



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 4 OF 2017

DANIEL KATEI NDWIKO.....PLAINTIFF/APPLICANT

VERSUS

J.C.C. MINISTRY INTERNATIONAL (Sued through its trustees

RODGERS MUCHOLWA SILALI)....DEFENDANT/RESPONDENT

JUDGMENT

1. In the Originating Summons dated 20th December, 2016 and filed on 5th January, 2017, the Applicant has prayed for the following orders:

a. The Respondent has breached the terms of the contract for Sale of Agreement entered into with the Applicant, and has failed to comply with the completion notice duly served upon them and now the said contract for sale to be rescinded and the court to grant an order of possession to the Applicant.

b. The Respondent does pay to the Applicant liquidated damages at 10% of the purchase price and mesne profits from the day they took possession of the property and, or in the alternative from the date of the completion notice.

c. Costs of this Application.

d. Any other relief that this Honourable Court may deem fit to grant.

2. The Originating Summons is premised on the grounds that the Applicant is the registered proprietor of land known as Mavoko Town Block 64(Gimu)/541, (*the suit land*); that the Applicant entered into a contract for sale of the suit land with the Respondent for Kshs. 3,000,000; that the Respondent paid the deposit of Kshs. 200,000 and a further sum of Kshs. 300,000 and that the balance of Kshs. 2,500,000 remains unpaid to date.

3. In response to the Originating Summons, the Respondent's Presiding Pastor and Trustee (*Trustee*) deponed that the Lease Agreement signed by the Applicant and the Respondent was to end in June, 2017; that the parties later on entered into a Sale Agreement in respect to the suit land and that the Applicant was supposed to utilize the deposit paid by the Respondent to process the title to the suit land.

4. According to the Respondent's trustee, the Applicant was required to handover completion documents for the transfer of the suit land to the Respondent which he has not done and that the Applicant does not have the *locus standi* to bring the suit.

5. In his evidence, the Applicant, PW1, informed the court that on 9th December, 2015, he leased the suit land to the Respondent; that later on, he sold the suit land to the Respondent by way of an Agreement dated 9th December, 2015 and that he was pursuing the issuance of the Title Deed by the time he entered into the said Sale Agreement with the Respondent.

6. According to PW1, the Respondent has never completed paying the balance of the purchase price; that on 17th March, 2016, he served upon the Respondent the completion notice and another letter dated 13th May, 2016 and that the total amount he was paid by the Respondent was Kshs. 550,000.

7. It was the evidence of PW1 that he could not handover the title document to the Respondent before being paid the entire purchase price and that having not been paid, the Sale Agreement stands rescinded.

8. On his part, the Respondent's trustees, DW1, informed the court that by the time they were entering into the Sale Agreement with the Applicant in respect to the suit land, the Applicant did not have a title document; that the Respondent was to raise the balance of the purchase price through financing and that the bank could not give them the loan without a Title Deed. It was the evidence of DW1 that they paid the

Applicant Kshs. 550,000 and that the balance of the purchase price was to be financed by the bank.

9. In cross-examination, DW1 stated that he is not sure if his advocate gave to the Applicant a professional undertaking in respect of the suit land and that it is the Applicant who has breached the Agreement.

10. The Applicant's advocate submitted that the advocate who drew the Agreement purported to act for both parties while in actual sense she was acting for the purchaser; that since the Respondent was to pay the purchase price by way of financing from the bank, the advocate failed to disclose that fact in the Agreement and that the advocate colluded with the Respondent during the drafting of the Agreement.

11. The Applicant's counsel submitted that the Applicant could not have released the completion documents before being paid the balance of the purchase price or before getting a professional undertaking from the Respondent's advocate; that no professional undertaking was given by the Respondent's advocate and that PW1 sought to make time of the essence in the payment of the balance of the purchase price by issuing the completion notice of 8th November, 2016. The Applicant's advocate relied on several authorities which I have considered.

12. The Respondent's advocate submitted that the Plaintiff refused to perform his part of the contract; that the Applicant, upon acquiring a Title Deed did not apply for the consent of the Land Control Board and that the Applicant is trying to shortchange the Respondent by acquiring easy money. Counsel relied on several authorities which I have also considered.

13. The only issue that I am required to consider in the current Originating Summons is if indeed the Respondent is in breach of the Sale Agreement of 9th December, 2015 and if so, the appropriate orders that this court should make.

14. It is not in dispute that on 9th December, 2015, the Applicant entered into an Agreement for Sale of land known as Mavoko 2180/7, which, after the survey and issuance of the Title Deed, became parcel of land known as Mavoko Town Block 64 (Gimu)/541. The Agreement provided that the Applicant was in the process of acquiring a Title Deed; that the said Title Deed will be used by the Respondent for a loan facility from SMEP Micro Finance Bank to offset the remaining balance and that the balance of the purchase price of Kshs. 2,800,000 would be paid on or before the completion date.

15. The Agreement further provided that the completion date shall be thirty (30) days from the date of acquiring the Title Deed and on or before the completion date, the Applicant was required to handover to the Respondent's advocate the original Title Deed; the executed Transfer forms, the consent of the Land Control Board to transfer the suit land and any other document in relation to the suit land.

16. Indeed, the Applicant admitted in evidence that his son, who knew how to read and write, read the Agreement to him. Although the Applicant has deponed that he received a deposit of Kshs. 500,000 from the Respondent, the Respondent's trustee informed the court that he paid to the Applicant Kshs. 550,000. In my view, the issue of whether the Applicant was paid a deposit of Kshs. 500,000 or Kshs. 550,000 is a non-issue at this stage. What is important at this stage is that the Applicant was paid a deposit of Kshs. 200,000 in accordance with the Agreement of Sale.

17. Having been paid the deposit of Kshs. 200,000, it was a term of the Agreement for the Applicant to release to the Respondent's advocate (*who was also the Applicant's advocate*) the Title Deed together with the other completion documents. Indeed, the Applicant was to be paid the balance of the purchase price after the Respondent had secured a loan using the Title Deed.

18. Although the Applicant secured a Title Deed in respect to the suit land on 28th January, 2016, he never released the said Title Deed to the Respondent. The Applicant also did not procure the consent of the Land Control Board to transfer the suit land. It is therefore obvious that it is the Applicant who is in breach of the clear terms of the Sale Agreement of 9th December, 2015.

19. Having read the Agreement, the Applicant cannot now claim that the advocate who drew the Agreement did not act in his interest. The Applicant cannot be allowed by this court to import certain terms of the Agreement, like a professional undertaking been given by the advocate, when such a term was not expressly stated in the Agreement.

20. If the Applicant is not satisfied with the way the advocate who drew the Agreement went about the drafting of the Agreement, his recourse is somewhere else but not purporting to rescind the Agreement. Having not handed in completion documents, the Applicant was not entitled to the balance of the purchase.

21. It has often been said that it is not the business of the courts to re-write contracts for parties. Considering that the Applicant's case is not that he entered into the Agreement of Sale of 9th December, 2015 by duress, coercion or mistake, I find that he has not proved his case on a balance of probabilities.

22. For those reasons, I dismiss the Originating Summons dated 20th December, 2016 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE