



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELC NO. 239 OF 2014

JOSEPH NJUGUNA MAINA.....1ST PLAINTIFF

DANIEL MAINA CHEGE.....2ND PLAINTIFF

STEPHEN KIGIMA GITIMU.....3RD PLAINTIFF

(C/O GATUMUTA & CO. ADVOCATES)

VERSUS

DANIEL MBUGUA MARI.....1ST DEFENDANT

PAUL GITHI KIGUNDA.....2ND DEFENDANT

JUDGMENT

BACKGROUND.

This suit came to be through a sale agreement for land. The plaint is dated 26/2/2014. The claim is undefended. Service of summons were served but no response was ever filed. The case proceeded exparte on 25/5/2017

Plaintiffs' case

Plaintiff's case is that they are the Registered Proprietors of the lease hold interest in Title No. NAIROBI/BLOCK 126/363 whereas the Defendants were the proposed Purchasers.

On 16th September 2011, the Plaintiffs and the Defendants entered into a Sale Agreement whereby the Defendants were to pay Kshs. 8,500,000 as consideration for the suit premises and the completion period was to be 90 days. Upon expiry of the completion period the Defendants had not paid the full purchase price and had an outstanding balance of Kshs. 5,600,000. The Defendants sought an additional 90 days to complete which the Plaintiffs granted through variation of the initial Sale Agreement dated 22nd February, 2012. Again the Defendants failed to complete the transaction even after the additional completion period.

The 1st plaintiff is the one who testified on behalf of his co-plaintiff's (PWI). He adopted his statement dated 26/2/14 as his evidence in chief. He also relied on the documents in the list of 26/2/14 which document he produced as P Exhibit 1-7. Plaintiff's evidence is in tandem with their pleadings. PWI has

given an account of how sometimes in October 2010 together with the Co-plaintiffs, they were looking for a suitable parcel of land to buy as an investment. They then bought the suit property in a public auction that took place on 28th October, 2010. Transfer was effected and plaintiffs acquired a Certificate of Lease dated 7th July, 2011. There were illegal occupants in the suit property and so plaintiffs instructed their Advocates to write to the illegal occupants in L.R Nairobi Block 126/363 and the letters were given to the occupants through the Provincial Administration. Thereafter the Defendants approached the plaintiffs with intention of purchasing the land for their own benefit and their agents or servants who were in occupation. The terms of the agreement are as set out in the plaint. The purchase price was ksh. 8,500 000 and defendants paid a deposit of sh. 2 000 000. They never paid the balance.

Plaintiffs contend that the transaction has failed and they pray for the following orders;

i. An eviction Order to be issued against the Defendants their agents or servants from Title No. NAIROBI/BLOCK 126/363 together with removal of all the Defendants and their agent's structures.

ii. Costs of the suit

DETERMINATION

I find that the Certificate of lease (Exhibit 1), does confirm that plaintiffs are the registered owners of the suit property. The agreement of 16/9/11 contains the terms and conditions of the sale of the suit property with clause 13 containing the default clause. The parties however entered into another agreement of 22/2/12 to vary the earlier agreement. In essence, parties were extending the completion date. The outstanding balance was Shs.5, 600,000.

The latter agreement states ***"In the event the Purchasers default to clear the balance of the Purchase price within the extended 90 days, the Vendors will be at liberty to revoke the sale agreement aforesaid and take appropriate Legal action to either recover the balance or take possession of their land or take any other Legal act at their disposal"***.

Plaintiffs' revoked the Sale agreement vide their notification of 8/8/12, as defendants had breached the terms of the agreement. There is nothing to indicate that the defendants ever tried to pay the balance of Shs.5, 600,000. I therefore find that the transaction failed on account of failure of the defendant to comply. The plaintiffs are entitled to the quiet possession of their land as they stand as true registered proprietors of the suit land.

According to PWI, plaintiffs were paid by defendants sh. 2,000 000 as deposit. Clause 14(v) of the Original Agreement and clause 3 of the 2nd agreement do not provide for the retention of the amount already paid. Clause 14 (v) states ***"If any party shall be in default of any term of this agreement, the innocent party shall be at liberty to sue for specific performance and if this sale shall totally fail/frustrated for any reason, the parties shall be restored to their original position"***

If that be the case, then plaintiff should refund back the amount defendant paid.

I hereby grant the following orders;

1) An eviction Order is hereby issued against the Defendants their agents or servants from Title No. NAIROBI/BLOCK 126/363 together with removal of all the Defendants and their agent's structures. This order to take effect within 30 days from date of delivery of this Judgment.

2) Plaintiffs are to refund the amount of Shs.2, 000,000 to defendant within 30 days from the date of delivery of this judgment otherwise interest is to start running on this amount at courts rate.

3) Defendants are condemned to pay costs of the suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER ,2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

Gatumuta for Plaintiff