



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 15 OF 2012

ESTHER KITUYI.....PLAINTIFF

=VERSUS=

EASY PROPERTIES LIMITED.....1ST DEFENDANT

KATHERINE N. KISILA.....2ND DEFENDANT

JUDGEMENT

1. By a further amended plaint dated 30th January, 2018 the Plaintiff sought the following reliefs:-

a) A permanent injunction against the Defendants, by themselves, their servants and agents restraining them and each of them from transferring, selling, charging, leasing, licensing and from in any manner whatsoever alienating the property known as Apartment No A17 Block A erected on L.R. No. 12715/552 Mombasa Road;

b) A mandatory Order of injunction against the Defendants to deliver vacant possession to the Plaintiff and to transfer title in favour of the Plaintiff of the property known as Apartment No A17 Block A erected on L.R. No. 12715/552 Mombasa Road;

c) A mandatory Injunction against the First Defendant to deliver to the Plaintiff absolute and unconditional use of the borehole at the premises;

d) A mandatory injunction against the First Defendant to deliver to construct at the premises a swimming pool and yield the same absolutely and unconditionally to the Plaintiff as proprietor of Apartment No A17 Block A erected on L.R. No. 12715/552 Mombasa Road;

e) Costs of this suit;

f) Alternatively to (b, (c) and (d) above, the First Defendant to reimburse the Plaintiff the purchase price of Kshs.7,697,000.00/= with interest at Commercial Bank rates from March, 2011 until payment in full;

g) General damages for loss of bargain.

2. On or around 8th February, 2011 the Plaintiff entered into a Sale Agreement for the purchase of a three bedroomed apartment in Block A unit No A17 erected on L.R. No 12715/552 for a consideration of Kshs.6,450,000/=. In addition to the purchase price, the Plaintiff was expected to pay other monies such as stamp duty.

3. On 8th February, 2011 the Plaintiff made a deposit of Kshs.700,000/= into the bank account of the 1st Defendant. on 14th February, 2011, a further payment of Kshs. 1,500,000/= was made into the account of the 1st Defendant. On 8th February, 2011 a cash payment of Kshs. 4,447,000/= was made to the 1st Defendant. on 7th March, 2011 the Plaintiff made a final payment of KShs. 1,050,000/= making a total of Kshs.7,697,000/=.

4. When the Plaintiff went to collect the keys to the apartment which she had paid for, she was informed that she could not get the keys as

she had not cleared payment for the house. She was told that the 1st Defendant had not received part of the money though a receipt had been issued to her. She was informed that one of the receipts which had been issued to her had been stolen from the company. The company therefore demanded that she pays Kshs.2,237,000/=. The 1st Defendant alleged that some of the monies which the Plaintiff paid was taken by the 1st Defendant's sales person who did not remit it to the company.

5. The Plaintiff did not agree to meet the demands by the 1st Defendant. The Plaintiff later learned that the house she had intended to purchase had been sold to the 2nd Defendant.

6. The 2nd Defendant was introduced into the suit through an amended plaint dated 15th August, 2016 and filed in Court on 17th August, 2016. The 2nd Defendant neither entered appearance nor filed a defence. There is no evidence that summons were ever served upon her or taken out after the amendment. The record shows that hearing notices have never been served upon her. The 1st Defendant filed an amended defence but did not call any evidence during the hearing as the 1st Defendant's advocate was denied an adjournment on 31st October, 2018. The 1st Defendant however filed Written Submissions.

7. I have considered the evidence adduced by the Plaintiff and the defence of the 1st Defendant as well as the Submissions by the Plaintiff and the 1st Defendant. The only issues for determination are whether the Plaintiff completed paying the purchase price in accordance with the agreement and if so whether the Plaintiff is entitled to the house which she was purchasing or refund of the amount paid to 1st Defendant.

8. The 1st Defendant does not deny that there was a Sale Agreement between it and the Defendant. The 1st Defendant only denies that the Plaintiff did not complete payment of the agreed purchase price. There is also no doubt that the same house which the Plaintiff had paid for has already been sold to the 2nd Defendant.

9. The Plaintiff produced a request for RTGS transfer. The request was for transfer of Kshs.700,000/= from the Plaintiff's account at Barclays Bank of Kenya Limited to the 1st Defendant's account at Diamond Trust Bank of Kenya. The Plaintiff also produced a receipt dated 8th February, 2011 for Kshs.4,447,000/= in cash. In this receipt, the payment of Kshs. 700,000/= which had been transferred electronically on the same day was acknowledged. The Plaintiff also produced a bank in slip which shows that she deposited Kshs.1,500,000/= into the account of the 1st Defendant on 14th February, 2011. This deposit was duly acknowledged by the 1st Defendant who issued a receipt for the amount on the same day. There is also a receipt for Kshs.1,050,000/= which was issued to the Plaintiff on 7th March, 2011. The total amount paid was Kshs.7,697,000/=.

10. The 1st Defendant in its letter of 8th August, 2011 wrote to the Plaintiff informing her that the balance she owed it was Kshs.500353/=. In another letter dated 23rd September, 2011 the 1st Defendant informed the Plaintiff that some receipts issued to her had been stolen from their company receipt book. They singled out receipt No. 248 for Kshs.1,050,000/= which they claimed that the entire money was not received by the company. Another receipt in contention was receipt No. 212 for Kshs. 4,447,000/=. In this receipt the 1st Defendant claimed that though their employee one job Tirimba issued a receipt of Kshs.4,447,000/= to the Plaintiff, the book copy only showed that Kshs.3,260,000/= was received. There was therefore Kshs.1,187,000/= which the 1st Defendant did not receive. The total not received was therefore Kshs.2,237,700/=. It is therefore clear that the Plaintiff paid a total of Kshs.7,697,000/=. If for any reason, some of the monies was not remitted to the 1st Defendant, that is a problem between the 1st Defendant and their employee who is said to be facing a criminal case at Makadara Chief Magistrate's Court. I therefore find that the Plaintiff paid Kshs.7,697,000/= to the 1st Defendant.

11. The house which the Plaintiff had paid for has already been sold to the 2nd Defendant. There is an agreement dated 19th December, 2011 between the 1st Defendant and the 2nd Defendant. As I have already pointed out hereinabove, there is no evidence that the 2nd Defendant was served with summons to enter appearance. The 2nd Defendant may have entered the house and is living in it. It will not be fair in the circumstances to order that the house be delivered to the Plaintiff. The appropriate remedy available for the Plaintiff is refund of the purchase price. The Plaintiff has no valid claim against the 2nd Defendant. I dismiss the Plaintiff's claim against the 2nd Defendant with no order as to costs. I proceed to enter Judgment for the Plaintiff against the Defendant for a refund of Kshs.7,697,000/= with interest at Court rates with effect from 7th March, 2011 until payment in full. The 1st Defendant shall pay costs of this suit to the Plaintiff.

Dated, Signed and delivered at Nairobi on this 21st day of March, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Muthee for Plaintiff.

Court Assistant: Hilda

E.O.OBAGA

JUDGE