



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CASE NO. 1498 OF 2007**

**BONIFACE NJERU NGEMI.....1<sup>ST</sup> PLAINTIFF**

**SOPHIA N. WAWERU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**VINCENT DAVIS KIHARA.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs entered into a sale agreement with the Defendant on 11/3/2003 for the sale of half an acre (1/2) which was to be excised from the Plaintiff's piece of land known as L.R. No. 2250/6 situated along Mukoma Road, Nairobi. The plot was identified as portion D in the deed plan annexed to the sale agreement.
2. The purchase price for the plot was agreed at Kshs. 1.6 million out of which 400,000 was payable on execution of the agreement; and the balance would be paid before the completion of the agreement. The other terms of the agreement were that the purchaser would have vacant possession of the land on execution of the agreement, and that before completion; the vendors would procure the issuance of a title for the plot and execute a transfer in favour of the purchaser.
3. The other condition was that the vendors were to construct an access road to the plot within 30 days of the agreement. The completion date was stated as 90 days from the date of the agreement.
4. Michael Ocharo Advocate of Ocharo and Company Advocates acted for both the vendors and purchaser in the sale transaction. Each party was expected to bear its own legal fees. The sale was subject to the Law Society of Kenya Conditions of Sale as long as they were not inconsistent with the terms of the sale agreement.
5. It is not in dispute that the Defendant paid the deposit of Kshs. 400,000 on 10/3/2003 and also made further payments amounting to Kshs. 603,000 on various dates and that there is an outstanding balance of Kshs. 557,000.
6. In the amended plaint filed in court on 5/10/2007, the Plaintiff complains that the Defendant stormed into the Suit Property on 21/7/2007 accompanied by a group of men and started fencing the plot using wooden posts and barbed wire. The Defendant further dug a pit latrine and built temporary structures on the plot despite the Plaintiffs protests. The Plaintiffs aver that the Defendant was in breach of the contract for the sale of the plot having failed to pay the purchase price within the agreed period and that they had

therefore repudiated the agreement for sale.

7. The Plaintiffs further complaint was that on conducting a search they found that the Defendant had registered a caveat based on the sale agreement of 11/3/2003 against a totally different plot that they own.

8. The Plaintiffs seek a permanent injunction to restrain the Defendant or his agents from dealing with the suit plot and a declaration that the Defendant had no right to occupy or remain on the suit plot since he was in breach of sale agreement; and that the Plaintiffs were entitled to repudiate the contract and retain the deposit of the purchase price as general damages for breach of contract. The Plaintiffs also seek the withdrawal of the caveat registered against their land.

9. On its part, the Defendant admits the sale agreement but maintains that the Plaintiffs breached the agreement by failing to execute a transfer in his favour together with all the documents necessary to complete the transaction before the completion date.

10. The Defendant also maintains that the Plaintiff failed to prepare the access road to the plot within the agreed period of 30 days. The Defendant registered the caveat against the Plaintiffs' land to protect his interest as a purchaser pending the completion of the sale.

11. The Defendant counterclaimed an injunction to restrain the Plaintiffs from continuing to breach the agreement of sale; and an order for specific performance of the sale agreement dated 11/3/2003. The Defendant seeks a further order for the Plaintiff to execute the documents necessary to transfer the purchased plot to the Defendant as well as damages in lieu of or in addition to the order for specific performance.

12. The 2<sup>nd</sup> Plaintiff testified in court and adopted her witness statement which was filed in court on 25/3/2014. She stated that the 1<sup>st</sup> Plaintiff died and she was the representative of his estate. She stated that the completion date was 90 days from 11/3/2003 and that the Defendant paid the sum of Kshs. 1,003,000 through instalments. She stated that she paid the sum of Kshs. 100,000 for the construction of access road to the plot. Upon the Defendant failing to pay the balance of the purchase price within the agreed period, the Plaintiff issued cheque number 431144 for Kshs. 1,003,000 being a refund of the purchase price which the Defendant had paid. The Defendant however, returned the cheque saying he wanted the land. The witness stated that the Defendant was occupying the land. He was cultivating it and had put a watchman on the plot.

13. The Defendant testified in court and relied on his witness statement which was filed in court on 12/10/2012. He stated that he bought ½ an acre of L.R. No. 2250/6 which was marked as portion D. He maintained that the Plaintiffs were in breach of the sale agreement and that he registered the caveat after carrying out investigations and establishing that portion D shown in the deed plan annexed to the sale agreement had been given land reference 2250/112. He stated that the Plaintiff gave him possession of the plot upon execution of the agreement pursuant to a clause in that agreement. The Defendant relied heavily on the ruling that this court delivered when it dismissed the Plaintiffs application for injunction.

14. The court has considered the evidence adduced in court. The issues for determination are:-

- i. Was the Plaintiff entitled to repudiate the contract?
- ii. Did the Defendant register a caveat against a different plot? Should that caveat be removed?
- iii. Should the Defendant be restrained from using, occupying, developing or dealing with the suit plot?
- iv. Are the Plaintiffs entitled to retain the deposit of the purchase price in lieu of general damages for breach of contract?
- v. Was the sale agreement drawn by an unqualified person? Is it valid?

15. The Plaintiffs did not produce evidence to show that they incurred the sum of Kshs. 100,000 in having the access road to the plot constructed. The Defendant produced an acknowledgement of receipt dated 31/5/2004 in which George Waweru of Natisa Timber and Hardware acknowledged receipt of Kshs. 82,000 from the Defendant for the construction of the access road on a property referenced Mukoma Road L. R. No. 2250/6.

16. It is not in dispute that the Defendant only paid Kshs. 1,003,000 of the agreed purchase price of Kshs. 1.6 million. It is also not in dispute that the Plaintiff did not issue a completion notice to the Defendant. The completion date under the agreement was 90 days from 11/3/2003. Up to the time the suit was filed the Defendant had not paid the full purchase price.

17. The court held in **Gatere Njamunyu V. Joseck Njue Nyaga** (1983) KLR 282 that where completion does not take place as intended by the parties, the option open to the concerned party is to give notice to the defaulting party making time of the essence and that where there is no notice making time of the essence, the court will require precise compliance with stipulations as to time where the circumstances of the case allowed. The court further held that specific performance cannot be claimed in respect of a dealing which becomes void. The court observed that the return of the money by the Defendant to the Plaintiffs was notice that the Defendant had rescinded the agreement. The Plaintiff therefore, had notice of the default which he was required to rectify within a reasonable time which he did not rectify. The court observed that had the Plaintiff paid the balance of the purchase price within a reasonable period equity would have come to his aid if the Defendant refused to complete.

18. The court finds that the Defendant here had notice of the rescission of the agreement when the Plaintiff returned the sum of Kshs. 1,003,000/= which the Defendant rejected.

19. The court finds that the Defendant was in breach of the terms of the sale agreement when he failed to pay the balance of purchase price and he could not therefore demand specific performance of the agreement by the Plaintiff who was entitled to rescind the sale. The legal effect of rescission is that it puts the parties back to the positions they were before the contract.

20. Where party choses to rescind a contract it is only fair he returns the purchase price for otherwise it will be unjustly enriched. The 2<sup>nd</sup> Plaintiff ought to refund the sum of Kshs. 1,003,000 which the Defendant paid as purchase price.

21. The Plaintiff did not adduce evidence to show that the Defendant registered the caveat against a plot which is different from the one sold to the Defendant.

22. The other issue the court has to consider is whether the sale agreement was void for being drawn by an unqualified person. Both parties were represented by Michael Ocharo Advocate of Ocharo and Company Advocates. A copy of the Law Society of Kenya letter dated 17/3/2010 addressed to the Defendant's advocate confirms that Ocharo Michael Omule Advocate (P105/3952/99) did not hold a practising certificate for 2003. In the case of **Omulo V. Small Enterprises- Finance Company Limited & Another** (2005) 1 KLR 668 the court held that according to Sections 31, 33 and 34 of the Advocates Act an unqualified person cannot purport to exercise the duties of a qualified person and that the documents prepared and witnessed by a person who is not an advocate were void. Both parties were represented by an unqualified person.

23. A party seeking the equitable remedy of specific performance of a contract must show that he has performed all the terms of the contract which he has undertaken to perform (See Halsbury's Laws of England, Vol. 44, 4<sup>th</sup> Edition Paragraph 487 and **Gurdev Singh Birdi and Narinder Singh & Another v Abubakar Madhubuti** (1997) eKLR. The Defendant not having performed the terms of the contract by paying the full purchase price is not entitled to an order of specific performance.

24. The court finds that the Plaintiff has proved her case on a balance of probability and grants prayer (a) and (d) of the Amended Plaint save that the Plaintiff will not retain the deposit of the purchase price in lieu of the general damages for breach of contract.

25. The Plaintiff is also awarded damages for breach of contract in the sum of Kshs. 200,000. The Defendant's counterclaim is dismissed. The Plaintiffs will have the costs of the suit and the counterclaim.

Dated and delivered at Nairobi this 14<sup>th</sup> day of December 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Kuloba for the Plaintiff

Mr. Baragu for the Defendant

Mr. V. Owuor- Court Assistant