



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 26 OF 2016

SAMMY INGUUVU ISIGI.....PLAINTIFF

VERSUS

ALPHONIS SAMUEL MAKOMERE.....DEFENDANT

JUDGEMENT

The Plaintiff case is that, at all material times he has been the registered proprietor of LR. Kakamega/Lusengeli/803. The Plaintiff avers that on the 16th day of January 2001, he entered into an agreement with the Defendant herein for sale of some premises erected on land parcel NO. Kakamega/Lusengeli/803. The Plaintiff further avers that the consideration for the said agreement was Kenya Shillings One Million (Kshs. 1,000,000/=) only. The Plaintiff avers that it was an express term of the agreement that the Defendant pays Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/=) on the date of agreement and Kenya Shillings Fifteen Thousand (Kshs. 15,000/=) per month till payment in full. The Plaintiff states that the Defendant deposited one instalment of Kshs. 15,000/= and started defaulting in payment. The Defendant has to-date paid to the Plaintiff Kenya Shillings Three Hundred and Four Thousand, Five hundred and Fifteen Shillings and Fifty cents Kshs. 304,515.50/= only. The Plaintiff avers that the balance of Kshs. 695,484.50/= still remains unpaid to-date by the Defendant. The Plaintiff avers that the Defendant is in total breach of contract made on 16/1/2001 as he has failed to clear the purchase price. The Plaintiff further avers that the Defendant was a rent paying tenant in the said premises before the date of agreement. The Plaintiff states that the Defendant has never paid rent since the date of the agreement of sale of premises to-date. The Plaintiff avers that he has on several occasions demanded for the payment of the same but the Defendant has refused to do so. The Plaintiff's claim against the Defendant therefore is for an order that the Defendant is in breach of the said contract rendering it un-enforceable. The Plaintiff further claims for rent arrears due and owing to him as from 16/1/2001. The Plaintiff prays that judgment be entered against the Defendant for:-

1. A declaration that the Defendant is in breach of the contract entered into on 16/1/2001 thus not enforceable.
2. General damages for breach of contract.
3. Payment of rent arrears due and owing for the said premises as from 16/1/2001 to date.
4. Termination of tenancy relationship between the Plaintiff and Defendant.
5. Costs of this suit.
6. Interest on (a) and (d) above at court rates.

PW1 testified that he got into a tenancy relationship with the Defendant therein sometime back in the year 2001 for premises erected on land parcel No. Kakamega/Lusengeli/803. That sometime in early January 2001, the Defendant expressed interest in the said premises and requested that he sell part of the premises to him. They reduced the agreement into writing on 16/1/2001 whereby he agreed to sell him part of the front premises at an agreed sum of Kshs. One Million (Kshs. 1,000,000/=) only. That the Defendant paid Kshs. 150,000/= only by date of agreement and it was expressly agreed that the balance shall be paid in instalments of Kshs. 15,000/= only every month till payment in full. This would have seen the Defendant clear the balance within 4 years and about 9 months. The Defendant paid the 1st instalment of Kshs. 15,000/= and started making irregular payments. He then suddenly stopped claiming he had cleared the balance yet he has to date received Kshs. 304,515.50/= only towards payment of the said premises. The Defendant has also refused to pay rent.

This court has considered the plaintiff's case. The Plaintiff herein filed his plaint dated on 2/3/2016 which plaint was amended and filed on 24th day of May 2017 vide an order issued on 14/3/2017. The Defendant was served with summons to enter appearance but failed to enter appearance and or file a defence and thus the matter proceeded ex parte. In evidence, the Plaintiff testified that he is the owner of the premises erected on L.R. NO. Kakamega/Lusengeli/803.

That in early January 2001, the Plaintiff got into a tenancy agreement with the

Defendant for the aforementioned premises. That shortly thereafter, the Defendant registered an interest purchasing part of the premises under lease. That the Plaintiff agreed his offer and had the agreement reduced into writing on 16/1/2001 before an advocate. That the consideration for the premises was Kshs. 1000,000/= (Kenya Shillings one million) only payable in installments that were to run over a period of about 5 years. That the Defendant paid a total of Kshs. 304,515.50/= only leaving a balance of Kshs. 695,484.50/= unpaid to date. The Plaintiff further testified that despite being unable to clear the purchase price even upon several reminders and demands, the Defendant also stopped paying rent altogether which rent had been agreed at Kshs. 5000/= (Kenya Shillings Five Thousand) only per month and has ever since been accruing to date.

In the case of **Curtis Vs Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631** in which Lord Denning held as follows:

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”

In support of his case, the Plaintiff produced a copy of the green card for L.R.No.Kakamega/Lusengeli/803 as a proof of ownership to the subject land and premises. He further produced an agreement dated 16/1/2001 detailing the terms and conditions of sale, of the subject property. He also produced a copy of a pay in slip and acknowledgement notes showing the amount paid and how irregular the payments were. The Plaintiff's evidence was not challenged. It is clear from the foregoing that the Defendant violated the terms of the agreement dated 16/1/2001 thus in breach of the same. His failure to file a defence does not help his case.

Plaintiff also pleaded for rent arrears. Upon the contract being frustrated by the Defendant, the Defendant should then be treated as a tenant and continues paying rent. The Defendant should be condemned to pay rent till the date of judgment and the monies paid towards the agreement dated 16/1/2001 be treated as part deposit for rent. I find the same would not be payable as this was a sale agreement and not a tenancy agreement. Special damages must be specifically pleaded and proved. General damages have also not been proved and will not be awarded. I find that the plaintiff has proved his case on a balance of probabilities on the breach of contract and grant the following orders;

1. A declaration that the Defendant is in breach of the contract entered into on 16/1/2001 thus not enforceable.
2. Termination of tenancy relationship between the Plaintiff and Defendant.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE