



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 263 OF 2010

JAMES NJOROGE KUNG’U.....PLAINTIFF

VERSUS

MICHAEL KARIUKI KIBUI.....DEFENDANT

JUDGMENT

By a Plaint dated 28th May 2010, the Plaintiff filed this suit against the Defendant praying for the following orders:-

- a. The refund of Kshs. 440,800/= plus interest as per the sale agreement dated 8th February 2010.
- b. In the alternative, specific performance of the sale agreement.
- c. General damages.
- d. Costs and interest at court rates.

The Pleadings

In his Plaint, the Plaintiff stated that on or about 8th February 2010, he and the Defendant entered into a sale agreement where the Defendant agreed to sell to him the parcel of land known as Dagoretti/Riruta/3255 (hereinafter referred to as the “suit property”) for Kshs. 1,250,000/=. He further stated that he paid to the Defendant a deposit of Kshs. 300,000/= as per the terms of the sale agreement. He added that as per the terms of the sale agreement, the Defendant was to transfer the suit property to him within 90 days which he has not done to date. He further stated that in May 2010, the Defendant sought to be given the balance of the money but could not produce the transfer documents. He further stated that he paid the Defendant a further sum of Kshs. 140,800 towards the purchase of the suit property and therefore wants a refund of the total amount paid to the Defendant amounting to Kshs. 440,800/-.

The Defendant filed his defence dated 8th July 2010 in which he denied the claims made by the Plaintiff. He stated that he had been willing to complete and facilitate the transfer of the suit property to the Plaintiff but could not because he was waiting to procure the letters of administration of the estate of the late Lawrence Kibui Kariuki in whose name the suit property was still registered. He further stated that in the circumstances, this suit is premature and an abuse of the legal process. He claimed that as per the sale

agreement, the Plaintiff would be given possession after the payment of the balance of the purchase price. He added that he had given the Plaintiff possession of the suit property.

The Evidence

The Plaintiff stated that he leased the suit property from the Defendant from 1st September 2003 up until 17th August 2009 where he paid an annual rent. He testified further that on 2nd April 2005, the Defendant informed him that he was selling the suit property and offered him the first opportunity to purchase it. He stated that he was interested in purchasing the suit property which led to his entering into a sale agreement dated 8th February 2010 with the Defendant. He added that according to the terms of the sale agreement, the purchase price was Kshs. 1,250,000/= of which he paid the Defendant a deposit of Kshs. 300,000/=. He stated that the balance of the purchase price was to be paid within 90 days. He testified further that in the course of time, he also paid the Defendant an additional sum of Kshs. 140,800/= making the total amount paid as Kshs. 440,800/= leaving a balance of Kshs. 810,200/-. He stated that after the 90 days from the date of signing the sale agreement lapsed, the Defendant never gave him the title to the suit property. He said that they agreed to meet at his lawyer Ms. Githaiga's office but added that though he carried with him a bankers cheque of Kshs. 810,200/= being the balance of the purchase price, the Defendant came empty handed. He stated that the Defendant explained to him that the title to the suit property being registered in his deceased father's name he needed to take out letters of administration and the process in court was slow. He stated that he ended up returning back with his money. He confirmed being in possession of the suit property. On cross examination, he stated that he knew the title deed to the suit property was in the Defendant's father who was deceased at the time of entering into the sale agreement and that the Defendant would transfer it to him after the title was in his name.

The Defendant testified that the suit property was registered in the name of his late father and formed part of his father's estate. He also stated that they were 10 beneficiaries. He stated that he rented the suit property to the Plaintiff in the year 2003. He stated further that he needed money to pay off a debt and to get letters of administration so he agreed to sell the suit property to the Plaintiff for Kshs. 1,250,000/-. He conceded that to further that, he entered into a sale agreement dated 8th February 2010 with the Plaintiff. He added that it was agreed between them that the title to the suit property would be transferred to the Plaintiff once the letters of administration over the estate of his late father had been acquired. He conceded that the Plaintiff paid him a deposit of Kshs. 300,000/- with the balance being payable when the letters of administration had been acquired. He further admitted having received a further Kshs. 140,800/- from the Plaintiff but said that this amount was a soft loan to him to be paid over a period of time and was not part of the purchase price. It was his testimony that the process to transfer the suit property to the Plaintiff had been frustrated by the fact that some of his siblings who are also beneficiaries to the estate reside outside the country and it had been difficult to push through the court process of obtaining letters of administration over the estate of his late father. He added that the Plaintiff has all along remained in possession and had halted paying rent to him since entering into the sale agreement. He stated further that when he obtains the title to the suit property in his name, he will proceed to transfer the same to the Plaintiff. He confirmed that he has never tried to evict the Plaintiff out of the suit property or offered it to anyone else to purchase. On cross examination, he stated that he did not know when he would obtain the letters of administration over the estate of his late father in order to transfer the suit property to the Plaintiff. He further stated that he is willing to refund the Plaintiff the amount he received from him if the Plaintiff wishes so.

Issues for Determination

The issues arising out of this suit for determination are as follows:

1. Whether to order the refund to the Plaintiff of the sum of Kshs. 440,800/- or in the alternative issue an order of specific performance of the sale agreement dated 8th February 2010.
2. Whether to order an award of general damages.

3. Who shall bear the costs of this suit.

Determination

1. Whether to order the refund to the Plaintiff of the sum of Kshs. 440,800/- or in the alternative issue an order of specific performance of the sale agreement dated 8th February 2010.

The Plaintiff claimed that he paid to the Defendant a total sum of Kshs. 440,800/- as part of the purchase price of the suit property. The Defendant on his part admitted having received this sum of money but contended that Kshs. 140,800/- out of that sum did not form part of the purchase price of the suit property but was a soft loan to be paid over the course of time. I hold the view that the Defendant has admitted having received a total sum of Kshs. 440,800/- from the Plaintiff and even stated that he is willing to refund this entire sum to the Plaintiff. I believe that this court can rely on that admission and do find that the Defendant owes the Plaintiff Kshs. 440,800/- and is hereby ordered to refund the same to the Plaintiff within 60 days from the date of delivery of this Judgment.

The Plaintiff made an alternative prayer of having an order of specific performance issued if the order for a refund is not issued. I have issued an order for the refund to be made. Further, an order of specific performance in this matter may very well be an order in vain. The parties entered into the sale agreement dated 8th February 2010 for the sale of the suit property to the Plaintiff while being aware that the suit property was at that time and still remains registered in the name of the Defendant's late father. The process of obtaining letters of administration over the estate of the Defendant's late father is not yet complete. To compound matters further, the Defendant admitted that there are 10 beneficiaries to the estate of his late father. There is no assurance that the Defendant would, after the estate is distributed, end up being the sole owner of the suit property. My finding on this point is that the sale agreement is frustrated by the fact that the Defendant undertook to sell what was not his. The order of specific performance cannot therefore issue.

2. Whether to order an award of general damages.

This suit is premised on a sale agreement dated 8th February 2010 and the Plaintiff contends that the Defendant breached that agreement by failing to transfer the suit property to him. The law is that there can be no general damages for a breach of contract. In **Joseph Ungadi Kadera v. Ebby Kangisha Kavai (Personal Representative of Ephraim Kavai Deceased), Kisumu Civil Appeal No. 239 of 1997 (unreported)**, (Kwach, Lakha & Owuor JJ.A) the Court of Appeal put it succinctly that there can be no general damages for breach of contract. That being the position, the Plaintiff's claim for general damages fails.

3. Who shall bear the costs of this suit.

The costs of this suit are awarded to the Plaintiff.

DELIVERED, DATED AND SIGNED ON THE 16TH DAY OF SEPTEMBER 2016.

MARY M. GITUMBI

JUDGE