



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.491 OF 2012

CATHERINE PAMELA IMUGE ORINA PLAINTIFF

VERSUS

RICHARD OSEKO.....DEFENDANT

JUDGMENT

1. By an agreement made in writing between the plaintiff and the defendant on 4th October 2011(hereinafter referred to only as “**the agreement**”), the defendant agreed to sell and the plaintiff agreed to purchase all that parcel of land known as **LR No. Wanjare/Bomerenda/3281** (hereinafter referred to as “**the suit property**”) on terms and conditions that were contained in the said agreement. The agreement provided among others that:-
 - i. **The purchase price for the suit property was Kshs. 1,100,000/= of which a sum of Kshs. 900,000/= was to be paid to the defendant on the date of execution of the agreement.**
 - ii. **The balance of the purchase price in the sum of kshs. 200,000/= was to be paid by the plaintiff to the defendant upon the defendant obtaining consent of the Land Control Board to transfer the suit property to the plaintiff and executing the instrument of transfer in favour of the plaintiff.**
 - iii. **The plaintiff had inspected the suit property and was ready to purchase it as it was.**
 - iv. **The defendant was to give vacant possession of the suit property to the plaintiff upon the execution of the agreement.**
 - v. **The defendant was to take the necessary steps to transfer the suit property to the plaintiff.**
 - vi. **In the event of breach of the agreement, the party in breach would pay to the other Kshs. 500,000/= as liquidated damages.**

2. The plaintiff brought this suit against the defendant claiming that the defendant had breached the agreement. In her plaint dated 29th October 2012, the plaintiff claimed that despite paying to the defendant a sum of kshs. 900,000/= in accordance with the terms of the agreement, the defendant had failed and/or neglected to fulfill his part of the agreement in that the defendant failed to obtain the necessary consent of the Land Control Board to enable him transfer the suit property to the plaintiff in accordance with the terms of the agreement. The plaintiff averred that when a demand letter was written to the defendant by the advocate who acted for the plaintiff and the defendant in the transaction for the defendant to fulfill his part of the agreement, the defendant claimed in response to that letter that he had agreed with the plaintiff to rescind the agreement and have the

sum of ksh. 900,000/= that the plaintiff had paid on account of the purchase price refunded to her. The plaintiff averred that he had not entered into any such agreement with the defendant. The plaintiff prayed for an order for specific performance of the agreement, damages for breach of contract, vacant possession and a permanent injunction to restrain the defendant from disposing off or interfering in any manner with the plaintiff's peaceful occupation and use of the suit property.

3. The plaintiff amended his plaint with leave of the court on 9th October 2013 and introduced an alternative prayer for the refund of the sum of ksh. 900,000/= that she had paid to the defendant on account of the purchase price for the suit property together with interest. In his defence to the plaintiff's claim dated 19th December 2012, the defendant admitted that he entered into an agreement for sale of the suit property to the plaintiff and that the plaintiff had paid to him a sum of Ksh. 900,000/= on account of the purchase price leaving a balance of Ksh. 200,000/= that was to be paid upon completion of the agreement. The defendant denied that he is in breach of the said agreement. The defendant contended that after the execution of the agreement, the plaintiff changed her mind and demanded a refund of the said sum of Ksh. 900,000/= that she had paid to the defendant on account of the purchase price on the ground that the site where the suit property is situated was not suitable to her. The defendant contended that he is not to be blamed for failure to obtain consent of the Land Control Board because the plaintiff had rescinded the agreement and demanded a refund of the payment that she had made on account of the purchase price and furthermore, the plaintiff herself made no effort to make the appropriate application for the said consent. The defendant contended that the plaintiff is not entitled to an order for specific performance because the agreement had become null and void for want of consent of Land Control Board. The defendant admitted however that the plaintiff is entitled to a refund of the purchase price that she had paid to the defendant. The defendant urged the court to dismiss the plaintiff's claim.
4. When the suit came up for hearing the plaintiff and the defendant gave evidence and called no witness. The plaintiff testified on how she entered into the agreement with the defendant for the purchase of the suit property, the terms of the said agreement that I have set out above, how she fulfilled her part of the said agreement and the defendant's failure to keep his part of the agreement. The plaintiff denied that she rescinded the agreement by demanding a refund of the part payment that she had made to the defendant on account of the purchase price. She denied that she had met the defendant to discuss a refund of the said part payment that she had made to him. The plaintiff urged the court to order for the refund of the sum of Ksh. 900,000/= that she paid to the defendant on account of the purchase price for the suit property in the event that that the court forms the view that an order for specific performance cannot be granted. In cross examination, the plaintiff stated that the agreement provided for a penalty of Ksh. 500,000/= to be paid by the party in default and that the defendant breached the agreement by failing to execute the transfer and also to provide other documents like his passport size photographs. The plaintiff stated that she did not take possession of the suit property because the defendant had planted sugarcane thereon. The plaintiff produced in evidence as exhibits; a copy of the title deed for the suit property dated 21st May 2009, a copy of a certificate official search on the title of the suit property dated 23rd October 2012, a copy of the agreement for sale dated 4th October 2011, a copy of a bankers cheque dated 4th October 2011 for the sum of ksh. 900,000/=, a copy of a letter addressed to the defendant by the firm of S. O. Omwega & Co. Advocates and a copy of a letter dated 20th September, 2012 by the firm of Anyona Mbunde & Co. Advocates to the firm of S. O. Omwega & Co. Advocates.
5. In his evidence, the defendant told the court that he sold the suit property to the plaintiff at a consideration of Kshs. 1.1 Million of which the plaintiff made a down payment of Ksh. 900,000/=. The plaintiff was to pay him the balance of the purchase price after consent had been obtained from the Land Control Board for the transaction. He stated that before they could go to the Land Control Board for the consent, the plaintiff and her husband came to see him. They informed him that they had a problem with the site of the suit property. The two had not seen the suit property by the time the plaintiff executed the agreement for sale. He accompanied the plaintiff and her husband to the suit property so that they may view the same. After viewing the property, the plaintiff's husband said that he did not like the same. It is after this that the plaintiff and her husband demanded a refund of the sum of Ksh. 900,000/= that the plaintiff had paid on

account of the purchase price for the suit property. The plaintiff and her husband told him that they were no longer interested in the property. Since he did not have the money, he told them to give him one (1) month to arrange for the refund. An attempt to persuade the plaintiff through clan elders to proceed with the agreement did not succeed. The defendant stated further that because he did not have the money, it was agreed that he would look for another person who would purchase the suit property so that he can get money to refund to the plaintiff.

6. The defendant testified that the agreement was frustrated by the plaintiff because, on his part, he was ready and willing to complete the agreement while the plaintiff insisted on a refund of the sum of Kshs. 900,000/= that she had paid on account of the purchase price. He expressed his willingness to refund to the plaintiff the said sum of Kshs. 900,000/= through yearly instalments of kshs. 300,000/= each. He stated that he could not honour the demand that was made by the plaintiff through the firm of S. O. Omwega & Co. Advocates more than one (1) year after the date of the agreement because the circumstances had changed by then. In cross-examination, the defendant maintained that the agreement was frustrated by the plaintiff. He stated further that the plaintiff had not approached him for the completion of the agreement prior to the letter from S. O. Omwega & Co. Advocates that was written a year after the date of the agreement. The defendant stated further that he did not apply for the consent of the Land Control Board because the plaintiff did not wish to continue with the agreement. The defendant stated that he was not liable to pay damages to the plaintiff because it is the plaintiff who breached the agreement.
7. After the close of the defendant's case on 14th November 2014, the parties were directed to make their closing submissions in writing. The plaintiff's advocates filed their submissions on 19th November 2014. The defendant's advocates did not file their written submissions as was directed by the court. I have considered the pleadings on record and the evidence that was adduced before me by the parties. I have also considered the closing submissions by the plaintiff's advocates. The parties did not agree on the issues for determination by the court. Each party came up with its own statement of issues. I have considered the two sets of issues and the evidence that was adduced by the parties. The following in my view are the issues that arise for determination in this suit namely;
 - a. Whether the defendant breached the agreement for sale between the defendant and the plaintiff dated 4th October 2011?
 - b. Whether the said agreement for sale dated 4th October 2011 is null and void?
 - c. Whether the plaintiff is entitled to the prayers set out in the amended plaint.

8. Issue No. 1:

It is not in dispute that, at all material times the defendant was and still is the registered proprietor of the suit property. It is also not in dispute that the defendant and the plaintiff entered into an agreement for sale of the suit property on 4th October 2011 whereby the defendant agreed to sell and the plaintiff agreed to purchase the suit property at a consideration of Kshs. 1.1million on terms and conditions set out in the said agreement. Pursuant to the terms of the said agreement, the plaintiff paid to the defendant a sum of Kshs. 900,000/= on account of the purchase price. It was a term of the agreement between the parties that the balance of the purchase price would be paid upon the defendant obtaining the consent of the Land Control Board to transfer the suit property to the plaintiff and upon him also signing the instrument of transfer in favour of the plaintiff. It is not in dispute that the defendant did not apply to the Land Control Board for the consent. Consequently, the agreement between the plaintiff and the defendant for the sale of the suit property was rendered null and void by dint of the provisions of the Land Control Act, Cap. 302, Laws of Kenya. It is the plaintiff's case that the defendant had an obligation under the agreement for sale aforesaid to apply for the consent of the Land Control Board and that his failure to do so was a breach of the terms of the agreement aforesaid.

9. The defendant on his part has denied any wrong doing. The defendant has contended that the agreement was frustrated by the plaintiff. He contended that he did not apply for the consent of the Land Control Board because after the execution of the agreement, the plaintiff expressed an intention of not proceeding with the agreement and demanded a refund of the sum of Kshs.

900,000/= that she had paid on account of the purchase price. It is not in dispute that under the agreement, the duty of obtaining the consent of the Land Control Board was upon the defendant. As I have stated above, the defendant did not apply for the said consent. That failure amounted to a breach of the agreement on the part of the defendant. The onus was upon the defendant to satisfy the court that the said breach is excusable. This he could do by demonstrating that the performance of the agreement on his part was frustrated by the plaintiff or by an act of God. The ground that was put forward by the defendant to justify his breach of the agreement was frustration by the plaintiff. The defendant contended that after the execution of the agreement, the plaintiff changed her mind regarding the purchase of the suit property and demanded a refund of the part payment that she had made. Could this justify the defendant's failure to perform his part of the agreement? I don't think so. A party to a contract cannot fail to perform his part of the contract on the ground that the other party has expressed an intention of not completing the contract. The defendant had a duty to perform his part of the agreement the alleged change of mind on the part of the plaintiff notwithstanding.

10. The defendant had to remain faithful to his obligations under the agreement and had no obligation or duty to give in to the alleged demand by the plaintiff for a refund of the part payment that she had made towards the purchase price of the suit property. The alleged change of mind by the plaintiff on the agreement could not therefore justify the defendant's failure to perform his part of the bargain that he entered into with the plaintiff. In any event, the defendant did not convince me that the plaintiff had demanded or had agreed to be refunded the purchase price. Although the defendant testified that the plaintiff had drafted an agreement to the effect that the plaintiff would hold the title deed for the suit property for 3 months pending the refund by the defendant of the sum of Kshs. 900,000/= to the plaintiff, the said agreement was not produced in evidence. The defendant also testified that together with some clan elders, they tried to persuade the plaintiff to continue with the agreement to no avail. The defendant did not call any of these elders as a witness to this fact. The defendant has failed in the circumstances to prove that the plaintiff had demanded the refund of part payment of the purchase price that she had made to the defendant or that there was an agreement between them for such refund. For the foregoing reasons, it is my finding that the defendant breached the agreement dated 4th October 2011 by failing to obtain consent of the Land Control Board.

11. Issue No. II;

This issue is not in contention. It is settled in law. There is no dispute that consent of the Land Control Board was not obtained for the agreement for sale that was entered into between the plaintiff and the defendant. Section 6 (1) of the Land Control Act, Cap 302 Laws of Kenya provides that, in the absence of such consent, the transaction becomes void for all intents and purposes. The agreement between the parties herein became null and void after the expiry of 6 months from the date of the agreement.

12. Issues No. III and IV;

The plaintiff has admitted in her submissions that she is not entitled to an order for specific performance as this is barred by sections 6, 7 and 22 of the Land Control Act, Cap 302 Laws of Kenya. The plaintiff's remedy is set out in section 7 of the Land Control Act, Cap 302 Laws of Kenya which provides that any money or consideration paid pursuant to a transaction that has been voided pursuant to section 6 of the said Act is recoverable from whoever received it as a debt. The plaintiff is therefore entitled to a refund of the sum of Kshs. 900,000/= that she paid to the defendant as part payment of the purchase price for the suit property. In addition to the refund of the said sum of Kshs. 900,000/=: the plaintiff has also sought general damages for breach of contract. As I have held above, the agreement between the plaintiff and the defendant became void due to the defendant's failure to apply for consent of the Land Control Board which was his obligation under the agreement. The agreement therefore became void as a result of the defendant's breach thereof. I am of the opinion that neither section 7 nor section 22 of the Land Control Act, Cap 302 Laws of Kenya bars the court from awarding damages for breach of contract. Such award cannot be deemed as payments made in furtherance of a void transaction. The agreement provided that a party who breaches the same would be liable to pay to the other a sum of kshs. 500,000/= as liquidated damages. The plaintiff has not sought liquidated damages but general damages. In the case of **Gatobu M'Ibuutu Karatho –vs- Christopher Muriithi Kubai [2014] eKLR** that was cited by the plaintiff, the

court referred to the case of **Hudley's Paxendale [1854] 9 Exch 341** where it was stated that:-

“Where two parties have made a contract which one of them had broken the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably be considered either naturally that is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.”

13. In the same case, the court also cited the case of **Guaranty Discount Company Ltd –vs- Oliver Lawrence Ward (1961) E.A.L.R 285** in which the court stated that;-

“..... if a contract is broken, where a sum is expressed to be payable on such breach, whether it would be deemed liquidated damages or penalty, the result which follows is the same: In either case the court will award reasonable compensation not exceeding the amount named.”

From the foregoing, I am persuaded that the plaintiff is entitled to reasonable compensation as damages for the defendant's breach of the contract dated 4th October 2011.

14. Conclusion;

In conclusion, I am satisfied that the plaintiff has proved her case against the defendant on a balance of probability. I therefore enter judgment for the plaintiff against the defendant as follows;-

- i. Kshs. 900,000/= being a refund of the payment that the plaintiff had made to the defendant on account of the purchase price for the suit property.**
- ii. Kshs. 100,000/= being general damages for breach of contract.**
- iii. Interest at court rates on (i) above from the date of filing suit and on (ii) above from the date hereof.**
- iv. The plaintiff shall have the costs of the suit.**

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bigogo for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE