



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 337 OF 2010

ROSE WAMBUI KAMAU1ST PLAINTIFF
JUDY WAIRIMU KAMAU.....2ND PLAINTIFF
JULIUS KARUGA MACHARIA.....3RD PLAINTIFF

VERSUS

CECILIA MOU CHARLES HARRIS.....DEFENDANT

JUDGEMENT

1. Dispute herein is in respect to an alleged Sale of that property known as Nairobi/Block 91/399 (herein after referred to as the suit property) which is currently registered in the name of Cecilia Mou Charles Harris (the Defendant).
2. It is the Plaintiffs' case that through an Agreement executed on 9th September, 2009, the 1st and 2nd Plaintiffs together with one Mary Ann Wanjiru Kamau accepted to buy the suit property together with the buildings, fixtures and fittings erected thereon at a consideration of Ksh.35,000,000/=. The Agreement was signed for and on behalf of the 2nd Plaintiff and Mary Ann by one Johnson Kamau Mangucia described therein as their Attorney. The Plaintiff avers that under the terms of this Agreement, they have paid a total sum of Kshs.4,250,000 to the Defendant.
3. The 1st and 2nd Plaintiffs further states that prior to the signing of the Sale Agreement, they (through their Attorney) and one Victor Karume (the Defendant's brother) (hereafter Karume) had executed a Memorandum of understanding (MOU) on or about 17th July 2009. That on the strength of the said MOU, and on representation on the part of Mr. Karume, the Plaintiffs acquired possession of the suit property since July 2009 with the full knowledge, authority and or consent of the Defendant. They since carried out repairs, modifications and alterations to the suit property.
4. There was failure to complete the transaction within the completion period. The Plaintiffs attribute this to the failure of the Defendant to forward to them the Approved Building Plan to the property. That the Defendant was only able to obtain the said Plan on 2nd December 2009 and deliver it to the Plaintiffs on or around 11th December 2009.
5. This necessitated a variation to the original Agreement which was done vide a Deed of Variation dated 19th February 2010. The Plaintiffs see two highlights to the said Deed of Variation. One, the completion

date was extended for 90 days from 19th February 2010. Second Mary Ann was substituted with the 3rd Plaintiff herein.

6. The Plaintiffs complain that in breach of the MOU, the Agreement for Sale and the Deed of Variation, the Defendant purported to forcefully evict the Plaintiffs from the suit property on or about 10th April, 2010. The particulars of breach of contract are set out in paragraph 16 of the amended plaint dated 16th December 2011.

7. The Plaintiffs contention is that the Defendant had fraudulently and maliciously represented to them that they were free to be in possession of the suit property as they awaited the transfer thereof to themselves. It is averred that the Defendant knew well that such representations were false and untrue or were made recklessly not caring whether they were true or false. Particulars of fraud and malice on the part of the Defendant are set out in paragraph 17 of the Pleading as follows:-

- a. Inducing the Plaintiffs to take vacant possession of the suit property and do any repairs, modification or alteration of their desire upon payment of the ten (10%) per cent deposit of the purchase price.
- b. Representing to the Plaintiffs that the suit property would be transferred in their name upon payment of the balance of the purchase price to be secured by a suitable undertaking issued by the Financier's Advocates.
- c. Deliberately writing to the Plaintiffs' Financier, Savings & Loan (k) Ltd objecting to the sale of the suit property on allegations that the Plaintiffs were in occupation illegally, with the sole aim of frustrating the transaction.
- d. Deliberately approaching the Plaintiffs' Financier, Savings & Loan (k) Ltd with intention to defame the Plaintiffs and jeopardize their chances of getting financing.
- e. Purporting to terminate the contract citing reasons that the suit property could not be sold since it is "next to her heart".
- f. Visiting the suit premises in the absence of the Plaintiffs on or about 24/02/2010 and thereafter locking in the Plaintiffs' caretakers in the suit property thus detaining them illegally.

8. The Plaintiffs state that they are ready and willing to complete the transaction and seek the following orders:-

- a) An order of specific performance.
- b) And in the alternative, General damages for breach of contract.
- c) Special damages for Kshs.3,500,000.00.
- d) Refund of Kshs.4,250,000.00.
- e) Costs of this suit.
- f) Interest on (b), (e) and (f) above at court rates.
- g) Any other relief this Honourable Court may deem fit to grant.

9. The Claim has been resisted by the Defendant. It is the Defendant's case that Mr. Mungucia is the corner stone of a fraudulent scheme to cover up and legitimize the Plaintiffs unauthorized possession of her property. She denies ever appointing her brother Victor Karume to act on her behalf and contends

that she is a stranger to the alleged MOU. It is her case that she has never consented or given permission to the Plaintiffs to take possession and do any repairs, modification or alterations to the suit property. She further alleges that the Plaintiffs acted fraudulently in acquiring possession of the said suit premises. The particulars of fraud are set out in paragraph 8 of her Amended Statement of Defence as follows:-

- a) Entering into a memorandum of understanding with one Karume/2nd Defendant without the 1st Defendant knowledge.
- b) Entering into agreement with Victor Karume/2nd Defendant who did not have capacity to transact on the suit property.
- c) Acquiring possession secretly and without disclosing the same to the 1st Defendant.
- d) Advancing the 1st Defendant a fraudulent acknowledgement and Transfer document prior to making the final payment.
- e) Substituting/altering the duly executed Agreement for Sale dated 5th August, 2009 with 9th September, 2009 and providing for a completion period of (90) days which was not on the Sale Agreement sent to the Plaintiff and signed on every page, on 5th August, 2009.
- f) Altering and/or substituting a Deed of Variation from 28th January, 2010 to 19th February 2010.
- g) Altering the period for completion from 30 days to 90 days.
- h) Fraudulently attesting to owning the 1st Defendant's property, as alleged on the fraudulent P/A, thus nullifying the Sale Agreement, not to mention any other.

10. In respect to the Sale agreement, the Defendant avers that she executed it on 5th August 2009. But the same has lapsed and is not capable of enforcement.

11. As to why there was delay in completion of the Agreement the Defendant blames the Plaintiffs and states that it was due to the Plaintiffs inability to secure appropriate documentation for Manguchia's Power of Attorney. The contention by the Defendant is that the approved Building Plan was not a requirement under the agreement for sale and its insistence was an afterthought to frustrate and delay the conclusion of the deal.

12. On the Deed of Variation the Defendant avers that it extended the Sale agreement for a period of 30 days on the Plaintiffs misrepresentation that it was required by the Bank to release funds. However, the Defendant denies knowledge of the substitution of Mary Ann with the 3rd Plaintiff.

13. The Defendant asserts that the date of execution of the Deed of Variation was altered from 28th January 2010 to 19th February 2010 without her consent. This necessitated the termination of the same on account of fraud and falsification of attestation. That in any event the Deed of Variation is derived from a Sale Agreement that had expired and which is a nullity.

14. Sometime in February 2010, the Defendant visited Kenyan and on 18th February 2010 learnt that the Plaintiffs had, in breach of the terms of Agreement for Sale, taken possession of the suit property and caused massive damages, modifications and alterations. The Defendant has set up a Counter Claim in which she seeks the sum of Kshs.4,778,275.50 which comprises of, inter alia, a Claim for loss and damages to her suit property.

15. Before setting out the evidence adduced by the respective parties it is necessary for this Court to give a brief history of the pleadings herein. In the Amended Plaint dated 16th December 2011, Karume had been enjoined as a 2nd Defendant. Aggrieved with that, Karume moved the Court through a Notice of

Motion dated 12th October 2012 seeking orders that the amended pleadings be struck out. That Motion was determined by Havelock J. on 20th November, 2013 in which he allowed it and ordered that the amended Plaintiff be struck out as against him.

16. Later through an Application dated 5th November 2014, the Defendant sought the striking out of the amended Plaintiff and in essence the dismissal of this suit. That Application was dismissed by Justice Gikonyo on 27th April 2015.

17. The taking of evidence commenced on 6th April, 2016 before Kariuki J. Johnson Kamau Mungucia (PW1) had executed a witness statement dated 16th December 2011 which formed part of his evidence in chief.

18. PW1 is the father of the 1st and 2nd Plaintiffs and deals with buying and selling of property. Through an agent whose name he gave as Ndegwa they became aware that the suit property was up for sale. The agent who was accompanied by Karume showed him the copy of title property and informed him that the Defendant who was the owner thereof was out of the Country. A price was bargained and settled at Kshs.35,000,000. Produced in Court was a Letter of Offer dated 12th June, 2009(Plaintiffs' exhibit page 3) to the 1st and 2nd Plaintiffs and Mary Ann. Although the letter is in the name of the Defendant, it appears to have been signed on her behalf.

19. It was his evidence that he entered an MOU with Karume dated 17th July 2009 in which it was agreed that he would pay sum of Kshs.1,000,000 to Karume and a sum of Kshs.2,500,000 by way of telegraphic transfer to the account of Karume. Following this understanding the Plaintiffs paid Ksh. 1,000,000/= to Karume and two Bankers Cheques for Kshs. 2,500,000 in the name of the Defendant. The witness told Court that as agreed in the MOU they took possession of the property. At the time the property was an empty shell and they carried out repairs including installing water, electricity, septic tanks and toilets which cost the sum of Kshs. 3,567,499 (Plaintiffs' exhibit pages 74 -428).

20. That all seemed well up to December when Karume demanded rent for seven months (Plaintiffs' exhibit page 13). PW1 responded to the demand (Plaintiffs' exhibit page 14 and 15). The demand for rent continued in 2010 when the Defendant called and demanded rent of Kshs.100,000 per month. It was the evidence of the witness that when he told the Defendant that the rent was not contemplated in the Agreement, she threatened to cancel the deal. On 20th March, 2010 (Plaintiffs' exhibit 40-42)the Defendant wrote to the Plaintiffs' Advocates purportedly cancelling the deal. Later, the Plaintiffs and the Defendant met and that they Defendant agreed to proceed with the Sale. It was the evidence of the PW1 that the Defendant sent to him a short message(SMS) confirming this. The record of Justice Kariuki is that the text message in the telephone of the witness was shown to Court.

21. On a different aspect of the case, the witness told Court that the Approved Building Plans to the building were obtained on 2nd December 2009 after the Sale Agreement had lapsed. That the Plaintiffs' advocates sought an extension of 90 days and this was granted through the Deed of Variation of 19th February, 2010.

22. That when the Defendant came back from USA she started complaining and that is when the witness learnt that she had a change of mind.

23. Under cross examination, PW1 explained that the MOU was entered to enable the Defendant receive some money prior to the entering of the Sale Agreement and that, indeed, a down payment was paid prior to the Sale Agreement.

24. He confirmed that 10% of the Sale Price having been paid, the rest was to be financed through a Bank Loan. He denied that the delay in completing the transaction was caused by the lateness in obtaining the Power of Attorney.

25. The 2nd Plaintiff's witness was Rose Wambui Kamau (the 1st Plaintiff). She reiterated the contents of her pleadings and the evidence given by her father (PW1).

26. In respect to the question of Approved Building Plans, the witness testified that Karume informed them that the Defendant did not have Approved Plans and that the Plan was later to be stamped on 11th December 2009.

27. The witness was questioned in respect to a draft Sale Agreement which was annexed to the Affidavit of the Defendant in support of her Motion of 5th November 2014. Clause 8.2 read as follows:-

“Upon receipt of confirmation of the availability of the Completion Documents, the Purchaser shall pay to the Vendors' Advocates in equal shares the full balance of the Purchase Price (that is to Kenya Shillings Thirty One Million Five Hundred Thousand (shs. 31,500,000/-) and simultaneously therewith the Vendor's Advocates shall release the Completion Documents to the Purchaser's Advocates. The balance of the Purchase Price shall not be released to the Vendors until registration of the Conveyance has been effected PROVIDED THAT “should due and effective registration not take place within 30 calendar days of delivery of the dully executed Conveyance to the Purchaser by the Vendors, then the Vendors' Advocates shall have to irrevocable authority of the Purchaser to release balance of the Purchase price to the Vendors”.

She denied that the Purchasers did not agree to the said terms.

28. The witness told Court that all along, Karume acted on behalf of the Defendant. He is the one who gave them an offer. The first payment was made into his account and although the subsequent payments were made in the name of the Defendants, the Cheques were collected by him.

29. As to why the Power of Attorney was necessary the witness explained that this was to shorten the process because her sisters were out of the Country, one in Bermuda and the other in Botswan.

30. Teresia Wanjiku Kamau (PW3) is the mother of the 1st and 2nd Plaintiffs. Her evidence collaborated that of the first two witnesses.

31. Hearing of the Defence case commenced on 7th February 2017. Just as the Plaintiffs' witnesses, the Defendant gave evidence that highlighted her Defence and Counterclaim as pleaded. After receiving information from her brother Karume that their family friend a Mr. Lazarus Ndegwa had been in touch with PW1 and PW3, she received a telephone call from PW3. This was in the month of July 2009 and PW3 expressed her interest to purchase the property. The Defendant instructed her former Advocate, a Mr. Munene, to prepare an Agreement for Sale. Although a draft was prepared, Karume informed her that PW1 and PW3 had suggested that for purposes of speeding up the sale they should use the same firm of Advocates who were also the Lawyers for the Bank that would provide finance for the purchase.

32. That Law Firm was Kale Maina & Bundotich Advocates. Important from the point of view of the Defendant is that this was the first time that the Purchasers had clearly indicated that they were going to seek a loan for the purchase.

33. On 5th August 2009, while in the United States, where she was then resident, she signed and dated the agreed version of the Sale Agreement. She then couriered it to Kenya on 5th September 2009. At that time the Agreement had not been witnessed. Four days later, on 9th September 2009 (D Exhibit page 3) the Advocates sent to her a letter enclosing a transfer for her execution. The Advocates also inform the Defendant that the Power of Attorney Number for PW1 would be sent to her for insertion in the Agreement upon receipt of the registered document. The witness has taken issue with the question of the delay in the procurement of the Power of Attorney in favour of PW1.

34. The Defendant visited Kenya on 18th February 2010. At that time the Agreement which she had

signed on 5th August 2009 had expired. To her shock, she discovered that the Plaintiffs had taken possession of the property without her knowledge, consent or agreement. When she visited the property, she saw that alterations had been made and the original design changed. Her property had been turned from a Family Housing Unit to a Motel. PW1 and PW3 apologized for these state of affairs and she relented on condition that she would receive payment before her departure from the country which was due for 13th March 2010.

35. At the end of March 2010 (although the witness statement talks of 2009), the witness says that she had run out of patience as the purchase price was not forthcoming. On April, 2010 she requested the Plaintiffs' caretaker to pack and move out of the property and she thereby repossessed it. She had forewarned the Plaintiffs that she did not intend to be bound by the Legal commitments and sent a letter of termination of the transaction to the Advocates and the Bank.

36. The witness explains why she took the view that the Plaintiffs had fundamentally breached the Sale Agreement. She was unhappy that the Plaintiffs had taken possession without her knowledge using what she asserts are two fraudulent documents. First, that the illegal Power of Attorney was intended to fraudulently give the 2nd Plaintiff the ownership of her property. Secondly, that the MOU was illegitimate. She also came to learn that the alleged Deed of Variation she had signed was invalid as the original Contract had expired and was fraught with illegality.

37. The Defendant has a Counterclaim for Kshs.4,778,257.50/=. Joseph Wiston Nandi Odhingo (DW2) is a Quantity Surveyor and the Principal of the firm of Quest Consultant Limited. He holds a Bachelor of Arts Degree in Building Economics and a Master of Arts in Construction Management. On the instructions of the Defendant, he gave an estimate cost for the restoration of the structure standing on the suit land to its original design. He prepared a Report which put the total cost for restoration at Kshs.4,629,275/=. This forms the bulk of the Plaintiffs Counterclaim.

38. Invited by the Court, the Plaintiffs and Defendant filed written Submissions. For a matter of this nature the submissions appear to be lengthy. The Defendant's submissions, for example, run into 28 typed pages. I do not propose to rehash the arguments otherwise there will be a danger, that this Judgement will be a prolix. Instead, I shall cite those submissions if and where they are relevant.

39. Both sides proposed their issues for determination. Keeping them in mind, the Pleadings, the evidence and the submissions herein, this Court sees the following emerging for determination;-

- (1) Was there a valid contract of Sale between the parties?
- (2) Did the contract grant possession to the Plaintiffs before completion or was possession otherwise granted to the Plaintiffs?
- (3) Was the contract validly extended?
- (4) Who breached the contract?
- (5) Is the Plaintiff entitled to the orders sought in the Plaintiff?
- (6) Is the Defendant entitled to the orders in the Counterclaim?
- (7) What is an appropriate order on costs?

40. There does not seem to be controversy that the journey herein began with discussions between a Mr. Ndegwa and Karume on the one hand and PW1 and PW3 on the other over the possible purchase of the suit property by the latter. Although the Defendant acknowledges that Karume was in the picture she denies that he was her representative. She further concedes that prior to formalizing the contract Karume, was to collect the 10% Deposit on her behalf.

41. It is common ground that the discussions yielded an arrangement for Sale at a purchase price of Kshs.35,000,000/= with a deposit of 10% thereof being Kshs.3,500,000/=. The deposit was to be paid prior to the execution of a Contract and it is not in dispute that it was paid as follows:-

(i) Kshs.1,000,000/= to Karume.

(ii) Kshs.1,500,000/= vide Bankers Cheque No.529829 of 28th July 2009, and Kshs.1,000,000/= vide Bankers Cheque No.816765 of 29th July 2009 in the names of the Defendant and collected by Karume.

The Defendant acknowledges receipt of these payments.

42. A controversial part of the Plaintiff's case is that Karume and PW1 entered into a Memorandum of Understanding on 17th July 2009. In the MOU (Plaintiffs Exhibit page 4), PW1 is described as Representative or Attorney to the 1st and 2nd Plaintiffs herein. The Defendant denies knowledge of this MOU and was emphatic that she did not grant any authority to Karume to enter it on her behalf.

43. The controversy of this MOU is clause 4 which reads,

“The Purchaser is to take vacant possession of the property and do any repairs, modification or alteration of their desire on the payment of the above monies and thereafter settle the full settlement within the agreed 90 days of this sale”.

44. The suit property was at the material time registered under the Provisions of The now repealed Registered Land Act (Chapter 300 Laws of Kenya). See Certificate of Official Search (Plaintiffs Exhibit page 70). The Defendant was and still is registered as the proprietor thereof. At the hearing the Plaintiffs were unable to demonstrate that Karume had any authority (either as a holder of a Power of Attorney or otherwise) to confer possession of the property to PW1 or the Purchasers. The MOU could not confer any possession of the suit property to the Purchasers as Karume was bereft of any legal authority to confer such right.

45. Importantly as well on the issue of possession is that a Sale Agreement was subsequently entered between the 1st and 2nd Plaintiffs and MaryAnn as Purchasers and the Defendant as Vendor. The date when the Sale Agreement was entered is not agreed. The Plaintiffs assert that it was on 9th September 2009 while the Defendant contends that it was on 5th August 2009. What is vital is that there is consensus that there was a duly executed Sale Agreement.

46. Clause 1.5 of the Agreement reads,

“This Agreement constitutes the entire Agreement of the Parties with regard to its subject matter and supersedes and cancels all previous Negotiations and Agreements”.

Even if it was to be accepted that the MOU was valid (which the Defendant refuses to accept) then anything in it that was contrary to the terms of the Sale Agreement was brought to an end by clause 1.5 of the said Agreement. And clause 7.1 of the Sale Agreement on possession was clear,

“The Purchasers shall be entitled to vacant possession on completion”

47. It is the finding of this Court that, *ex facie*, the MOU could not confer any possession of the suit land to the Purchasers and that even if it did the terms of the Sale Agreement brought that possession to an end at the date of execution of the Sale Agreement (be it 5th August 2009 or 9th September 2009).

48. The evidence by the Plaintiffs is that they moved into the suit property in mid July, 2009 and began to carry out some renovations. But the finding of this Court is that the possession was not lawfully authorized and in any event could not continue after execution of the Agreement whilst the contract

remained uncompleted. There is therefore a strong and forceful argument made by the Defendant that the terms of the Sale Agreement were breached right from the outset and as a consequence the contract was null abinito.

49. To this argument the Plaintiffs invoke estoppel. The Plaintiffs submit that through her words and actions the Defendant acquiesced to the Plaintiffs possession. These rival arguments are considered in the context of events that happened after the entering into the Sale Agreement.

50. The completion date of the Agreement was 90 days from the date of the Agreement. That Sale did not complete within the 90 days even if the latter date of 9th September 2009 is taken as the date of the Agreement. The Plaintiffs attribute the delay in completion to lack of Approved Building Plans to the suit property which was required by their Financiers as one of the Completion documents.

51. The Defendant does not agree and asserts that the Approved Building Plans was not a requirement under the Agreement for Sale and was merely an afterthought. The Defendant submits that the delay was due to the Plaintiffs inability to secure appropriate documentation for the Power of Attorney in favour of PW1.

52. Clause 5.3 of the Sale Agreement lists the following as the Completion Documents:-

5.3 On or before completion date and against the tender of an appropriate professional undertaking to secure the balance of the purchase price, the Vendor shall forward to the Purchasers' Financier's Advocates the following documents:-

5.3.1 An instrument of transfer (in triplicate) duly executed by the Vendor in favour of the Purchasers.

5.3.2 All original documents of title in respect of the property which are in the Vendor's possession.

5.3.3 All the necessary consents required for registration of the transfer.

5.3.4 Copies of;

- Copies of the Vendor's Income Pin Certificate and National Identity Card.

- 3 copies coloured passport size photographs of the Vendor.

5.3.5 Valid Land Rent and Rates Clearance Certificates (if any).

53. Clearly, it was not in the contemplation of the Sale Agreement that the Approved Building Plan was one of the Documents required to complete the Sale. The evidence of PW1 (see his witness Statement), was that, prior to entry of Sale Agreement, they were aware that the Plans had to be redone due to an error of the Plot Number on the original Approved Building Plans. If the Purchasers were aware of this and knew that their Financiers would require the Plans before approving Finances then it was incumbent upon the Purchasers to insist that completion be conditional, inter alia, upon the release of the Approved Building Plans. They did not and blame cannot be placed on the doorstep of the Defendant.

54. That notwithstanding, the delay in completion may not turn out to be of significance given that the Defendant acceded to an extension of the period for completion. The Defendant however thinks it was an extension for 30 days while the Plaintiffs assert that it was for 90 days from 19th February 2010. That extension was in a Deed of Variation.

55. In her oral evidence (under cross-examination) the Defendant stated,

"This is a Deed of Variation. I signed this Deed of Variation (page 3) I was tired, sleepy. I trusted

these people. The relationship was congenial. I did not look to see that the extension was for 3 months”.

56. The Defendant sought to rely on a letter dated 1st January 2010 (Defendant Exhibit page 12) in which Kale, Maina & Bundotich had advised that the transaction would be finalized on or before 31st January 2010 to demonstrate that her understanding was that the transaction would close within 30 days. However, it is evident that the Deed of Variation was sent to her for signature on 20th January 2010 (D Exhibit page 112) and that upon execution she sent it back on 5th February 2010 (D Exhibit pages 31-32). That would be a date after 31st January 2010.

57. It seems to this Court that at the time of execution the Defendant was fully aware of the purport and implications of the Deed of Variation. That Deed was of crucial importance in one respect. It extended completion for 90 days from 28th January 2010 (going by the date of the Defendant) or 19th February 2010 (accepting the Plaintiffs’ date). Whilst the Defendant thrashes the extension by submitting that it could not breath life into a Contract that was already expired, the Deed of Variation itself acknowledged that on the date of its execution, the completion date had past. Recital C of the Deed reads,

“By an Agreement of Sale dated the 9th day of September two thousand and Nine, it was agreed that the completion date would be Ninety (90) days from the date of the Agreement (now past) or such other date as the parties would mutually agree.*(my emphasis)*”

The parties were well aware that the intention of the Deed was to revive the contract for another 90 days from the date of the Deed.

58. There is a second limb of the Deed. Under the terms of the Sale Agreement, the expression ‘Purchasers’ was to include the Personal Representatives and assigns of the named Purchaser. In the Deed of Variation, MaryAnn assigned her right to purchase the property to Macharia Julius Karuga.

59. Whether the date of the Deed is 28th January 2010 or 19th February 2010, it is common ground that the Defendant terminated the contract before the expiry of the extended completion date. In this regard two emails of 31st March 2010 (D Exhibit pages 125-126) from the Defendant to, amongst other persons, the firm of Kale Maina & Bundotich Advocates need to be considered.

60. In the email sent at 10.33 am, the Defendant explains it to be a formal Notice of cancellation and backdates it to 20th March 2010. In it she raises the issue of the occupation of the house. Again in the email sent out 1 hour later she states,

“This is to advise you that I have decided to cancel the Sales Agreement dated 9th September 2009. The reason for my decision is a violation of the agreement by the aspiring purchasers, by allowing the occupation of the premises by related parties before the full execution and completion of the Agreement. I also note that I am holding the aspiring Purchaser entirely responsible for that extensive damage done to the house”.

From the mail, the Defendant makes it clear that she is walking out of the deal because of the alleged illegal occupation of the suit property.

61. The position of the Plaintiffs, as stated earlier, is that even if it were to be taken that their entry and occupation was illegal, the Defendant would be estopped from raising the issue because she had through word and Deed acquiesced to the Plaintiffs possession.

62. In his evidence, PW1 states that on 27th February 2010 the Defendant demanded rent of Kshs.100,000/= and enquired about the alteration done on the property. That his response was that he could not commit to the issue of rent but promised to consult the family. That on 1st March 2010, the Defendant sent a text message confirming that the agreement could proceed. The Court record indicates

that the text message was shown to Judge Kariuki by PW1 as he testified.

63. On her part the Defendant told Court, in her oral testimony, that she asked the Plaintiffs to pay rent for the period they had occupied the house for purposes of restarting the Agreement. In her written statement she stated,

“That afternoon, I had a meeting with Mr. Mangucia and his wife, when they apologized and implored for my understanding, and I relented, on condition that my payment be made as expected, before my departure from the country. I was made to believe that they were in a position to pay the balance of the purchase price within (30) days, not even aware that my extended Sale Agreement had been extended for another 9 days by then. I had hoped to finalize within a period, but before my schedule return for 13th March, 2010”.

64. There is also this critical evidence in the Defendant’s letter of 4th March 2010 (D Exhibit pages 113-114) to the Advocates. After expressing her displeasure at the manner the purchasers had taken possession of the suit property she nevertheless reiterates her intention to continue with the sale and asks the Advocates, inter alia,

“...if you could negotiate with them on the need to pay some form of rent, as we await the finalization..”

Through her words and Deed the Defendant had acquiesced to the possession that had angered her early.

65. It would seem, and I hold, that the issue of payment of some form of rent was not a pre-condition to completion. Indeed in her Notice of cancellation, the Defendant **does not** state that she cancels the deal because of the refusal or reluctance of the Plaintiffs to pay rent for the period of occupation.

66. Now, Section 120 of The Evidence Act is on General estoppel and provides as follows:-

“When one person has, by his declaration, act of omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing”

In the Plaintiffs Amended Plaintiff and Amended Reply to the Defendant Statement of Defence and Amended Defence to Counterclaim, the Plaintiffs plead that they had acquired possession of the suit premises with the full knowledge, authority and /or consent of the Defendant(see paragraph 17 thereof).

67. The Plaintiffs pleaded estoppel and had on a balance of probabilities proved that the Defendant had consented or in the very least acquiesced to the Plaintiffs possession. That being the case, this Court is of the view, and does find, that the Defendant is estopped from insisting that the occupation by the Plaintiffs (which was initially unlawful) rendered the Sale Agreement a nullity from the beginning. Any illegality or blot to the Sale Agreement was cleansed when the Defendant acquiesced to Plaintiffs occupation of the suit land. Further, the Defendant could not put forth occupation as a reason to terminate the Contract of Sale.

68. In addition, any insistence by the Defendant that the Plaintiffs should make payment of the purchase price before the end of extended completion period (be it 90 days from 28th January 2010 or 19th February 2010) was outside the Contract and could not be a basis for calling off the Contract.

69. In the end I find that the purported termination of the Agreement before the extended completion date was a breach of Contract. As the Plaintiffs have expressed a readiness and willingness to complete the transaction, their Claim for Specific Performance will succeed.

70. In the same breath the Defendants Counterclaim fails. But as the Defendant may have been entitled to some rent or mesne profits for the period of the unlawful occupation, I am inclined not to burden her with

an order of costs on the Counterclaim. Each party shall bear their costs on the Counterclaim.

71. The upshot is Judgement is entered herein in favour of the Plaintiffs for Specific Performance as prayed for on the Amended Plaint of 16th December 2011. The Plaintiffs shall also have costs of their Claim.

Dated, Signed and Delivered in Court at Nairobi this 22nd day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Defendant present in person

N/A for Plaintiffs

Alex - Court clerk