



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 411 OF 1998

NAJU INVESTMENTS LTD..... PLAINTIFF

VERSUS

SHIVALI HOLDINGS LTD 1ST DEFENDANT

RAJU SANGHANI.....2ND DEFENDANT

GUILDERS INTERNATIONAL BANK LTD..... 3RD DEFENDANT

NIVA PROPERTIES LTD.....4TH DEFENDANT

JUDGMENT

By a plaint amended on 10th November, 1998 and filed in court on 12th November, 1998, the Plaintiff prayed that judgment be entered against the Defendants jointly and severally for –

a) A declaration that the Agreement dated 9th July 1997 is valid and binding on the Defendants;

b) A permanent injunction do issue restraining the Defendants/Respondents by themselves, their agents, servants or any of them whatsoever from alienating, selling, disposing and or dealing with the premises, until further orders of this court.

c) An order for Specific Performance of the Agreement against the Defendants.

d) IN THE ALTERNATIVE, a Declaration that the sale and/or purported transfer of the said property that is to say All that piece of land known as LR. Number 205/81 (original number 67/1) Nairobi, measuring approximately 0.02036 of a hectare by the Plaintiff to the Defendants is null and void.

e) That the Registrar of Titles be and is hereby directed to forthwith rectify the register in respect of LR. No 205/81 (original No. 67/1) Nairobi, cancel entries relating to the transfer to the Defendants and to reinstate the status quo in the register prior to 9th July 1997 and interest thereby the Plaintiff as the registered owner of the said property.

f) Mesne profits at the rate of Kshs 85,000/- per month from June 1998 until the final determination of this suit.

g) An order for damages for breach of contract

h) Interest due and outstanding on the said sum of Shs. 18,674,400/- at commercial rates, ruling and current at the date of the determination of this suit on (a), (c), (f) and (g) above, until payment in full.

i) Such other relief that the Honourable court may deem just and expedient.

j) Costs of this suit.

All the parties to the suit filed their respective pleadings as required by law. The matter failed to take off on several occasions, and it was finally fixed for hearing on 5th October, 2010. When it was called out for hearing on that date, only the Plaintiff was in attendance. The court noted that by an affidavit of service sworn on 19th July, 2010 and filed in court on the same date, the Defendants' Advocates were duly served with a hearing notice which they received on 13th July, 2010. Indeed, their office date- stamp is endorsed to the effect that the hearing notice was received in their offices at 2.24 pm. Being satisfied that they had reasonable notice to attend court on hearing date, but failed to do so, the court decided to proceed *ex parte*.

The Plaintiff called only one witness, one JOB OKUNA OYUGI, a Director of the Plaintiff Company. The witness referred to documents which were attached to the Plaintiff's list of documents and the Plaintiff's supplementary list of documents, which documents were produced in evidence as exhibits. Referring to the agreement for sale between the Plaintiff and the 1st Defendant, the witness said that the sale was in regard to the Plaintiff's property known as L.R. No 205/81, and it was dated 9th June, 1997. According to that Agreement, the sale price was Kshs 30 million. Special condition No. 5 of the said agreement read as follows –

“5. On completion the purchaser shall pay the purchase priced as follows –

(a) The sum of Kshs 11,325,600/- to Post Bank Credit Limited (in Liquidation) to clear the liabilities of Roths Kenya Ltd. with the said Bank.

(b) The balance shall be paid by the Purchaser as the Vendor shall direct.”

By referring to the Purchaser as Shivali Holding Ltd and/or nominee, the agreement for sale permitted the transfer to be made to the 1st Defendant's nominee, which in this case was Niva Properties Ltd, the 4th Defendant herein.

In his testimony, PW 1 admitted that special condition 5(a) (supra) was duly complied with by the Defendants by the payment of Kshs 11,325,600/- to Post Bank Credit Ltd and consequently the Plaintiff's property was transferred and registered in the name of the 1st Defendant's nominee who was the 4th Defendant. The witness also referred the court to a letter dated 22nd December, 1997, addressed to the 4th Defendant by the Purchaser's Advocate, which letter was attached to the Plaintiff's supplementary list of documents. The said letter confirmed that the transfer of the suit property had been duly registered in the name of the 4th Defendant and under cover thereof forwarded the original title to the said Defendant.

The said letter reiterated further the contents of special condition No. 5 by stating as follows –

“Please do note that the purchase price was to be paid as follows –

1) Kshs 11,325,600/- directly to Post Bank Credit Ltd.

2) The balance of Kshs 18,674,400/- to the Vendor or as the Vendor shall direct.”

Since by 23rd June, 1988 the Plaintiff had not been paid the balance of the purchase price, PW 1 referred the court to a letter of the same date addressed to the Advocates for the Purchaser by the Vendor's Advocates. In the said letter, the Vendor's Advocates demanded payment of the balance of the purchase price within 7 days failing which they would take **"appropriate legal steps to safeguard"** their clients interests. Having not received the balance of the purchase price, the Plaintiff subsequently filed this suit on 24th August, 1998, simultaneously with an application for injunction against the Defendants. The court record shows that when the application came for hearing on 2nd November, 1998, the parties recorded a consent order which read as follows –

"IT IS ORDERED BY CONSENT

1) THAT a temporary injunction be and is hereby issued restraining the Defendant/Respondents by themselves, their agents, servants, or any of them whatsoever from alienating, selling, disposing and or dealing with the property known as L.R. No. 205/81 (original No. 67/1) Nairobi (the "premises") until further orders of this court.

2) THAT the Defendant/Respondent be and is hereby restrained from collecting and or receiving rent from the tenants of the premises.

3) THAT the tenants of the premises be and are hereby ordered to pay rent to the Plaintiff/Applicant in accordance with the current lease of the premises."

It was the evidence of PW 1 that although these orders have never been discharged, the Purchaser (4th Defendant) charged the suit property to Guardian Bank (3rd Defendant). On discovering that development, the Plaintiff's lawyers wrote to the Defendant's Advocates on 2nd February, 2005, to enquire about the said disobedience and breach of the court order by the Defendants. This letter elicited no response. The charge document is annexed to that letter and was marked as No. 3 among the Plaintiff's documents. All this was being done contrary to the subsisting court order.

The final document referred to by the witness was the certificate of title which shows the charge to Guardian Bank Ltd for Kshs 28,000,000/- registered as entry No. 17 against the certificate of title. In spite of being in breach of a court order, the Defendants have not purged their contempt. For the above

reasons, the witness prayed for Prayers (d) and (e) as stated in the Amended Plaintiff filed on 12th November, 1998, and costs of the suit.

From the above deposition, and as explained at the beginning of this judgment, the Defendants did not attend court at the hearing of this case and the witness was not cross-examined. The absence of cross-examination notwithstanding, the witness gave his evidence in a straight forward manner and impressed the Court as being honest and truthful. That evidence was not contradicted in any manner and I therefore find that the Plaintiff has proved its case on a balance of probability. I note that in the case of **EDWARD MUGAMBI v. JASON MATHIU**, Civil Appeal No 286 of 2002, the Court of Appeal stated as follows –

“... surely, failure to pay a substantial portion of the purchase price, i.e, the consideration for the deal, must of necessity amount to a breach of a condition and must entitle the innocent party to a discharge of the contract... Like the two courts below, we are satisfied the Appellant was in fundamental breach of their bargain and the Respondent was entitled to treat the contract as discharged and to seek the eviction of the Appellant.”

These sentiments are as applicable to this matter as they applied in the above case. In this case, failure to pay the Plaintiff the balance of the purchase price amounting to a huge sum of money close to Kshs. 20 million for more than 13 years is an unpardonable fundamental breach of the sale agreement dated 9th June, 1997. This breach entitles the Plaintiff to treat the agreement as discharged.

By reason of the foregoing, I find that the Plaintiff is entitled to judgment in terms of Prayers (d) and (e) of the Amended Plaintiff. I accordingly enter judgment for the Plaintiff as follows –

(i) The sale and/all purported transfer of the suit property that is to say all that piece of land known as L.R. No 205/81 Nairobi measuring approximately 0.02036 of a hectare by the Plaintiff to the Defendants is hereby declared null and void as prayed.

(ii) The Registrar of Titles be and is hereby directed to forthwith rectify the register in respect of LR No. 205/81 Nairobi, cancel the entries relating to the transfer to the Defendants and to reinstate the status quo in the register prior to 9th June, 1997 and insert thereby the Plaintiff as the Registered owner of the said property.

(iii) The Defendants will pay the Plaintiff's costs of this suit.

Orders accordingly.

Dated and delivered in Nairobi this 20th day of December, 2010.

L. NJAGI

JUDGE



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