Ali & another v APA Homes (K) Limited (Environment & Land Case 111 of 2018) [2024] KEELC 936 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEELC 936 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 111 OF 2018

NA MATHEKA, J

FEBRUARY 27, 2024

BETWEEN

NAGIEB OMAR ALI ..... 1ST PLAINTIFF

SHUKRI OMAR ALI ..... 2ND PLAINTIFF

AND

APA HOMES (K) LIMITED ..... DEFENDANT

JUDGMENT

1. The 2nd plaintiff through his personal representative the 1st plaintiff purchased apartment E5 hereafter known as the suit property. The apartment was part of a development project by the defendant known as Sahel Apartments situated in Nyali on Plot No. MN/I/2911. One Hussein Shariff Alwy offered the suit property while it was still off plan and on 17th April 2013 and a letter of offer was prepared by the defendant to the 1st plaintiff for acceptance. The letter of offer was executed by the 1st plaintiff as the purchaser and the said Hussein and one Khalid Shariff Alwy as the vendors. Upon completion of the payment on 27th November 2017 counsel representing the 1st plaintiff in the sale instructed the defendant's counsel to initiate transfer to the 2nd plaintiff. A second reminder was made on 12th February 2018 but no action was taken. This prompted the plaintiffs to file the suit herein seeking the following orders:

    a. Specific performance of the sale agreement dated 17th April 2013 by the defendant.

    b. Mesne profits at a rate of Kshs. 100,000/= per month from October 2017 to May 2018.

    c. Mesne profits at a rate of Kshs. 100,000/= per month from June 2018 to the date the defendant hands over vacant possession of the suit property to the plaintiffs.

    d. Costs of the suit be awarded to the plaintiffs.

    e. Any other reliefs that this court deems fit to grant.

2. The defendant denies selling the suit property as the said Hussein Shariff Alwy and Khalid Shariff Alwy are strangers. Furthermore, it claims that it did not receive any monies from the plaintiffs and that the plaintiffs did not conduct due diligence before purchasing the suit property. The defendant is adamant that the suit property is not vacant as it was sold on 12th March 2016 to one Joseph Ngigi Kangethe who has taken possession to date.

3. PW1, the 1st plaintiff testified that he knows the said Hussein Shariff as he had bought other flats from him before. He admitted to not conducting a search of the title and he was not given any documents regarding the shareholding of the defendant. He was not aware of a nominee agreement between the said Hussein and the defendant's shareholders. PW2, the said Hussein Shariff testified that he was a director of the defendant between 2013 and 2017 he produced the minutes of the special board resolution appointing him dated 14th January 2014. PW2 stated that the 1st plaintiff was a client to whom he had sold other properties. He stated his role was to supervise construction and sales of Sahel Apartments. He narrated how he sold the suit property for Kshs. 16 million and that the cash he received from the 1st plaintiff he partly deposited into the defendant's account and partly into the defendant's counsel's account. He explained that he had sold some units to other people and the defendant never raised objections. PW2 admitted that no sale agreement was executed. He stated that he deposited the money in the defendant's bank account and some of the money was paid to the contractor on behalf of the developer. Bank statements have been produced showing some of the said deposits.

4. DW1, Nasir Mohamed Danyal testified that the defendant is a family business and has been a manager since 2009. He specifically stated that PW2 had no authority to sell the suit property and produced DEx1 which was an agreement to transfer shares to PW2 and the aforesaid Khalid Shariff. He referred to clause 3 of DEx1 which provides as follows:

> " 3. That the said transferee shall hold the said shares and shall have no authority to sell of transfer to any other person except to the transferors."

5. He also states that PW2 was never a director in the defendant and produced two CR 12 dated 15th October 2015 and 16th July 2018 stating PW2 was not a director.

Analysis

6. I have considered the pleadings and evidence tendered in court and the issues for determination are;

    1. Whether the sale of the suit property was valid?

    2. What prayers can be granted?

1.Whether the sale of the suit property was valid?

7. The 1st plaintiff allegedly bought the suit property from PW2 through a letter of offer dated 17th April 2013 which had no strict timelines for a consideration of Kshs. 16 million. According to PW2 his authority to sell the suit property came from the fact that he had sold other apartments and he was a director of the defendant company. DW1 did not dispute the above but was adamant that PW2 had no authority to sell any apartment from Sahel Apartments and referred to clause 3 of the share agreement dated 14th January 2013. The *Law of Contract Act* clearly stipulates the requirements for a

valid instrument to convey an interest in land. Section 3 (3) of the *Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that;

> " No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> a. the contract upon which the suit is founded—
>
> i. is in writing;
>
> ii. is signed by all the parties thereto; and
>
> b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:"

8. In Harris JA in Garvey v Richards {2011} JMCA 16 the court in considering the essential components of a contract reflected the following principles:

> " It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

9. The Supreme Court of United Kingdom in RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G. [2010] UKSC 14:

> " The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement."

10. PW 2 entered into an agreement with the defendant for transfer of shares from the defendant to himself thus making him a nominee shareholder. The plaintiffs produced a notification of change of directors dated 22nd October 2013 which showed that PW2 together with the said Khalid Shariff Alwy were the directors of the defendant as from 14th January 2013. They also produced a special resolution dated 25th October 2013 showing that PW2 together with the said Khalid had been appointed as directors, non-shareholders of the defendant. The letter of offer for the purchase of the said apartment was dated 17th April 2013 and signed by PW2 and Khalid Shariff Alwy for the defendant on one hand and the 1st plaintiff as the purchaser. Clause 11 of the said letter states that;

> " A formal Agreement to the Lease/ Sale Agreement shall be drafted by our lawyers incorporating these terms. Until such agreement is executed by both parties then this letter shall be deemed to be a Contract for sale."

11. I find that this contract was properly executed by the Directors of the defendant at the material time and is valid and binding. As to whether they had authority to sell or not, the plaintiffs are protected by

the doctrine of indoor management or turquand rule which shields the plaintiffs from the illegalities of the PW2 if any. In Kimani Kabucho Karuga 7 Co Advocates vs Sundowner Lodge Limited (2011) eKLR the Court stated;

> " Counsel further sought to rely on the doctrine of "Indoor Management" which operates to protect outsiders against a company's internal operations and arrangements. The rule is to the effect that outsiders who have no notice as to how the company's internal machinery is handled by its officers should not be prejudiced by any irregularities that may beset the indoor working of the company."

12. In the case of East Africa Safari Air Limited vs Anthony Ambaka Kegode & Another C.A. No. 42 OF 2007 wherein it was held thus;

> " While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called "the Indoor Management" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained." [own emphasis]

What prayers can be granted

13. The plaintiffs sought specific performance of the letter of offer (deemed sale agreement) dated 17th April 2013. In Thrift Homes Ltd vs. Kenya Investment Ltd 2015 eKLR, the court stated that;

> " specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction".

14. The Court has carefully perused the letter of offer produced as Exhibit 1 by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. I find that the sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. In the case of Nelson Kivuvani v Yuda Komora & Another, Nairobi HCCC No.956 of 1991, the Court held that;

> " the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or

implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract".

15. On whether or not the Defendant breached the agreement for sale, Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

> "a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

16. In the case of Shah v Guilders International Bank Ltd [2003]KLR the Court in considering the terms of the parties contract stated;

> " The parties executed the same willingly and they are therefore bound by it."

17. And in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 [2001] KLR 112 [2002] EA 503, where the Court held that;

> " A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleased and proved".

18. In the instant case the agreement is clear that the purchase price was Ksh. 16 million. That the agreement dated 17th April 2018 further stated that the defendant was paid in full. I am satisfied that the defendant through PW2 (and he does not dispute this) did receive the full purchase price and the failed to transfer the property to the 1st plaintiff hence the defendant is in breach of the agreement. The PW2 admits to receiving Kshs. 16 million. The bank statements and acknowledgements have been produced to this effect. Be that as it may it has come out in evidence that the apartment is no longer available as it was sold to a third party. The Court of Appeal in Civil Appeal No. 165 of 1996 between Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti, Tunoi, JA (as he then was) said;

> "However, the appellants' conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated".

19. Likewise, l find that the payment of the purchase price was completed way back in 2018 however the apartment has since been sold to a third party and specific performance is no longer possible. The issue of mesne profits was not proved and the same will not be awarded. It is the finding of this court that there is a breach of contract on the part of the defendant in this case. I find that the plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. That the defendant is to refund the sum of Kshs 16 million to the plaintiffs plus costs and interest at court rates from the date of filing this suit within the next 90 (ninety) days from today.

2. Costs of the suit to the plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE