



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 692 OF 2013

EDWARD HESTINGS NICONARY OKIDA.....PLAINTIFF

VERSUS

TELPOSTA PENSION SCHEME REGISTERED TRUSTEES.....DEFENDANT

AND

ELIZABETH NYAMBURA MWAURA.....THIRD PARTY

JUDGMENT

The Plaintiff brought this suit by way of Originating Summons dated 7th June 2013 seeking the determination of the following issues:-

- (1) Whether the Defendant should be ordered to perform the Agreement for sale dated 5th December 2009 between the Defendant and the Plaintiff by delivering vacant possession of all that parcel of land known as Title No. Nairobi/Block 55 /202/139 (hereinafter “**the suit property**”) to the Plaintiff.
- (2) Whether the Defendant should be ordered to pay to the Plaintiff mesne profits at the rate of Kshs. 20,000/= per month with the effect from April 2010 until the date of delivery of vacant possession as damages for breach of contract in addition to specific performance.
- (3) Whether the Defendant should be ordered to comply with the orders sought in prayers (1) and (2) above within 14 days in default of which the Defendant should refund to the Plaintiff a sum of Kshs. 2,600,000/= which was paid by the Plaintiff to the Defendant as the purchase price for the suit property together with interest thereon at the rate of 30% per annum with effect from April 2010 until payment in full.

The Originating Summons was supported by the affidavit of the Plaintiff sworn on 7th June 2013. In that affidavit, the Plaintiff averred that he entered into an agreement for sale with the Defendant on 5th December 2009 pursuant to which the Defendant agreed to sell to him the suit property at a price of Kshs. 2,600,000/= on terms and conditions which were contained in the said agreement. The Plaintiff averred that it was a term of the agreement that the Defendant would deliver vacant possession upon receipt of the purchase price in full and that the completion date was 90 days from the date of the agreement. The Plaintiff averred that he paid the purchase price in full to the Defendant with the last installment of the purchase price having been paid on 9th April 2010. The Plaintiff averred that after receipt of the purchase price in full, the Defendant transferred the suit property to the Plaintiff. The Plaintiff averred that the Defendant has however refused and/or declined to hand over vacant possession of the suit property to

him. The Plaintiff averred that by failing to deliver vacant possession of the suit property, the Defendant was in breach of the agreement for sale and should be ordered to perform the same or refund the purchase price.

The Defendant responded to the Originating Summons through a replying affidavit sworn by Peter K. Rotich on 19th March 2014. The Defendant admitted that it entered into an agreement for sale with the Plaintiff in respect of the suit property and that it was under obligation to deliver vacant possession of the suit property upon receipt of the purchase price in full. The Defendant admitted further that it had not delivered the suit property to the Plaintiff in vacant possession. The Defendant contended that it was not to blame for the Plaintiff's failure to obtain vacant possession of the suit property. The Defendant contended that the Plaintiff was aware that the suit property was occupied by a tenant who had refused to vacate the property. The Defendant averred that the Plaintiff had agreed to give it time to institute legal proceedings against the said tenant for vacant possession. The Defendant averred that the orders sought herein against the Defendant should be enforced against the said tenant. The Defendant averred that it would seek leave of the court to take out third party proceedings against the said tenant. The Plaintiff filed a further affidavit in response of the Defendant's replying affidavit. The Plaintiff reiterated that the Defendant was in breach of the agreement for sale and that the claim brought against it was proper.

On 31st March 2014, the Defendant sought and was granted leave to take out third party proceedings against Elizabeth Nyambura Mwaura (hereinafter referred to as "the 3rd party"). Pursuant to that leave, the Defendant took out and served upon the third party, a third party notice dated 10th June 2014. In the said notice, the Defendant notified the third party of the claim brought against it herein by the Plaintiff and claimed from the 3rd party vacant possession of the suit property and mesne profits at the rate of Kshs. 20,000/= per month with effect from April 2010 until possession is delivered. The 3rd party entered appearance to the said notice and filed a replying affidavit on 4th November 2014. In her affidavit, the 3rd party averred that she was a former employee of Telkom Kenya Ltd. and Postal Corporation by virtue of which she became member of Telposta Pension Scheme. The 3rd party averred that by virtue of her membership of the said scheme, she was entitled to be given priority to purchase the suit property which she had occupied since 1983. The 3rd party averred that the former employees of Telkom Kenya and Postal Corporation were entitled to continue occupying the Defendant's houses which were in their occupation as of the date of retirement awaiting receipt of offers by the Defendant to sell the same to them. The 3rd party averred that she retired in the year 2005 and paid rent for the suit property until March, 2006 when the Defendant refused to accept rent from her. The 3rd party averred that she was always ready and willing to pay rent to the Defendant for the suit property but could not do so due to the Defendant's refusal to accept the same. The 3rd party averred that all along she was waiting for an offer letter from the Defendant only to learn that the suit property had been sold to the Plaintiff. The 3rd party contended that she had no notice of the sale of the suit property to the Plaintiff until she was served with the 3rd party notice herein. The 3rd party reiterated that she was entitled to be given first priority to purchase the suit property from the Defendant. The 3rd party averred that she was not privy to the agreement for sale between the Plaintiff and the Defendant and as such her joinder in these proceedings was improper. The 3rd party averred that the Plaintiff's claim is rightly directed against the Defendant with whom they had privity of contract.

The Originating Summons came up for directions on 6th May 2015. By consent of the parties, the court directed that the Originating Summons be heard by way of affidavit evidence and written submissions. Following those directions, all the parties filed written submissions. I have considered the Originating Summons together with the two affidavits which were filed in support thereof. I have also considered the affidavit which was filed by the Defendant in response to the Originating Summons. As between the Defendant and the 3rd party, I have considered the Third Party Notice and the replying affidavit which was filed in opposition thereto by the 3rd party. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. In this suit, the court is supposed to determine the dispute between the Plaintiff and the Defendant on the one hand and as between the Defendant and the 3rd party on the other hand. There are no clear directions on record as to whether the

issues arising between the Plaintiff and the Defendant and between the Defendant and the 3rd party were to be determined at the same. I believe that this is what was intended by the parties when directions were given on 6th May 2015. As between the Plaintiff and the Defendant, the following in my view are the issues arising for determination which will enable the court to answer the questions set out in the Originating Summons;

- (1) Whether the Plaintiff is entitled to specific performance of the agreement for sale dated 5th December, 2009 and mesne profits?
- (2) Whether the Plaintiff is entitled to a refund of the purchase price paid for the suit property together with the interest in the event that the Defendant is unable to perform the said agreement?

As between the Defendant and the 3rd party, the issues that arise for determination are the following;

- (1) Whether the 3rd party has a right to continue occupying the suit property?
- (2) Whether the 3rd party should deliver vacant possession of the suit property to the Plaintiff?
- (3) Whether the 3rd party should pay the mesne profits claimed by the Plaintiff against the Defendant?

It is not disputed that the Plaintiff and the Defendant entered into an agreement for sale dated 5th December 2009 in respect of the suit property. The terms of the said agreement are not in dispute. It is not in dispute that the Plaintiff fulfilled his part of the agreement. It is also not in dispute that the Defendant performed only part of the agreement, namely, the transfer of the suit property to the Plaintiff. It is admitted that the Defendant has failed to deliver vacant possession of the suit property to the Plaintiff. It is in respect of this contractual obligation that the Plaintiff is seeking the assistance of the court to compel the Defendant to perform. In the case of Gurdev Singh Birdi & Another vs. Abubakar Madhubuti, Court of Appeal, Civil Appeal No. 165 of 1996, [1997] e KLR, it was held that a party seeking an order for specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. As I have stated above, it is not in dispute that the Plaintiff has performed his part of the agreement for sale between him and the Defendant. I am satisfied that the Plaintiff has met the conditions for an order of specific performance. Specific performance is a discretionary remedy. It follows therefore that even if the Plaintiff has satisfied all the conditions for grant of the relief, the court can decline to grant the same for good reason. In the case of Amina Abdulkadir Hawavs. Rabinder Nath Anand & Another [2012] e KLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:-

“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles.....specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party.....severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which affect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”

In this case, the Defendant has contended that it has been unable to deliver vacant possession of the suit property to the Plaintiff due to the refusal by the 3rd party who is in occupation of the suit property to

vacate the same. The Defendant has contended that the Plaintiff has also along been aware of the 3rd party's occupation of the suit property. It is common ground that the 3rd party is in occupation of the suit property and as such the Defendant cannot deliver vacant possession of the suit property to the Plaintiff until the 3rd party vacates the same. It follows from the foregoing that an order for specific performance of the agreement for sale dated 5th December 2009 would be futile unless an order is made at the same time for the 3rd party to deliver vacant possession of the suit property to the Defendant. The Defendant served the 3rd party with a third party notice in which the Defendant claimed vacant possession of the suit property from the 3rd party. Since the Plaintiff's claim against the Defendant and the Defendant's claim against the third party are being determined together, I would consider the Defendant's claim against the third party before I determine whether or not the Plaintiff is entitled to an order for specific performance. This is due to the fact that the granting of the order would depend on whether or not the Defendant would obtain vacant possession of the suit property from the 3rd party.

The Defendant's contention is that the 3rd party is a trespasser on the suit property and as such should be ordered to vacate and hand over possession of the property to the Defendant so that the Defendant can deliver the same to the Plaintiff. The 3rd party's defence to the Defendant's claim is that she is a former employee of Postal Corporation of Kenya and Telkom Kenya Ltd. by virtue of which employment she became a member of the Defendant. The 3rd party who retired from the employment of Postal Corporation of Kenya in the year 2005 has contended that she was entitled to remain in occupation of the suit property as a tenant of the Defendant awaiting an offer from the Defendant to sell the property to her. The 3rd party has contended that she was entitled to be given first priority to purchase the suit property. In support of this contention, the 3rd party has referred to an alleged order which was made by Angawa J. The third party has not given the particulars of the case in which the said order was given or the date of the order. The order was also not annexed to the 3rd party's affidavit in response to the third party notice. I have considered the third party notice and the reply thereto. This is my view on the issues arising for determination between the Defendant and the 3rd party. It is not disputed that the suit property was at all material times registered in the name of the Defendant. It is also not disputed that the Defendant as the registered owner of the suit property was entitled to sell the same. It is also not disputed that the 1st Defendant has sold and transferred the suit property to the Plaintiff. The Plaintiff has been registered as the owner of the suit property and issued with a title deed in respect thereof. As I have stated above, the 3rd party has contended that there was an agreement that she would continue to occupy the suit property after retirement as a tenant awaiting an offer from the Defendant to sell the suit property to her. The 3rd party has not stated with whom she entered into this agreement. The 3rd party has also not placed before the court any material in proof of the existence of the said agreement. There is also no evidence showing that the 3rd party was entitled to be given first priority to purchase the suit property. The 3rd party has not in my view established any legal interest in the suit property. The 3rd party who claims to have been a tenant in the suit property has only placed before the court, five (5) receipts for the rent payments made between 23rd August 2005 and 30th June 2006. These payments were made to the 3rd party's former employee Postal Corporation of Kenya. There is no evidence that these payments were made pursuant to some tenancy or lease agreement between the 3rd party and the Defendant. From June, 2006 to date; a period of over 11 years, the 3rd party has remained in occupation of the suit property without paying any rent in the pretext that she is waiting for an offer from the Defendant to purchase the suit property. Due to the foregoing, it is my finding that the 3rd party has no right to continue in occupation of the suit property. I therefore hold that the Defendant is entitled to vacant possession of the suit property as claimed in the 3rd party notice.

Having determined the dispute between the Defendant and the 3rd party, I will now go back to the Plaintiff's claim against the Defendant. I have already held that the Plaintiff has established a case for grant of an order for specific performance. The obstacle to the grant of the order was the fact that the Defendant had no possession of the suit property and as such could not deliver vacant possession of the same to the Plaintiff even if ordered to do so. I have held above that the Defendant is entitled to vacant possession of the suit property from the 3rd party who is in possession thereof. In the circumstances, the

Defendant would now be in a position to deliver possession of the suit property to the Plaintiff. There is no longer any hardship which will be occasioned to the Defendant if an order of specific performance is made against it.

In addition to vacant possession, the Plaintiff had also claimed mesne profits at the rate of Kshs. 20,000/= per month with effect from April 2010 until payment in full. The agreement for sale between the Plaintiff and the Defendant provided that the Defendant was to give vacant possession of the suit property to the Plaintiff upon receipt of the full purchase price. It is not disputed that the Plaintiff made the last payment of the purchase price on 9th April, 2010 on which date he was supposed to be handed possession of the suit property. The Plaintiff's claim for mesne profits from April 2010 is therefore well founded. What has not come out clearly in the submissions by the Plaintiff is how he has arrived at the sum of Kshs. 20,000/= per month which has been claimed as mesne profits. Although the Plaintiff has claimed that the said sum of Kshs. 20,000/= per month is the rent which the suit property could fetch in open market, no evidence was placed before the court in support of this contention. I have noted from the record that the 3rd party had paid as rent a sum of kshs. 6,000/= per month from August 2005 to June 2006. In the absence of any evidence as to the rent the suit property would fetch in the open market or the nature of the premises and the condition thereof, I would adopt the sum of Kshs. 6,000/= as the reasonable rent that the suit property would fetch as at April 2010. I would therefore award the Plaintiff mesne profits at the rate of Kshs. 6,000/= per month from April 2010 until payment in full. This amount shall be paid by the Defendant to the Plaintiff and the Defendant shall be entitled to recover the same from the 3rd party who has been occupying the premises without paying rent.

In conclusion, I hereby enter judgment for the Plaintiff against the Defendant and for the Defendant against the 3rd party on the following terms;

1. The 3rd party shall vacate and handover possession of all that property known as Title No. Nairobi/Block 55 /202/139 to the Defendant within sixty (60) days from the date hereof.
2. The 3rd party shall pay to the Defendant as mesne profits a sum of Kshs. 6,000/= per month from the month of April 2010 until vacant possession is delivered to the Defendant.
3. The 3rd party shall bear the cost of the 3rd party Notice.
4. The Defendant shall handover vacant possession of all that property known as Title No. Nairobi/Block 55 /202/139 to the Plaintiff within (30) days of receipt of the premises from the 3rd party.
5. The Defendant shall pay to the Plaintiff a sum of Kshs. 6,000/= as mesne profits with effect from April 2010 until vacant possession is delivered to the Plaintiff.
6. The defendant shall bear the cost of the suit.

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

S. OKONG'O

JUDGE

Ruling read in open court in presence of:

N/A for Plaintiff

Mr. Simiyu h/b for Ms. Mathenge for Defendant

N/A

for the 3rd Party

Kajuju

Court Assistant