obligations under the sale agreement dated 17/7/2006 and transfer the Suit Property to his name. The Plaintiff also seeks cancellation of the title issued to the 5th Defendant and vacant possession of the Suit Property.
6. The Plaintiff seeks special damages in the sum of Kshs. 106, 804, 458.92 on account of loss of profits; cost of additional civil works; amalgamation and subdivision costs; and cost of reversal of the amalgamation.
7. The Plaintiff intended to develop the Suit Property with the adjoining plot number 7785/791. The Plaintiff’s company acquired the latter plot in November 2006.
8. On filing this suit, the Plaintiff obtained injunctive orders restraining the 1st and 2nd Defendants from dealing with the Suit Property on 15/10/2007, which orders were subsequently extended. He alleges that the 1st, 2nd, 5th and 6th Defendants colluded and fraudulently procured

the registration of the transfer to the 5th Defendant and a charge in favour the 6th Defendant despite being served with the court order.

9. The Plaintiff registered a caveat against the Suit Property on 9/10/2006 claiming purchaser's interest. The Plaintiff maintains that the Defendants were aware of the existence of the two caveats lodged against the Suit Property and faults the 4th Defendant for registering the transfer and charge in favour of the 5th and 6th Defendants respectively after discharging the caveat without giving him notice.

10. The questions the court has to determine are:

- a) Was the 1st Defendant entitled to withdraw from the sale agreement dated 17/7/2006?
- b) Was the 2nd Defendant entitled at law to sell the Suit Property to the 5th Defendant under its statutory power of sale?
- c) Did the 2nd Defendant collude with the 1st, 5th and 6th Defendants? Did they act fraudulently?
- d) Was the registration of the transfer and charge in favour of the 5th and 6th Defendants respectively effected in breach of the court orders granted on 15/10/2007?
- e) Is the Plaintiff entitled to the orders he seeks?

11. The Plaintiff entered into the sale agreement with the 1st Defendant on 17/7/2006. The 2nd Defendant which held a charge over the Suit Property was not made a party to the sale agreement. The agreement stated that the sale was subject to the charge held by the 2nd Defendant. Clause 2.3 provided that the purchaser would pay the outstanding amount of the charge to the Bank to redeem the title.

12. It is useful to set out the correspondence exchanged in the matter. The 1st Defendant's advocates, M/s Kamau Kinga & Company Advocates forwarded a copy of the title of the Suit Property to the Plaintiff's advocates on 27/6/2006 which showed that it was charged to the Cooperative Bank of Kenya Limited to secure the sum of Kshs. 4,500,000/=.

13. The Plaintiff's advocate informed the 1st Defendant's advocate vide his letter of 3/10/2006 that the Plaintiff was ready, willing and able to complete the sale. The letter asked the 1st Defendant's advocate to confirm that the completion documents were available so that payment could be made before 17/10/2006 in exchange for the documents. The Plaintiff was aware that the Bank had the title deed over the property since it held a charge over the land. It was not possible for the 1st Defendant to deliver some of the completion documents sought by the Plaintiff.

14. The 1st Defendant's new advocates M/s Macharia Kenneth & Associates Advocates wrote to the Plaintiff's advocate on 17/10/2006 stating that the Plaintiff had failed to remit the balance of the purchase price to the 1st Defendant or the Bank for it to release the documents. The letter demanded immediate remittance of Kshs. 1,450,000/= together with a copy of professional undertaking in respect of the Bank's charge. The letter pointed out that completion of the sale was not pegged on the availability of the documents but that the purchaser too had a responsibility to obtain some of the documents.

15. The Plaintiff's advocate responded on 27/10/2006 pointing out that the 1st Defendant had neither confirmed that completion documents were ready nor had they executed the transfer forwarded by the Plaintiff's advocate. The advocate reiterated his willingness to go to the offices of the 1st Defendant's advocate and make payment in exchange for completion documents and confirmation of vacant possession.

16. The Plaintiff's advocate wrote to the Bank on 30/10/2006 informing it about the agreement for the sale of property charged to the Bank. The letter sought the Bank's assistance in formalising the transaction through a direct transfer from the Bank as chargee for the same consideration earlier agreed on with the 1st Defendant. This was the first time the purchaser contacted the Bank which held the title over the Suit Property yet it knew the title was with the Bank and could not be transferred by the seller until the Bank's loan had been paid off.

17. On 31/10/2006 the Plaintiff's advocate wrote to the Bank expressing their willingness to pay the sum of Kshs. 6,120,000 in return for an executed transfer from the Bank in favour of the Plaintiff and a rate clearance certificate. In the letter, the advocate gave his professional undertaking to pay that amount in exchange for the original title deed, executed transfer and the clearance certificate.

18. The Bank wrote to the Plaintiff's Advocates on 12/1/2007 and confirmed that it had no objection to the sale of the Suit Property subject to the sale proceeds being paid directly to the Bank. The Plaintiff's lawyer gave his undertaking to pay the balance of the purchase price to the Bank vide his letter of 19/1/2007. In his letter of 24/1/2007 addressed to the Bank, the Plaintiff's advocate notified the Bank that a caveat had been registered against the title by A. G. M. Kamau Advocate.

19. The Bank advised the Plaintiff's advocate on 22/2/2007 to have the purchaser enter into an agreement for sale with the Bank and forwarded a draft copy. The Bank pointed out that its charge over the Suit Property ranked in priority over the caveat placed by AGM Kamau Advocate and that the caveat ought not to have been registered without the Bank's consent. By this time the Plaintiff had also registered a caveat against the Suit Property on 9/10/2006 without the Bank's consent.

20. The Plaintiff's advocate wrote to the Bank on 8/8/2007 confirming that the Plaintiff was ready and able to redeem the charge. The Bank responded on 28/8/2007 stating that it would revert after consulting the borrower. The Bank wrote to the Plaintiff's lawyer on 5/9/2007 advising them that the 1st Defendant had withdrawn from the transaction and advised that they take up the matter directly with her.

21. On 5/10/2007 the Plaintiff's advocate forwarded to the Bank two banker's cheques for Kshs. 4.6 million and 400,000/= towards redemption of the charge and interest respectively while undertaking to pay the difference if the interest was more than the sum forwarded. The Plaintiff's advocate followed with a letter on the same date stating that it had come to the Plaintiff's notice that the Bank was trying to sell the Suit Property in purported exercise of its statutory power of sale. The letter threatened to file suit.
22. The Bank responded on 8/10/2007 pointing out that the Bank was not bound to release the original title to the Plaintiff and that the Plaintiff's recourse lay properly against the borrower which he could pursue directly. The Bank returned the two cheques to the Plaintiff.
23. The Plaintiff entered into the agreement of sale with the 1st Defendant on 17/7/2006 and paid the deposit of Kshs. 680,000/= to the 1st Defendant knowing very well that the Suit Property was charged to the Bank. The Plaintiff's advocates were required to give an undertaking to the Bank to pay the outstanding loan sum. His advocates wrote to the Bank three months after entering into the agreement with the chargor. The Plaintiff failed to demonstrate that he was ready, willing and able to complete the agreement by paying the balance of the purchase price. It was only after he learnt that the Bank was selling the Suit Property that the Plaintiff's advocate forwarded the two cheques for Kshs. 4.6 million and 400,000/= to the Bank on 5/10/2007.
24. A party who does not complete on the day fixed for completion is not in fundamental breach of the contract provided he is ready to complete within a reasonable time. The Plaintiff failed to meet his obligations under the sale agreement. There was inordinate delay on the part of the Plaintiff, he entered into the agreement on 17/7/2006 and failed to remit the balance of the purchase price for more than a year. Unreasonable delay in performing the obligation of completion would entitle a party to make time of the essence for the contract.
25. The court finds that the 1st Defendant was entitled to withdraw from the sale since the Plaintiff had failed to pay the outstanding amount of charge to the Bank and his advocates also failed to give an undertaking to the Bank to enable the Bank release the title document. The loan sum continued to attract interest at the agreed rate during this time.
26. The Plaintiff's advocate filed this suit and wrote to the Bank on 15/10/2007 informing the Bank that the court had issued an interim injunction restraining the Bank and the borrower from dealing with the Suit Property. The letter, which was sent by fax, stated that the copy of the order would be served later.
27. The court issued the injunctive order on 16/10/2007. The court stamp certifying the order as a true copy of the original is dated 29/10/2007. The application for registration of the order against the Suit Property lodged at the Lands office is dated 30/10/2007 and is endorsed "The property has been transferred".
28. From the copy of the search it is apparent that the Suit Property was transferred to the 5th Defendant on 18/10/2007 for Kshs. 6.5 million. There is no Affidavit of service showing when the court order was served on the 1st and 2nd Defendants. The copy of the certificate of urgency on the court file was stamped by the 2nd Defendant on 17/10/2007 at 11.00 am. However, no copy of the order served was attached to the application for injunction. The Plaintiff failed to prove when the court order restraining dealings with the Suit Property was served on the 2nd Defendant.
29. The onus of showing that the court order was served rested on the Plaintiff. In the absence of evidence of when the court order was served, the court is unable to find that the 2nd Defendant was in breach of the court order when it transferred the Suit Property to the 5th Defendant.
30. The Plaintiff's advocate's letter of 26/2/2009 expressed concern over the application for registration of the court order against the Suit Property to the Commissioner of Lands. The order had not been registered as at that date.
31. The Bank entered into a sale agreement dated 4/9/2007 with the 5th Defendant in exercise of its statutory power of sale conferred by Section 76 of the Registration of Titles Act for the consideration of Kshs. 6.5 million to be paid in one lump sum. The Bank executed a transfer in favour of the 5th Defendant on 4/10/2007.
32. The 5th and 6th Defendants argue that the Plaintiff's suit discloses no cause of action against them and that the 5th Defendant is an innocent purchaser for value without notice.
33. Under Section 46 of the Registration of Titles Act (now repealed), registration of a charge rendered the charged property subject to the same security and to the same powers and remedies on the part of the chargee as those under a legal mortgage of land which is not registered under that Act.
34. Section 76 of that Act stipulated that a transfer by a chargee on a sale under its statutory power of sale can only be registered if the instrument refers to the power under which it is made in exercise of the mortgagee's statutory power of sale conferred by the Transfer of Property Act, 1882. The latter Act was also repealed. The court notes that the transfer between the Bank and the 5th Defendant states that it is made in exercise of the statutory power of sale conferred by the Transfer of Property Act, 1882.
35. Section 69 of the Transfer of Property Act, 1882 granted a mortgagee, without the intervention of the court, power to sell the mortgaged property when the mortgage money became due. This could be either by public auction or private contract. The section gave the chargee the discretion to vary any contract for sale and to resell without being answerable for any loss occasioned by the sale. The statutory power of sale became due whenever the day fixed for repayment by the charge had passed or some event stated in the instrument had occurred which rendered the mortgage money payable.
36. The Bank was entitled to sell the charged property in exercise of its statutory power of sale when the Plaintiff failed to remit to the Bank

the outstanding amount of charge or an acceptable professional undertaking from his advocates to pay the loan sum. The Bank was not bound by the sale agreement entered into between the Plaintiff and 1st Defendant.

37. The onus of showing that the Defendants acted fraudulently fell on the Plaintiff; who failed to prove that the 2nd Defendant colluded with the 1st, 5th and 6th Defendants, or that they acted fraudulently when the Suit Property was sold and charged to the 5th and 6th Defendants respectively.

38. The City Council of Nairobi issued a notification of approval development permission in respect of the Suit Property and L.R. No. 7785/791 which was being amalgamated with L.R. No. 7785/793. The notification refers to the application submitted on 30/6/2006 and is dated 28/7/2006. By the time the Plaintiff entered into the sale agreement with the 1st Defendant on 17/7/2006, he had already applied to the City Council of Nairobi for approval to amalgamate the Suit Property with plot number 791 which was transferred to his company on 3/11/2006.

39. The Plaintiff is a consultant civil engineer. It would not be prudent to seek approval to amalgamate and develop any property before acquiring legal title over that property. The court is unable to find in favour of the Plaintiff for it was not prudent for him to incur the costs of seeking approval for the amalgamation of the Suit Property with the other plot he was purchasing way before he had completed the purchase of the Suit Property.

40. In **Openda v Ahn** [1984] KLR 208 the court held that a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such person as he directs at the time and place of completing the place. The Plaintiff in this case had not paid the purchase price to the 2nd Defendant as the agreement stated. The Plaintiff only tendered payment of the balance of the purchase price to the Bank after learning that the Suit Property had been sold by the Bank.

41. The court agrees with the Plaintiff that the sum counterclaimed by the 5th Defendants for architectural drawings and guard fees are costs the 5th Defendant would nevertheless have incurred if the injunction had not been granted by the court. The 5th Defendants failed to prove their counterclaim; it is dismissed with no orders as to costs.

42. The Plaintiff has failed to prove his case on a balance of probabilities. It is dismissed. Each party will bear its own costs.

43. The court is of the view that the Plaintiff is entitled to damages since it would be wrong to make an order for specific performance of transfer of the Suit Property which has already been sold and transferred to the 5th Defendant. It is reasonable that the Plaintiff should have a refund of that which he already paid as a deposit, Kshs. 680,000/= plus interest at court rates to be calculated from the date the Plaintiff paid the deposit to the 1st Defendant until it is paid in full.

Dated and delivered at Nairobi this 25th day of January 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Sarvia for the Plaintiff

Mr. Terrell for the 3rd and 4th Defendants

Mr. Mogere for the 2nd, 5th & 6th Defendants

No appearance for the 1st Defendant

Mr. J. Okumu- Court Assistant