



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC. SUIT NO. 563 OF 2012

CHARLES NYINGI KIHUGU.....PLAINTIFF

VERSUS

JAMES N. MWANGI T/A ELAN TRADERS.....DEFENDANT

JUDGMENT

The Plaintiff brought this suit against the Defendant on 31st August 2012 seeking; a permanent injunction restraining the Defendant from transferring all that parcel of land known as Plot No. 13673/1264 (hereinafter referred to as “the suit property”) to any other person, the transfer of the suit property to the Plaintiff or the reimbursement to him of the purchase price of the suit property together with interest at market rate. In his plaint dated 31st August 2012, the Plaintiff averred that sometimes in the year 2006, he purchased from the Defendant the suit property at a consideration of Kshs. 120,000/= which was inclusive of administrative charges. The Plaintiff averred that he paid to the Defendant the said sum of Kshs. 120,000 in installments with the last payment being made on 1st December 2008. The Plaintiff averred that despite receipt of the said sum of Kshs. 120,000 the Defendant had refused and/or declined to transfer the suit property to him. The Plaintiff averred that the failure by Defendant to transfer the suit property to him amounted to a breach of contract in respect of which the Plaintiff was entitled to the reliefs sought herein.

The Defendant entered appearance in person and filed a statement of defence on 12th November 2012. In his statement of defence, the Defendant averred that he sold the suit property to the Plaintiff not in his personal capacity but as an agent of the Registrar General who had instructed him to carry out the sale. The Defendant admitted that the Plaintiff paid the purchase price in full. The Defendant denied however that he was under an obligation to transfer the suit property to the Plaintiff. The Defendant averred that it was the Registrar General who had the duty of transferring the suit property to the Plaintiff. The Defendant denied that he breached the contract he entered into with the Plaintiff. The Plaintiff filed a reply to defence on 5th December 2012 in which he reiterated that the Defendant had breached the conditions of the memorandum of sale which was executed between him and the Plaintiff. The Plaintiff averred that he was a stranger to the relationship which the Defendant had with the official receiver in the office of the Registrar General.

The suit came up for hearing on 26th March 2014 when only the Plaintiff and his advocate appeared in court. The court after satisfying itself that the Defendant was served, allowed the hearing to go on the absence of the Defendant notwithstanding. The Plaintiff gave evidence and closed his case. In his testimony, the Plaintiff told the court that the Defendant who was an auctioneer was known to him. He stated that the Defendant had put an advertisement in the Daily Nation Newspaper in the year 2006 that

he was selling some parcels of land situated at Githurai, Nairobi. Following that advertisement, he visited the offices of the Defendant and was told by the Defendant's employees that the said parcels of land were being sold at Kshs. 120,000/= which was payable in installments.

He stated that he was told that the said sum of Kshs. 120,000/= was inclusive of the fees for processing title deed for the parcels of land which were on sale. He stated that the Defendant's employees showed him the parcels of land which were on sale after which they entered into agreement for sale in respect of the suit property. He thereafter paid out a sum of Kshs. 120,000 to the Defendant by way of installments of which amount, Kshs. 80,000/= was towards the purchase price of the suit property while Kshs. 40,000 was for processing the title deed. The Plaintiff stated that he took possession of the suit property and constructed a small structure using iron sheets and a toilet thereon. He stated that although he was still in occupation of the suit property, someone had come and put beacons on the same. He stated that the Defendant had not issued him with a title deed despite several visits which he had made to his office. He stated that the Defendant told him that the suit property had been sold to someone else. He urged the court to order the Defendant to either issue him with a title deed or to refund the money which he paid for the suit property.

After the close of Plaintiff's case, the court directed the Plaintiff to make closing submissions in writing. The Plaintiff filed his submissions on 13th May 2014. The Defendant was served with the Plaintiff's submissions but did not file any submissions in reply.

I have considered the pleadings and the evidence on record. The Plaintiff had framed a total of ten issues for determination by the court. In my view these issues can be summarized into three as follows:-

1. Whether the Defendant breached the contract for sale between him and the Plaintiff?
2. Whether the Plaintiff is entitled to specific performance of the said contract or a refund of the purchase price and other payments made to the Defendant?
3. Who is liable for the cost of the suit?

In order to determine the first issue, I need to consider the agreement which was entered into between the Plaintiff and the Defendant. The Plaintiff had produced the alleged agreement as Pexh.1. The document is in three (3) parts. The first part contains the particulars of the property and the conditions of sale. The second part consists of a memorandum through which the Defendant agreed to process for the Plaintiff the title deed for the suit property upon receipt of a sum of Kshs. 40,000/=. The third part is yet another memorandum confirming that the Plaintiff purchased the suit property at a public auction which was held on 12th April 2006 at a price of Kshs. 80,000/=. These memoranda are not dated. From the evidence on record, it is not clear whether or not the Plaintiff purchased the suit property at a public auction. The memorandum at page 11 of Pexh. 1 talks of the Plaintiff having purchased the suit property at a public auction on 12th April 2006 and paid a deposit of Kshs. 80,000 with the balance to be paid as provided in the agreement. The receipts produced by the Plaintiff in evidence as Pexh. 2 show that the Plaintiff paid a sum of Kshs. 120,000/= between 29th October 2007 and 1st December 2008. The first payment was made on 29th October 2007 over one year after the date of the purported agreement for sale. I have also noted that there was no provision in the terms of sale for payment of the purchase price of the suit property by way of installments. From the material before me, I have formed the view that the Plaintiff is not candid to the court as concerns the date when he entered into the agreement for sale with the Defendant and whether he purchased the suit property at a public auction or by private treaty. I have noted further in the particulars of the property that was sold by the Defendant to the Plaintiff that the Defendant sold the property on instructions from a chargee in exercise of the chargee's statutory power of sale. It is clear from the foregoing that the Defendant who was an auctioneer was selling the suit property as an agent of a disclosed principal. The Defendant did not make any representation in the memorandum of sale that he was the owner of the suit property and that he was selling the property on his own account. The advertisements of the auction sale which are attached to the Defendant's bundle of documents filed in court on 12th November 2012 show explicitly that the parcels of land which were to be sold by public

auction belonged to Kenya National Assurance (in liquidation) and that the Defendant was selling the same on instructions from a principal. I am in agreement with the Defendant that in the circumstances of this case the Plaintiff should have sought the transfer of the suit property from the Defendant's principal, the liquidator of Kenya National Assurance (in liquidation). The suit property did not belong to the Defendant and as such the Defendant could not transfer the same to the Plaintiff. The memorandum of sale which the parties executed bound and Defendant's principal. It is not clear to me why the Plaintiff chose not to join the liquidator of Kenya National Assurance (in liquidation) in this suit. I have noted that the Defendant had undertaken to pay stamp duty, Land Rent and Rates on behalf of the Plaintiff. He was also to obtain all the necessary approvals and consents to enable the suit property to be registered in the name of the Plaintiff. It is in consideration of this that additional sum of Kshs. 40,000/= was paid to the Defendant over and above the purchase price of the suit property which was Kshs. 80,000/=. It was not possible to for the Defendant to have made the payments aforesaid and to have sought the consents and approvals referred to above until the instrument of transfer was executed. The Defendant's principal having refused to execute the transfer in favour of the Plaintiff, the Defendant could not perform the terms of the agreement under which he was to process the title deed for the said property on behalf of the Plaintiff. Due to the foregoing, I am not satisfied that the Defendant breached the agreement for sale which he entered into with the Plaintiff. The Defendant entered into the said agreement as an agent of a disclosed principal which the Plaintiff should have pursued for the enforcement of his rights under the said agreement. In the circumstances of this case the Defendant cannot be held liable on behalf of his principal save for the terms of the agreement which he personally undertook to perform.

On the second issue, I am for the reasons which I have already given above not satisfied that the Plaintiff is entitled to an order for specific performance. The agreement which the Plaintiff entered into with the Defendant for the sale of the suit property cannot be enforced against the Defendant. As I have mentioned above, the Defendant is unable to perform the same even if ordered by the court to do so. A court of law cannot make an order in vain. An order of specific performance is normally made on the premise that a party against whom it is sought has failed to fulfill his contractual obligations and should be compelled to do so. In this case, I have already made a finding that the Defendant is not guilty of breach of contract. An order for specific performance cannot therefore be issued against him.

The Plaintiff had sought an alternative prayer for the refund of the purchase price and the payments he had made to the Defendant for processing the title deed for the suit property. For the reasons which I have already given above, the Defendant is not liable to the Plaintiff for the sum of Kshs. 80,000 which the Plaintiff paid as purchase price for the suit property. The Defendant received he payment of the purchase price on behalf of a disclosed principal. The Plaintiff can only claim the refund of the said sum of Kshs. 80,000/= from the liquidator of Kenya National Assurance Ltd. (in liquidation). That said, I am satisfied that the Defendant is liable to the Plaintiff for the sum of Kshs. 40,000/= which the Plaintiff paid to the Defendant for processing the title deed for the suit property. I am of the view that the consideration for which that payment was made to the Defendant failed and it would amount to unjust enrichment if the Defendant was to keep the payment.

In conclusion, I hereby enter judgment for the Plaintiff against the Defendant in the sum of Kenya Shillings Forty Thousand (Kshs. 40,000/=) together with interest at court rates from the date hereof until payment in full. Each party shall bear its own costs of the suit.

Delivered and signed at Nairobi this 27th day of June, 2017

S.OKONGO

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the Defendant

Kajuju

Court Assistant