



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 216 OF 2012

GIRIAMA CENTRAL PROPERTIES ASSOCIATES AND PROPERTY

MANAGEMENT LIMITED PLAINTIFF

VERSUS

AYUB SHERO BALUCHI 1ST DEFENDANT

OMAR MOHSEN AHMED MOHAMED 2ND DEFENDANT

MWAKASA LIMITED 3RD DEFENDANT

JUDGMENT

(Suit by the plaintiff seeking an order of specific performance for a property that it purports to have purchased; sale agreement relied upon by the plaintiff being between himself and a person bearing the name of the 1st defendant but evidence adduced that the 1st defendant could not have executed the agreement as he was out of the country; sale agreement thus null and void; even then, the person named as 1st defendant not being the owner of the property being sold which was owned by the 3rd defendant; no agreement between the plaintiff and 3rd defendant and nothing to show that 3rd defendant had transferred its interest to the 1st defendant to enable the 1st defendant deal with the property; no proof of payment of the full purchase price; plaintiff cannot in those circumstances be entitled to an order of specific performance; plaintiff's suit dismissed with costs)

1. This suit was commenced through a plaint which was filed on 7 December 2012 against three defendants, respectively being, Ayub Shero Baluchi, Omar Mohsen Ahmed Mohamed and Mwakasa Limited. It is pleaded that through an agreement dated 26 May 2012, and executed on 31 May 2012, between the plaintiff and the 1st defendant, the 1st defendant agreed to sell to the plaintiff the Plot No. MN/5215/4 title No. 37064/1 located in Nyali, Mombasa. It is averred that the purchase price was agreed at Kshs. 50,000,000/= and a deposit of 10% being Kshs. 5,000,000/= was paid. It is pleaded that the negotiations and actual conclusion of the terms of the agreement were conducted by the 2nd defendant on behalf of the 1st defendant and the payments were similarly made to the 2nd defendant on behalf of the 1st defendant. It is averred that subsequently, the 2nd defendant disclosed that the 1st defendant first needed to have the property transferred to him by the 3rd defendant, who it is said had no objection to the sale. It is averred that a meeting was held in August 2012 between the plaintiff's directors, the 2nd defendant, and one Mr. Suresh of the 3rd defendant, where it was agreed that the plaintiff could occupy the suit property, which was an unfinished residential house, and proceed to construct it to completion. The plaintiff pleads that she proceeded to complete the house after using in excess of Kshs. 3,500,000/= and occupied it. The plaintiff filed suit upon learning that the defendants intend to renege on the agreement for sale. In the suit, the plaintiff seeks the following orders :-

(a) An order of injunction to restrain the defendants, their agents and or servants from charging, selling, or disposing of, property

known as Plot No. 5215/4 title No. 37064/1 or in any other manner whatsoever dealing with the said property to the detriment and prejudice of the plaintiff's interest therein as purchaser (in possession).

(b) An order of specific performance to compel the 1st and 2nd defendants to complete the sale transaction between the plaintiff and the 1st defendant as stipulated in the agreement made on the 26 May 2012 and executed on the 31 May 2012.

(c) Costs of this suit.

2. The 1st defendant filed defence where he inter alia denied executing any agreement with the plaintiff. He averred that he is not the registered owner of the suit property and had no capacity to enter into any agreement. He pleaded that there is no power of attorney authorising himself or the 2nd defendant to execute any sale or lease of the property to the plaintiff.

3. The 2nd defendant filed defence and pleaded inter alia that the plaintiff has contrived this suit in order to defraud the registered owner of the land known as Plot No. 12881 Section I, Mainland North. He pleaded that the plaintiff forged the sale agreement, as the person who purportedly signed it, was out of the country. It is alleged that the plaintiff lifted the signature of the 1st defendant and also forged acknowledgment notes to create the impression that it paid money to the 2nd defendant. He pleaded that the suit property belongs to the 3rd defendant.

4. The 3rd defendant filed defence where it inter alia pleaded to be the registered proprietor of the Plot No. MN/5214/4 title No. 37064/1 (the suit property). It denied having entered into any agreement to sell the property to the 1st defendant and denied transferring the property to the 1st defendant. It pleaded that it did not authorise the 1st defendant or 2nd defendant to sell the suit property. It also denied authorising the plaintiff to take possession. It asked that the suit be dismissed.

5. In the course of the proceedings, the 2nd defendant applied to have the suit against him struck out and his name be removed from this suit. The application was allowed on 2 April 2014. The suit therefore remains only as against the 1st and 3rd defendants.

6. To support her case, the plaintiff called Andrew Peter Ngirichi as her witness. He testified that he is a director of the plaintiff. He adopted as his evidence in chief an affidavit that he had sworn on 6 December 2012. In it, he stated that on 26 May 2012 the plaintiff entered into an agreement with the 1st defendant to sell to the plaintiff the property Plot MN/5215/4 title No. 37064/1. The negotiations were done by himself and his co-director, Purity Wangui Kuriah, and the 2nd defendant on behalf of the 1st defendant. The purchase price was Kshs. 5,000,000/- and he paid Kshs. 2,000,000/= on 26 May 2012 and Kshs. 3,000,000/= on 31 May 2012 to constitute 10% deposit. Payment was to the 2nd defendant who acknowledged the money. He stated that the land was still registered in the name of the 3rd defendant who had no objection to the sale. He annexed a copy of the title which shows the correct description of the land as LR No. 12881 (Original Number 5215/4 Section I Mainland North) Certificate of Title No. 37064. He stated that the 2nd defendant intimated to him that the 1st defendant had gotten another buyer at a higher price and therefore the plaintiff should proceed to occupy the property as a tenant. As a consequence, he executed on behalf of the plaintiff a lease to run for 3 years, and in the meantime, the 1st defendant was to pay whatever balance he owed the 3rd defendant so that the 3rd defendant could transfer its interest to him. He produced a lease dated 1 August 2012 said to be executed by the 1st defendant and the plaintiff. Upon execution of the lease, the 3rd defendant handed over to him the keys to the main entrance and the keys to the house. He stated that there was also an understanding that he would proceed to finish construction of the house which he did at the cost of Kshs. 1, 792,610/=. The 2nd defendant wrote a letter dated 18 September 2012 that this amount can be offset from rent. He then took full occupation of the house from October 2012. He filed suit because he learnt that the 1st and 2nd defendants want to resell the property to another person.

7. Cross-examined by counsel for the 1st defendant, he stated that the property was located in a gated community and the 3rd defendant was the developer. He stated that the 3rd defendant confirmed to him that the house was owned by the 1st defendant but he had a balance outstanding. There was a house developed but which was not complete. He called the 1st defendant who confirmed to be out of the country. He asserted that the 1st defendant would be lying if he said that he did not sign the agreement. He stated that the agreement was signed in the plaintiff's offices and the advocate who attested it, Mr. Enock Ratemo, was stationed in the plaintiff's offices. He did not have any agreement with the 3rd defendant and he did not have anything in writing to show that the 3rd defendant had authorised the sale. Neither did he have any document from the 1st defendant to the 3rd defendant to allow him purchase the property. He testified that he paid the deposit of Kshs. 5 million in cash, and that he paid a further Kshs. 5 million in clearance of the balance of Kshs. 45 million, through Western Union, but he did not have any evidence of this. He paid the deposit of Kshs. 5 million to the 2nd defendant. The 1st defendant was not there when this money was paid. He denied that he entered the house as a tenant and not a purchaser. He stated that they also purchased another plot in Mwembelegeza from the 1st defendant.

8. Cross-examined by counsel for the 3rd defendant, he stated that he sued the 3rd defendant because the 3rd defendant gave him authority to complete the house and handed to him the keys. He stated that the 3rd defendant promised to transfer the property to him after he had paid the money. He did not have any agreement with the 3rd defendant.

9. With the above evidence the plaintiff closed his case.

10. The evidence of the 1st defendant was taken *de bene esse* on 24 February 2017 before the plaintiff could testify on the ground that the 3rd defendant was only in the country for a short period of time. His evidence was that he resides in the United Arab Emirates (UAE) where he works as a mechanical engineer. He has lived in the UAE since the year 1979. He testified that the last time he was in Kenya was in the year 2011 then on 6 February 2017. He testified that he was not aware of the sale agreement in issue as he was not in the country on 26 May 2012 or 31 May 2012 when it was purportedly executed by him. He was not in the country at all in the year 2012. He produced a copy of his passport to demonstrate this. He stated that he does not know the plaintiff company or its directors. He did not know a Mr. Ratemo advocate who attested the agreement. He testified that he does not also know the property in dispute and does not know where it is. Neither was he aware of the amount of Kshs. 5 million purportedly paid as deposit of the purchase price. He testified that upon getting knowledge of the agreement, he reported the matter to the police.

11. The 1st defendant called Enock Ondieki Ratemo as his witness. He is an Advocate of the High Court practising in Mombasa. He has been in practice since the year 2010. He testified that he is the one who drew and witnessed the sale agreement dated 26 May 2012. Mr. Ngirichi was personally known to him and the sale agreement was executed at the plaintiff's offices. After about 3 weeks he was called by the police over a complaint lodged by the person named as seller claiming that he never signed the agreement. He went to the police station but nothing arose. He was again called in the year 2018 over the same issue. He went to the police station and was shown a person that he had never met before who was introduced to him as the 1st defendant. He was also shown his passport which showed that he left the country for Dubai in the year 2010 and came back in the year 2018. He testified that the person who signed the agreement as vendor was not the same person he met at the police station. He testified that when he attested the agreement, he did not know the vendor, and relied on information from the purchaser, who had said that he was his tenant. He conceded that whoever signed the sale agreement was pretending to be the real Ayub Shero.

12. The 3rd defendant did not call a witness.

13. I invited counsel to file written submissions which they did. I have taken note of the submissions of Mr. Buti, learned counsel for the plaintiff; Mr. S.M. Kimani, learned counsel for the 1st defendant; and Mr. Mutubia, learned counsel for the 3rd defendant.

14. I will be brief in my delivery because to me the issue herein is straightforward.

15. The plaintiff has filed this case seeking specific performance of the sale agreement dated 26 May 2012. In that agreement, one Ayub Shero Baluch purports to sell the suit property to the plaintiff. Ayub Shero Baluch testified that he never executed the sale agreement as he was out of the country at the time. He produced his passport to prove that he was not in the country at the time. Mr. Ratemo affirmed that the person who executed the agreement as seller is not the same person who had the Identity Card and passport bearing the name Ayub Shero Baluch. Although the plaintiff's witness tried to press that the real Ayub Baluchi is the one who executed the agreement, it wouldn't make sense that instead of paying him the deposit, he paid the 2nd defendant. Why would one pay money to a third party if the real seller is available " I am persuaded to find that the real Ayub Shero Baluch never executed the sale agreement of 26 May 2012. Whoever purported to sell the suit property to the plaintiff was certainly a rogue who may have been out to swindle the plaintiff. That sale agreement dated 26 May 2012 is not worth the paper that it is written on and cannot be enforced against the 1st defendant.

16. That aside, it is apparent that the suit property is actually owned by the 3rd defendant, and not Ayub Shero Baluch. The plaintiff cannot obtain an order for specific performance as he has no agreement with the 3rd defendant who is the owner of the property and there is nothing before me that shows that the 3rd defendant had transferred its interest to the 1st defendant and has subsequently consented to the 1st defendant selling the property to a third party. There is nothing before me linking the suit property to the 1st defendant at all, so that even assuming that it was the real Ayub Shero Baluch who signed the agreement dated 25 May 2012, an order of specific performance can still not issue, as there is nothing to show that Ayub Shero Baluch could deal with the suit property. It was incumbent upon the plaintiff to undertake due diligence before entering into the sale agreement of 25 May 2012. Due diligence would have revealed that the property is actually owned by the 3rd defendant and a sale agreement could only be entered by the 3rd defendant, or by a person who has acquired the interest of the 3rd defendant, and the 3rd defendant has acquiesced to such sale and is consequently ready to transfer the property to the purchaser. That is not what happened in this case. The plaintiff

instead went to sign an agreement with a complete stranger, a person whose identity was never revealed within this proceeding. He cannot, in those circumstances obtain an order for specific performance.

17. I am aware that in his submissions, Mr. Buti, learned counsel for the plaintiff, brought issue that the 1st defendant disowned his defence when he testified and therefore there does not exist any defence. He also pointed out that the 3rd defendant did not offer any evidence. Still, this does not help the plaintiff. The burden of proof is upon the plaintiff and Mr. Buti correctly referred me to Section 107 of the Evidence Act, that he who asserts must prove. Even if I am to assume that there is no defence, that does not automatically qualify the plaintiff to an order for specific performance. To sustain such prayer, the plaintiff still needs to prove that he purchased the suit property from the registered proprietor or from a person who had purchased the interest of the registered proprietor which I am afraid has not been proved in this case. Thus even without any defence and even without any evidence coming from the defendants, the plaintiff's case would still fail.

18. Moreover, even assuming that the sale agreement was valid, there is no proof of payment of the full purchase price. The plaintiff's witness stated that save for the deposit of Kshs. 5 million, only a further Kshs. 5 million was paid, forget for a moment that no proof of this latter payment was made. All this money was never paid to the person who signed the agreement or to the registered owner. In any event, a whopping Kshs. 40 million would still be due at the very least. How can this court issue an order of specific performance when there is no proof of payment of the full purchase price "

19. I really do not see the need of belabouring the point any further. It is clear to me that there is no substance in this suit and it is hereby dismissed with costs to the defendants.

20. Judgment accordingly.

DATED AND DELIVERED THIS 13TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA



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