



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. NO. 614 OF 2016

EDWARD NJUGUNA KANGETHE.....PLAINTIFF

- VS -

JOEL KIEMA MUTINDA.....1ST DEFENDANT

VIOLET NDANU MUTINDA.....2ND DEFENDANT

BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND....3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on the 17th December 2009 and later amended it with leave of the Court on the 9th March 2010. In the said suit the Plaintiff is seeking for judgement against the three Defendants jointly and severally for, *inter-alia*, an order for specific performance to transfer L.R No 12948/266 (IR No. 63124), House No 81 situate at Mountain View Estate -Nairobi (hereinafter called the suit premises) and an order for general damages against the 1st and 2nd Defendants (1st and 2nd Defendants) on account of loss of income in respect to the suit property and costs of the suit.

The Plaintiff's Case

2. The Plaintiff avers that on the 27th July 2009, through its then lawyers Messrs. Kinyanjui & Njau Advocates wrote to the 1st and 2nd Defendants' Advocates expressing interest to purchase the suit premises. On the 28th July 2009, the offer was duly accepted by the 1st and 2nd Defendants through their advocates, culminating into the parties entering into an Agreement for Sale on the 25th September 2009. In said agreement, the 1st and 2nd Defendants agreed to sell and the Plaintiff agreed to purchase the suit premises at the price of Kshs. 16,000,000/-. The Plaintiff avers that pursuant to the terms of the agreement of sale he paid Kshs1.6 million being deposit of the purchase to the 1st and 2nd Defendants which amount was duly acknowledged.

3. It is the Plaintiff's case that the suit premises were registered in the name of the 3rd Defendant. The 1st and 2nd Defendants were purchasers of the suit premises from the 3rd Defendant (hereinafter referred to as "NSSF") under a Tenant Purchase arrangement on account of which the 1st and 2nd Defendants serviced a loan facility with a monthly payment of Kshs. 100,000/-.

4. That Clause 3 of the agreement provided that the balance of the purchase price in the sum of Kshs 14.4

million would be paid in two tranches; Kshs 7.3 million or any other sum demanded on account of the property to the NSSF and the balance thereof to the 1st and 2nd Defendants. By a letter dated 2nd December 2009 the NSSF advised the Plaintiff that the sum of 8,307,416/-, was due from the 1st and 2nd Defendants on account of the property and that the amount was payable before the release of the transfer documents. The Plaintiff duly paid the said monies on the 4th December 2009 to the NSSF and on behalf of the 1st and 2nd Defendants. In addition to the sum stated in the preceding sentence at the request of the 1st and 2nd Defendants the Plaintiff paid a sum of Kshs. 3,100/- being Land Rent in respect to the suit premises.

5. The Plaintiff asserts that at this point, having paid a total of Kshs. 9.9 million on account of the suit premises, the 1st and 2nd Defendants were obliged to release to him the completion documents as listed under special conditions No. 1 in the Agreement for Sale. That what startled him was the 1st and 2nd Defendants' letter dated the 14th December 2009 demanding that the NSSF stop transacting with the Plaintiff until they are in receipt of their share of the purchase price as per agreement. It is his evidence that it is the 1st and 2nd Defendants refusal to so release the documents and decline to proceed with the completion of the sale, albeit within the completion period, that led him to file this suit seeking orders as aforesaid.

6. In his submissions, the learned counsel distinguished the Plaintiff's claim and anchored it on specific performance in addition to the general damages and costs. He submitted that he is justified in law to the relief of specific performance even before rescission of contract occurs. He cited the cases of **Butuli Hassan Vs James Njuna Njoroge (2016) @ KLR page 5, Caltex (Kenya) Limited Vs Rono Limited (2016) @ KLR and CASSAM Vs Sachania (1982) @ KLR** to support the Plaintiff's claim.

The 1st and 2nd Defendants' Case.

7. The 1st and 2nd Defendants filed their defence in which they denied the Plaintiff's claims in toto. They blame the Plaintiff for breaching the contract. The bone of contention on the part of the 1st and 2nd Defendants appears to be the fact that the Plaintiff paid the sum advised by the NSSF without seeking their concurrence. In their defence the 1st and 2nd Defendants has accused the Plaintiff and 3rd Defendant of conspiracy to defraud them. The particulars of conspiracy are stated to include making secret arrangements to transact directly to the exclusion of the 1st and 2nd Defendants and inflating the amounts due to the 3rd Defendant.

8. In their Counter-Claim, the 1st and 2nd Defendants aver that the Plaintiff frustrated and breached the sale which action has occasioned them damages and costs. That as a result the Plaintiff should be condemned to pay them interest on deposit at the rate of 10% p.a. They urged the Court to dismiss the Plaintiff's claim and enter judgment in their favour in their Counter-Claim.

9. In her evidence in chief the 2nd Defendant stated under oath that she cancelled the transaction after she had been served with the suit documents. Earlier on, she had instructed the NSSF to stop direct transactions with the Plaintiff until she received payments due to them. She averred that she was uncomfortable with NSSF and Plaintiff transacting in exclusion of her and did not want the completion documents to be released to the Plaintiff before they were paid. She testified they were selling the house to purchase another one and on receipt of Kshs.1.6 million, she committed to another sale transaction and paid Kshs1.1 which she lost when she was unable to complete the transaction with the Plaintiff.

10. In their submissions, the 1st and 2nd Defendants acknowledge that there was a balance of payment due to the NSSF but their bone of contention is that the sum of Kshs 1,007, 416/- more than Kshs 7.3 million was determined by the Plaintiff and the NSSF to their exclusion. That the sale agreement obligated them to procure the statement of account from the 3rd Defendant, an obligation that seemed to have been usurped by the Plaintiff in the way they were excluded. That no particulars were provided by the NSSF to them, which information, they were entitled to as the principal debtors. That the Plaintiff's allegation that he paid Kshs. 8.3 million to the NSSF was without any demand from the NSSF at all. That they did not

give the Plaintiff express authority for him to pay the NSSF on their behalf. That the 1st and 2nd Defendants' conclusion was that this was a conspiracy between the Plaintiff and the NSSF to falsify their accounts. That in that case the 1st and 2nd Defendants were not obliged to release the completion documents to the Plaintiff until they were in receipt of their payments as per special condition number 2. This condition required the Plaintiff to pay the 1st and 2nd Defendants the balance of the purchase price in exchange of the completion documents.

11. Further they submitted that the relief of specific performance as pleaded by the Plaintiff was not available to him because firstly, the Plaintiff did not have money to complete the sale on or before the date of completion which was set as the 24th December 2009, notwithstanding a demand for payment by their advocates sent to the Plaintiff on the 14th December 2009. That he was only ready to complete in 2012, 3 years down the line. Secondly, that the claim of specific performance being an equitable remedy would not be available as he came to court with unclean hands in that he breached the agreement for sale. Thirdly that time was of the essence in the agreement and non-completion on or before the completion date deprives him of the relief of specific performance. Fourthly, the Plaintiff being in breach cannot be allowed to benefit from his wrong. In support of their case they have cited the following cases; **Lammers Vs Kamunge (1991) KLR 345; Acres and Homes Limited Vs Insurance Company Limited of East Africa CA 245 of 2011 Eklr and Cassam Vs Sachania (1982) KLR1.**

12. That the Plaintiff's claim of loss of rent cannot be sustained because he frustrated the contract.

The 3rd Defendant's case

13. The claim of the Plaintiff against the NSSF was not defended. It is on record that the NSSF was served but neither entered appearance nor filed a defence and judgement was entered against it as prayed on the 11th October 2010 subject to formal proof. I have not seen any evidence that the Plaintiff did proof his case against the 3rd Defendant.

Issues, analysis & determination

14. The issues that commend themselves to the Court for determination are:-

Whether there was a valid payment of Kshs 8.3 million on account of the 1st and 2nd Defendants.

Whether the 1st and 2nd Defendants were obliged to release the documents of title to the Plaintiff as soon as the Plaintiff made the payment of Kshs. 8.3 million to the 3rd Defendant.

Whether the Plaintiff is in breach of the contract.

Whether the Plaintiff is entitled to specific performance against the 1st and 2nd Defendants.

Who should pay the costs of this suit?

Whether there was a valid payment of Kshs 8.3 million on account of the 1st and 2nd Defendants as full and final payment.

15. It is on record that in the Agreement for Sale the parties acknowledged the existence of Kshs 7.3 million loan balance payable to NSSF way back as the 28th July 2009. Clause 3 of the agreement stated that:-

“the balance of the Purchase price being Kshs 14.4 million shall be paid as follows;

a) Kshs 7.3 million or any other sum demanded on account of the property to NSSF.

b) The balance due after the amount mentioned in sub clause (3a) above to the 1st and 2nd Defendants”.

16. NSSF vide a letter dated the 2nd December 2009 informed the Plaintiff's advocates that the amount payable on account of the 1st and 2nd Defendants account with them stood at Kshs 8.3 million. The Plaintiff paid the Kshs. 8.3 million to NSSF on the 4th December 2009 vide RTGS. There is no evidence that NSSF has denied receiving the amount. The 2nd Defendant in her oral evidence acknowledged the payment of this amount. She went on to confirm that their account with NSSF is no longer in arrears and neither has NSSF demanded any more money from them on account of loan repayments nor have they paid any more monies. They therefore received the benefit of the Kshs 8.3 million immediately upon receipt of the same by NSSF, their lender, with the result being their loan balance was reduced to zero.

17. The bone of contention of the 1st and 2nd Defendants is the amount of Kshs 1.007,416/- which is more than Kshs 7.3 million. It is noted that though the amount of Kshs 8,307,416/- was given by NSSF, no explanation on the excess was given nor an account rendered to ascertain whether it is the accurate excess over and above the amount of Kshs 7.3 million which had been acknowledged by the parties as owing to NSSF. I have considered the facts going by the evidence tendered, the Plaintiff paid Kshs 1.6 m to the 1st and 2nd Defendants, the 1st and 2nd Defendants in the agreement for Sale agreed that out the balance of the purchase price payable by the Plaintiff there was Kshs.7.3 Million or other sum payable on demand to the NSSF, the NSSF informed the Plaintiff that there was a balance of Kshs. 8.3m payable by the 1st and 2nd Defendants on account of the suit premises and demanded payment to the credit for the benefit of the 1st and 2nd Defendants, the Plaintiff paid to the NSSF the said Kshs. 8.3M, the NSSF has not made a demand on the 1st and 2nd Defendants for further payments on account of the suit premises, the 1st and 2nd Defendants are not making any additional payments to the NSSF and their accounts are not in arrears. All this is contained in the 2nd Defendant's own evidence. It is valid to conclude that for all intents and purposes, the sum of Kshs 8.3 million is a valid payment for and on behalf and to the credit of the 1st and 2nd Defendants for which they have enjoyed a benefit of the amount. If the 1st and 2nd Defendants had or have any genuine desire to know how the amount is arrived at, common sense required and does to date that, they seek from the 3rd Defendant a statement of account as to how the sum claimed is calculated and arrived at. They have not done so.

18. As to Whether the Plaintiff is in breach of the contract, the 1st and 2nd Defendants allege that the action of the Plaintiff in paying Kshs 8.3 million to NSSF directly amounted to breach of the terms of agreement. The agreement does not state who the demand should be made to. But it is clear in the agreement that the Plaintiff was obliged to pay and that on enquiry by the Plaintiff the NSSF gave the Plaintiff information on the amount due which he paid. It would appear that the statement of the account was part of the completion documents as provided by special conditions number 1. The 1st and 2nd Defendants were to provide a Statement of Account to the Plaintiffs along with other the completion documents. This was rightly so because they were the debtors and so would be entitled to know the amount outstanding and how it has been arrived at.

19. What prejudice did the 1st and 2nd Defendants suffer due to the Plaintiff consulting and paying the monies complained to the NSSF without their involvement? Except for want of information on how the sum paid more than Kshs. 7.3 is arrived at, I do not find any prejudice. I say so because the 1st and 2nd Defendants are still in possession and occupation of the suit premises upon which the Plaintiff has paid a deposit to them, settled Land Rent and liability with the NSSF for them, deposited the balance of the purchase price in a joint account with the 1st and 2nd Defendants all of which the 1st and 2nd Defendants have received and continue to receive benefits.

20. It is my finding that, in so far as the Plaintiff did not obtain the concurrence of the 1st and 2nd Defendants on the sum due paid to the NSSF in excess of Kshs 7.3 million, such action constituted an irregularity in the performance of the contract and NOT so material as to result in a breach of the agreement. Weighing one thing with another and doing the best I can, I will answer the issue in the affirmative.

21. As to whether the 1st and 2nd Defendants were obliged to release the documents of title to the Plaintiff as soon as the Plaintiff made the payment of Kshs. 8.3 million to the 3rd Defendant, the agreement in special condition No. 2 stated that on or before the completion date the 1st and 2nd Defendants advocates shall deliver to the Purchaser's advocates the completion documents in respect of the property upon the purchaser or its advocates paying to the 1st and 2nd Defendants the balance of the purchase price. It then follows that the release of the documents to the Plaintiff was to be in accordance with the above clause. It follows, therefore, that the 1st and 2nd Defendants were not obliged to release the documents until and unless in exchange with the payment of the balance to them.

22. There is evidence on record that the Plaintiff successfully before completion date made arrangements to fund the balance of the payments due to the 1st and 2nd Defendants through the Eco bank Kenya Limited. The letter dated the 23rd November 2009 forwarding the undertaking and copied to NSSF is testament to that fact. There is no evidence however that this undertaking was repudiated by the 1st and 2nd Defendants. Indeed the Plaintiff's advocates wrote to the 1st and 2nd Defendants advocates requesting for bank account particulars into which the amounts payable to the 1st and 2nd Defendants. Nothing seems to have happened after that. The turning point is that the 1st and 2nd Defendants purported to cancel their contract with the Plaintiff and on 14th December 2009 which was 9 days before the completion date stopped the NSSF from making any transactions with the Plaintiff.

23. Whether the Plaintiff is entitled to specific performance against the 1st and 2nd Defendants. To answer this question, the issue of who breached the agreement must be dealt with. It is on record that both parties are blaming each other for breaching the agreement. I have found that the Plaintiff's action is an irregularity as opposed to a breach. From the evidence on record the 1st and 2nd Defendants on finding out that their loan obligation in the sum of Kshs 8.3 million had been repaid wrote a letter to the NSSF on the 14th December 2009 demanding that they should not transact with the Plaintiff. In the said letter, they acknowledge in writing that the payments due to NSSF had been paid in full as per the agreement and that the only concern they had was their balance due to them. They cannot therefore be allowed to deny that the payment was not done. Noticing that the 1st and 2nd Defendants were stalling the process, the Plaintiff filed suit on the 17th December 2009. On the 18th December 2009, the 1st and 2nd Defendants wrote another letter advising NSSF that they had stopped selling the suit premises to the Plaintiff. I reiterate that if the 1st and 2nd Defendants had a genuine grievance with the monies paid by the Plaintiff to the NSSF, they should have made a demand and obtain an account from NSSF, their lender on how Kshs 8.3 million was calculated and arrived at. That, if indeed they had issues on the sum of Kshs 1,007,416/- , the amount more than Kshs 7.3 million. On the other hand, one would have expected the 1st and 2nd Defendants to ask NSSF to release the documents of title to them so that they would be able to complete the sale in accordance with special condition No 1 and 2 of the agreement. The 1st and 2nd Defendants did not. The reasons attributed to the cancellation i.e. that the transaction between the Plaintiff and the NSSF was excluding them was in my considered view unconvincing and did not depict prudence on the part of the 1st and 2nd Defendants. In any event the 1st and 2nd Defendants did not prove any of the allegations of fraud and conspiracy in evidence. The cancellation of the transaction 6 days to completion brought the transaction to an abrupt halt in contravention of Clause 5 of the agreement of sale that notice of 21 days be issued to complete. The cancellation was without any valid reason in my view and this is the act of breach to the agreement. I hold that the 1st and 2nd Defendants were in breach of the agreement of sale.

24. A prayer for specific performance being an equitable remedy must meet the test as thus; the conduct of the parties; whether the party seeking the remedy has come to court with clean hands; whether it has performed its obligations under the agreement sought to be enforced; whether it has always been ready and willing to perform its part of the agreement. It was submitted that the Plaintiff has fulfilled all these requirements.

25. The role of the Court is to interpret contracts and never to rewrite the contracts for the parties. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB**

592, Scrutton L.J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”

26. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009)**, 1WLR 1980 at page 1993, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973)** I WLR 601 at 609, held as follows:

“The Court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

27. Applying the facts of this case to the law, this suit falls within the law of contract. There was an offer and an acceptance. The contract was duly signed and thereafter the purchaser paid the purchase price in full. Before completion date and without any regard to the terms of the contract, the 1st and 2nd Defendants declined to proceed with the sale transaction. In the decision of the Court of Appeal in **Butuli Hassan Vs James Njuguna Njoroge (2016) KLR** the law is entitled to enforce the rights of the Plaintiff where he prays for specific performance of the contract. I hold that the 1st and 2nd Defendants were in breach as they did not deliver the documents of completion on or before the completion date. Instead they cancelled the agreement for flimsy and whimsical reasons. I hold that the Plaintiff is entitled to the relief of specific performance of the contract.

28. Is the Plaintiff entitled to loss of income in the sum of Kshs 80,000/- as pleaded?. I have read the ruling of Hon Justice Mutava where he ordered that the 1st and 2nd Defendants to deposit the amount of Kshs 80,000/- monthly in a joint interest account of the advocates of the Plaintiff and the 1st and 2nd Defendants. My understanding of this order is that Kshs 80,000/- was to preserve a loss which may or may not occur to the Plaintiff as a defector owner of the suit premises, he having paid the full purchase price. The Plaintiff has pleaded it as general damages for loss of rental income.

29. Damages in form of rental income fall in the arena of special damages. It is trite law that damages must not only be pleaded but must be strictly proven. In this case, it is not enough for the Plaintiff to throw the figure of Kshs 80,000/- to the Court as monthly rental income that the Plaintiff would have earned from the suit premises had the transaction been completed. It is the duty of the Plaintiff to strictly prove and persuade the court that he is entitled to the same. Ideally one would have expected him to present to court a valuation for rental income for a similar stature of a house as well as that a tenant has or likely to be obtained for the house. No evidence was tendered in that regard and I accordingly deny the prayer.

30. It must be noted that at this point the Plaintiff has paid the full sale price of Kshs 16 million as follows;

- a) Kshs 1.6 million to the 1st and 2nd Defendants as deposit
- b) Kshs 8,307,416/- paid to NSSF on account of the 1st and 2nd Defendants
- c) Kshs 3,100/- in respect to the land rent for the suit premises
- d) Kshs 6,089,484/- deposited in the joint account held by the advocates of the Plaintiff and the 1st and 2nd Defendants.

The 2nd Defendant stated in her submission and evidence that the amount deposited in the joint account is not monies attributable to her as the same is not in her account. I beg to disagree with this reasoning.

Having deposited the amount of Kshs. 6,089,484/- in a joint interest earning account in accordance with the court order dated the 30th July 2010, that money is being held in trust for both the Plaintiff and the 1st and 2nd Defendants pending the determination of the case. I hold that the Kshs 6,089,484/- is part of the payment of the purchase price in full as listed above.

31. I would like to now turn to the 1st and 2nd Defendants' Counter-Claim. The 1st and 2nd Defendants have not laid a basis for the claim and that I find no rationale to demand of the Plaintiff to pay interest on the sum of Kshs 1.6 million paid to the 1st and 2nd Defendants and for which they have had the benefit of since 2009. The 1st and 2nd Defendants submitted that they are entitled to damages for loss of Kshs 1.1 million in a sale transaction which fell through because they were unable to complete this transaction at hand. Notwithstanding having seen copies of the Cheques on record, no evidence of actual payment and receipt of the money nor forfeiture of the same was adduced. No evidence has been adduced in form of agreement for sale or such other evidence to satisfy the court of any loss allegedly suffered by the 1st and 2nd Defendants. The prayer in the Counter-Claim is denied accordingly.

32. Who meets the costs of this suit?. Costs ideally follow the event. It is trite law that costs in a suit are also at the discretion of the Court. The specifics that triggered the case to be filed is the conduct of the parties. The Plaintiff has a duty to consult the 1st and 2nd Defendants before making payment of Kshs 8.3 million to NSSF. He did not do so. The 1st and 2nd Defendants had a duty to procure the statement on the balance of the payments payable to NSSF so as to first satisfy themselves that the amounts payable to the NSSF was correct and secondly be able to supply the balance outstanding to the Plaintiff as part of the completion documents. They did not do so before the suit was filed, at the time the suit was being filed and after the Suit was filed. In her evidence in Court, the 2nd Defendant confirmed that to date, she has never asked for the statement from NSSF. The 3rd Defendant purported to give a statement without particulars to the Plaintiff as the sum payable and required the Plaintiff to pay (which he obliged) without recourse to the 1st and 2nd Defendants who were obliged to pay the same under the Tenant Purchase agreement. In the circumstances, each party shall bear their own costs.

33. Having analyzed the evidence and taking into consideration that the 1st and 2nd Defendants have been in possession of the house for the last 8 years rent free, having cancelled the sale transaction without any valid reason, their loan having been paid in full thus relieving them the monthly payment of Kshs 100,000/- , the justice of this case leads me to make the following orders;

a) An order for specific performance directing all the three Defendants jointly and severally to transfer the suit premises Known as L.R NO. 12948/266 (registered as I.R NO. 63124) situate at Mountain View, House No. 81 in the city of Nairobi, the Plaintiff.

b) The 1st, 2nd and 3rd Defendants jointly and severally deliver the following documents to the Plaintiff forthwith;

I. A consent to transfer from the commissioner of lands or equivalent.

II. Original documents of title of the property

III. Fully paid city council rate clearance water and electricity bills and land rent receipts

IV. Discharge of charge (if any)

V. Copies of 1st and 2nd Defendants Identity cards and PIN cards

VI. Passport size photographs of the 1st and 2nd Defendants

VII. Duly executed but undated transfer of the property in favour of the purchaser or as directed by the purchaser

VIII. A statement from the fund showing how the Kshs 8.3 million was arrived at.

IX. Any other documents reasonably required by the purchaser or his advocates to effect registration of the transfers and all documents of title relating to the property in the 1st and 2nd Defendants or NSSF possession.

c) In default of a) above the Deputy Registrar be and is hereby directed to sign the transfer to the suit premises to the Plaintiff.

d) A permanent injunction to restrain the defendants jointly and severally their agents, servants and or employees from breaching the said agreement and further from selling alienating in any manner offering for sale advertising mortgaging charging assigning and or otherwise dealing with the suit premises know as L.R NO. 12948/266 (registered as I.R NO. 63124) situate at Mountain View, House No. 81 in the city of Nairobi.

e) The claim of Kshs 80,000/- per month being rental income loss is dismissed.

f) The Counterclaim is hereby dismissed.

g) The 1st and 2nd defendants to bear the costs of the suit.

DATED SIGNED & DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017.

J. G. KEMEI

JUDGE