



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 619 OF 2004

GLADYS MARJORIE AKINYI.....PLAINTIFF

VERSUS

DORCAS J JAHENDA.....1ST DEFENDANT

TELEPOSTA PENSION SCHEME TRUSTEES.....2ND DEFENDANT

JUDGMENT

Background

[1] Sometime in March 2004, the parties hereto entered into two separate agreements. The Defendants entered into an agreement on 5th March 2004 in which the 2nd Defendant, as a vendor, agreed to sell to the 1st Defendant L.R. No 209/14990/34 at a consideration of Kshs. 4,340,000/-. Subsequently, on 29th March 2004, the Plaintiff and the 1st Defendant entered into a separate agreement for the purchase of the said property for a similar consideration. It is from these two agreements that the Plaintiff stakes claim as against the Defendants, and which led to this suit.

Plaintiff's Case

[2] The Plaintiff filed her Amended Plaintiff dated 10th December 2004 on 15th December 2004. It was averred that the Plaintiff and 1st Defendant entered into an agreement dated 29th March 2004 for the purchase of L.R No 209/14490/34 (hereinafter referred to as the suit property). in accordance with the terms and conditions of the said sale agreement, the Plaintiff was to purchase from the 1st Defendant the suit premises upon satisfaction of certain conditions to the 2nd Defendant, and other obligations as contained on the aforementioned sale agreement.

[3] It was the Plaintiff's contention that she had satisfied her obligations under the agreement, by paying the 10% deposit of Kshs 434,000/- on 24th February 2004 to the 2nd Defendant, and that it was incumbent upon the 1st Defendant to discharge her obligations, which included the forwarding of the title documents, transfer documents as well as all requisite consents and clearances to the Plaintiff. She stated that she took out a mortgage with Commercial Bank of Africa in the sum of Kshs 4,340,000/- which was to be secured by a charge over the suit property once it was transferred to the financier, CBA Bank. However, on 27th October 2004, the 1st Defendant purported to cancel the agreement and return the deposit to the Plaintiff.

[4] The Plaintiff's claim was that she suffered loss and damage from the said cancellation of the agreement, and was aggrieved that the suit property had been transferred on 6th October 2004 to the 1st Defendant on the basis of the deposit she had paid to the 2nd Defendant. Subsequently, the 1st Defendant sold and transferred the suit property to a third party, Azelia Court Apartments Ltd. The Plaintiff prayed for an injunction to issue against the Defendants from selling, alienating, transferring or in any manner whatsoever dealing with the suit property; a declaration that any transfer by the 2nd Defendant of the suit property to any other party is fraudulent, illegal, void and of no legal effect; a declaration that the sale agreement dated 29th March 2004 between the Plaintiff and the 1st Defendant is lawful, valid and still in force; a payment of the balance of the purchase price to the 1st and 2nd Defendants; and an order for specific performance against the Defendants.

[5] During the hearing of the suit, the Plaintiff reiterated that the 1st Defendant had transferred the suit property to herself and subsequently sold and transferred the same to a third party. This was, as alleged, in contravention and in breach of the sale agreement dated 29th March 2004, in which the suit property was to be transferred directly to her by the 2nd Defendant. It was further stated that the Plaintiff was not aware of any underlying issues between herself and the 1st Defendant, and that the 1st Defendant's conduct and actions were not only surprising but also unprocedural and in contravention of the agreement.

[6] In cross-examination, the Plaintiff stated that the sale agreement between herself and the 1st Defendant was pegged upon the sale and transfer of the suit property to the 1st Defendant by the 2nd Defendant as per the sale agreement dated 5th March 2004. She further alluded to the fact that, at the time of entering into the agreement with the 1st Defendant on 29th March 2004, the suit property was still registered in the name of the 2nd Defendant. She was also categorical that she was not at any one time a party to the sale agreement dated 5th March 2004. She also stated that the purported letter of undertaking dated 14th July 2004 was not addressed to the firm of M/s Mativo & Co. Advocates, which firm had drawn up the sale agreement and as per the instructions in the sale agreement dated 29th March 2004. She was not aware whether the same had been received and approved by the 2nd Defendant. She stated that none of her appointed advocate's correspondences were copied and/or forwarded to the firm of M/s Mativo & Co Advocates, and that the demand letter dated 26th October 2004 was only addressed to the firm of Kale Maina & Co Advocates. It was further stated that the Plaintiff wrote a letter to the 2nd Defendant dated 28th October 2004 intimating that the 1st Defendant was opting out of the sale agreement, and that they were instituting proceedings to register a caveat on the suit property.

1st Defendant's Case

[7] On 19th March 2013, the Court made an order that the matter was to proceed on the basis that the 1st Defendant did not have evidence to tender in defence of the Plaintiff's claim. However on 23rd July 2014, this Court allowed the 1st Defendant to give her testimony. She relied on her statement of Defence dated 15th January 2005 and filed on 18th January 2005. In the defence, the 1st Defendant reiterated that sometime in the year 2003, the 2nd Defendant, her employer, offered her the opportunity to purchase the suit property. This was as indicated in the letter dated 8th August 2003. She stated that she had paid the deposit of 10% as per the sale agreement dated 5th March 2004, but was unable to pay the balance. Due to that inability, she approached the Plaintiff to act as her financier. The Plaintiff, it was stated, accepted the offer and entered into an agreement with the 1st Defendant on 29th March 2004. She intimated that the Plaintiff paid the deposit of Kshs 434,000/- to the 2nd Defendant but failed to pay the balance within the 90 days as stipulated in the agreement. By her failure to secure the balance, the 2nd Defendant sought to take

over the property which thereby necessitated the 1st Defendant to seek a different financier to purchase the property from her. She later sold and transferred the suit property to Azelia Court Apartments Ltd on 3rd November 2004.

[8] She stated that, the financial issues reiterated in the letter dated 18th October 2004, relate to the delay in the remitting of the balance of the purchase price by the Plaintiff to the 2nd Defendant and her subsequent default. Further, in cross-examination, the 1st Defendant stated that the Plaintiff was aware that the sale agreement had been cancelled due to the delay in the remitting of the balance of the purchase price, even though she was unable to produce the letter to evidence these averments. She further reiterated that after the breach by the Plaintiff, she refunded back the deposit and the costs of valuation to the firm of advocates representing the Plaintiff, but they rejected and returned the deposit and went ahead to file this suit against her and the 2nd Defendant.

2nd Defendant's Case

[9] The 2nd Defendant called upon DW1 who further relied upon the statement of Defence dated 17th January 2005 and filed on 18th January 2005. In his testimony, it was alluded to that the parties to the sale agreement dated 5th March 2004, namely the Defendants, had complied with the obligations thereto and that the suit property was transferred to the 1st Defendant. Further, it was stated that the 2nd Defendant was not in breach of any contractual obligations to the sale agreement entered into between the Plaintiff and the 1st Defendant on 29th March 2004, and that its obligations were only to the *offeree* under the sale agreement dated 5th March 2004. It was stated that the only obligation by the 2nd Defendant was to transfer the suit property to the 1st Defendant, which obligation was nevertheless satisfied.

[10] In cross examination, DW1 reiterated that the 2nd Defendant was not aware of the transaction between the Plaintiff and the 1st Defendant. He stated that as far as the 2nd Defendant was concerned, the suit property was sold to the 1st Defendant and that all monies were received from her. Further, he stated that they did not release the title document to the Plaintiff's advocates upon receiving the letter of professional undertaking dated 14th July 2004 and was also unaware of when they received the purchase price from the 1st Defendant, although the suit property was registered on 6th October 2004 in favour of the 1st Defendant.

DETERMINATION BY COURT

Issues

[11] I have considered all the submissions, evidence and pleadings of the parties. There is no dispute that there were two sale agreements dated 5th March 2004 and 29th March 2004. The former agreement was between the Defendants and the latter was between the Plaintiff and 1st Defendant. All the parties concerned in the suit have each reinforced their respective positions in this matter, and it is for the Court to resolve the point of dispute. Parties filed separate statement of issues dated 28th November and 29th November 2005 for the Plaintiff and Defendants respectively. They are on record. But the ultimate decision is on the legal status of each of the agreements between the parties herein and whether the reliefs sought are deserved.

[12] The Plaintiff's case is that she entered into an agreement with the 1st Defendant in which she was to purchase the suit property from the 2nd Defendant. She submitted that the 2nd Defendant was aware of the sale agreement dated 29th March 2004 between herself and the 1st Defendant, and had even accepted a deposit of Kshs 434,000/- from her, as well as receiving a letter of professional undertaking dated 14th July 2004. She testified that the suit property was to be transferred and a charge registered in favour of CBA as the financier and to secure the purchase

price. she was clear that she satisfied her obligations under the sale agreement. She averred that the 1st Defendant was in breach of the sale agreement, despite the fact that the 1st Defendant utilized the monies paid by the plaintiff as deposit to the 2nd Defendant to secure the suit property in her favour. Further, she alluded that there was no reasonable excuse as to why the 1st Defendant breached the sale agreement, and was therefore culpable for the breach. She relied on the case of **Thomas Joseph Openda v Peter Martin Ahn (1983) KLR 165; Kilimanjaro Construction v The East African Power & Lighting Co Ltd (1985) KLR 201, Nairobi HCCC No 956 of 1991 [1991] LLR 7670 Nelson Kivuvani v Yuda Komora & Another and Nairobi HCCC No 574 of 1998 Luster Limited v Nadha Limited & Another** to support the claim for damages. With regards to specific performance the Plaintiff relied on the case **Masha v Tol Ltd [2003] 2 EA 593**.

[13] The Plaintiff also made a claim that there was an inducement by the 2nd Defendant to breach the 2nd agreement dated 29th March 2004. According to the Plaintiff, the inducement is found in the alleged knowledge of the agreement dated 29th March 2004 by the 2nd Defendant. The Plaintiff argued that, by this awareness, the 2nd Defendant's assertions that its role in the transaction was not addressed could not form the basis of the Court decision ; it was baseless. They relied on the cases of **Joseph Amisi Okundi v Independent Elections and Boundaries Commission & 2 Others [2014] eKLR, North Kisii Central Farmers Ltd v Jeremiah Mayaka Ombui & 4 Others [2014] eKLR** and **Odd Jobs v Mubia (1970) EA 476** to support of her dispositions.

[14] I should state from the outset that, in answer to one of the issues formulated by the Plaintiff, there is nothing which makes any of the agreements not genuine. The agreements were duly executed by the Parties and I do not see anything illegal with them. I should proceed on that basis to determine the other substantive issues. The reality in this case is that the two agreements are separate except the one dated 29th March 2004 makes reference to and is dependent on the one dated 5th March 2004. The 2nd Defendant was not a party in the agreement dated 29th March 2004. But, the plaintiff seems to have levelled claims also against the 2nd Defendant. The court will need to be satisfied of the legal and factual basis of liability of the 2nd Defendant to her. As against the 1st Defendant, she stood in a direct nexus with the plaintiff through the agreement dated 29th March 2004 which was founded on the agreement dated 5th March 2005. However, in both cases, the plaintiff must prove on balance of probabilities that there was breach of agreement in order to succeed. As between the Defendants, it is absolutely correct to state the transaction to sell and transfer the suit property is governed by the agreement dated 5th March 2004; it governs the rights and obligations of the parties thereto. The only aspect that may require interrogation is the claim by the 2nd Defendant that they had no obligation to the Plaintiff, as they were not a party to the sale agreement dated 29th March 2009. The plaintiff on the other hand stated that the 2nd Defendant was aware of the agreement between her and the 1st Defendant and should, therefore, not feign ignorance or escape liability. I note that, from the evidence placed before the Court, they had accepted the deposit of Kshs 434,000/- which was given by the Plaintiff, and further instructed their firm of advocates to have a letter of professional undertaking issued in their favour. But, for some time, there was no response by the 2nd Defendant to the letters and correspondence from the Plaintiff's advocate as shown in the letter dated 6th October 2004. Further, the 2nd Defendant did not expressly address the issue of the deposit by the Plaintiff. However, there must be concrete evidence that the Defendants willfully and negligently refused to respond to the said letters especially noting that clause 1(d) of the agreement dated 29th March 2004 named Mativo & Co Advocates as the advocate for the 1st Defendant but the Plaintiff admitted that they did not correspond with the said advocate. Mere knowledge of the agreement between the plaintiff and the 1st defendant is not enough to attract liability on the part of the 2nd defendant. There must also be cogent evidence that the 2nd defendant was bound by the agreement dated 29th March 2004. I will seek out from the material presented before court.

[15] The first best argument by the Plaintiff is that it paid a deposit of Kshs. 434,000/-. There is no doubt the deposit was paid to the 2nd Defendant on 24th February 2004. The payment was, however, on account of the 1st Defendant with the 2nd Defendant which was based on the contract dated 5th March 2004. I note that after payment of the deposit, for a while there was no further correspondence that was made with regards to the payment of the balance of the purchase price until 21st June 2004 when the advocate for the 2nd Defendant forwarded the completion documents to the advocate for the Plaintiff and 1st Defendant. The balance was not paid. Then on 29th June 2004 the advocate for the Plaintiff in a letter of even date wrote a letter of professional undertaking. In response to the said letter, the advocates for the 2nd Defendant wrote a letter requesting for the same to be addressed directly to the 2nd Defendant. The same was dated 14th July 2004. There were several other correspondences between the advocates but all of them referred to the 1st Defendant as the purchaser. At one point in a letter dated 9th July 2004, Kale Maina & Co Advocates cautioned Njoroge Regeru & Co Advocates not to necessarily indicate that the sale to their client is in the offing. But sometimes in October 2004, Njoroge Regeru & Co Advocates started to complain to Kale Maina & Co Advocates that four months have lapsed since they gave them a professional undertaking to pay the balance of the purchase price on terms stipulate in the undertaking. They even dared them to let them know whether they are still interested in the transaction. See letter dated 6th October 2004. The response was in the letter dated 18th October 2004 where Kale Maina & Co Advocates informed Njoroge Regeru & Co Advocates that the vendor advised them that the 1st Defendant had some issues of a financial nature to sort out with their client before the transaction could proceed. Accordingly, Kale Maina & Co Advocates advised the matter be held in abeyance until those issues are settled. Therefore, even if the 2nd Defendant was not a party in the agreement between the plaintiff and the 1st Defendant, it cannot feign ignorance of the said agreement. Nonetheless, the turning point is defined by the terms of the agreements themselves. I will now look at the terms of the agreements herein. .

[16] One thing is clear. The agreement dated 29th March 2004 between the plaintiff and the 1st Defendant was dependent upon the agreement dated 5th March 2004. The plaintiff and the defendant were under an obligation to perform their respective roles in both agreements if the agreement dated 29th March 2004 was to take full effect. Under Clause 3 of the terms of the sale agreement dated 29th March 2004, it was provided that;

THAT the Purchaser undertakes to pay a further sum of Kenya Shillings Three Million Nine Hundred and Six Thousand (Kshs 3,906,000/-) directly to M/s Telposta Pension Scheme within Ninety (90) days from the date of the agreement between Telposta Pension Scheme and the Vendor. The Purchaser shall effect the said payment for and on behalf of the Vendor and the said payment totaling Kenya Shillings Four Million Three Hundred and Forty (Kshs 4,340,000/-) shall form part of the purchase price between the parties herein.

Further at Clause 4 of the said agreement, it was stated that;

THAT M/s Telposta Pension Scheme and/or their advocates shall forward the title documents, transfer and all the requisite consents/clearances to the Purchaser's advocate as stated in Clause ten of the agreement between the Vendor and Telposta Pension Scheme.

[17] The payment of the balance of the purchase price, according to Clause 3, was to be paid within 90 days of the date of the agreement between the Defendants. The agreement was undoubtedly entered on 5th March 2004. The deposit was paid on 24th February 2004, and the balance was to be paid within 90 days. The agreement dated 29th March 2004 was pegged on the agreement dated 5th March 2004. The 90 days was as stipulated in the agreement dated 5th March 2004. The Plaintiff issued a letter of professional undertaking on 14th July 2004, which was beyond the stipulated time of 90 days. The advocates for the 2nd Defendant undertook to forward

the requisite documents in their letter dated 21st June 2004. They (M/s Mativo & Co Advocates) were neither informed nor notified of any further developments with regard to the payment of the purchase balance, at least according to the Plaintiff's testimony. Accordingly, it would seem that it was the Plaintiff who was in breach of the agreement by failing to satisfy its obligations for the payment of the balance of the purchase price within 90 days as stipulated in the sale agreement. Further, as an assignee of the 1st Defendant under the agreement dated 29th March 2004, the plaintiff failed to satisfy the conditions under the letter dated 8th August 2003. Under the said letter dated 8th August 2003, the 1st Defendant was obligated to satisfy certain conditions under the provisional house allocation and option to purchase the suit property. The Plaintiff has not shown that further to the payment of the deposit of Kshs 434,000/- to the 2nd Defendant, she also paid the charges/fees set out in the letter dated 8th August 2003 or that the 1st Defendant had satisfied the conditions in the said letter, which was nonetheless non-binding upon the 2nd Defendant. It is a material fact that, it was not a term of the sale agreement that the balance of the purchase price was to be paid by the issuance of an undertaking by the Plaintiff and/or its financier. See **Masha v Tol Ltd (2003) 2 EA 593**). The 1st Defendant did not breach the contract between her and the plaintiff. Also, I must admit that from the evidence, the Plaintiff has not clearly demonstrated how the 2nd Defendant was in breach of the sale agreement dated 29th March 2004 or 5th of March 2004.

[18] Further, the Plaintiff, being aggrieved by alleged delay in the transaction, which was in any event attributable to her, called for and demanded for the refund of the deposit of Kshs 434,000/- paid on 24th February 2004, and the costs for the valuation for Kshs 11,600/-. In the letter dated 26th October 2004, the Plaintiff wrote that;

As our client cannot wait indefinitely, please note that if we do not receive the sum of Kshs 434,000/- and the monies expended by our client as regards valuation of the property in the sum of Kshs 11,600/- plus interest thereof at the commercial rates from 24th February 2004 until payment in full by the close of business on Wednesday, 27th October 2004, our client shall institute legal proceedings for, *inter alia*, the recovery thereof.

[19] In the letter dated 27th October 2004, the 1st Defendant sought for indulgence from the Plaintiff to repay the amount on or about 3rd November 2004. However, the Plaintiff rejected the request and even rejected a refund cheque of Kshs. 445,600. The plaintiff wrote back and enquired only whether Kale Maina & Co Advocates had instructions to receive summons. See letters dated 4th and 8th November 2004. Worth of note is that the Plaintiff initially demanded the refund of the deposit and the costs for valuation from the 2nd Defendant. Accordingly, by actions, the Plaintiff had opted to terminate the sale agreement for what she claimed as an indefinite wait for the Defendants to act in transferring the suit property. It bears repeating that the evidence before court shows that the delay was necessitated by the plaintiff's inactions or delayed or alternative actions.

[20] The yardstick in a claim for specific performance is as was reiterated in **Masha v Tol Ltd** (supra), which made reference to the case of **Coker v Ajewole (1976) 1 ALR Comm 230** at 235;

“It is settled law that a person seeking to enforce a contract must show that all the conditions precedent have been fulfilled and that he has either performed or is ready and willing to perform all the terms which ought to be performed by him. Accordingly, generally a plaintiff in action for specific performance of an agreement cannot succeed if there is a failure on his part to discharge his obligations under the said agreement.”

[21] In light of the above yardstick, the actions of the Plaintiff cannot be said to be in fulfilment of all her obligations under the sale agreement dated 29th March 2004. She had not fulfilled her obligations fully as agreed and her response in the matter is not synonymous with the

phraseology “ready and willing to perform all the terms” which ought to have been performed. After the lapse of the period of 90 days, which was adequate time to pay the balance of the purchase price, the Plaintiff would be deemed to have been unwilling to complete and/or fulfill her obligations under the sale agreement. Further, and I stated this earlier, it was not a term of the sale agreement that the balance of the purchase price was to be remitted via a letter of professional undertaking. Their agreement expressly provided in clause 3 that the balance will be paid directly to the 2nd Defendant within ninety (90) days from the date of the agreement between the Defendants. The date of the agreement between the defendants was 5th March 2004. There was no any addendum to any of these two agreements to the contrary. Therefore, the prayer for specific performance fails.

[22] As concerns the claim for damages, the Plaintiff must show the Court how they were aggrieved by the Defendants actions and the damage suffered. In principle, the claim for damages is to restitute the claimant to the same position she would have been had the contract been completed. However, for one to succeed in a claim for damages, it has to be shown that the contract was unlawfully or illegally terminated, and that the claimant has the onerous task of strictly proving the claim for unlawful or illegal termination. In **Nelson Kivuvani v Yuda Komora & Another** (supra) it was reiterated;

“Where it is the vendor who wrongfully refuses to complete, the measure of damages is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor, such damages will include the return of any deposit paid by the purchaser with interest, together with expenses he has incurred in the investigation of the title, and also, where there is evidence that the value of the property was at the date of the repudiation greater than the agreed purchase price, damages for loss of bargain.”

In **Kilimanjaro Construction v The East African Power & Lighting Co Ltd** (supra), the Court in allowing a claim for damages stated that;

“Where a contract is unlawfully determined, in principle the plaintiff is entitled to such damages as would as nearly as possible put him in the same position as if the contract had been completed.”

[23] It should be underscored that it is imperative to show that the determination of the contract was unlawful and wrongful in order for the Court to award damages to the Plaintiff. The Plaintiff has failed to show that the determination of the sale agreement was unlawful and illegal, and that she was therefore entitled to an award for damages. The basis upon which the learned Judge in **Kilimanjaro Construction v The East African Power & Lighting Co Ltd** (supra) allowed for an award for damages was by virtue of the Defendant purporting to terminate the contract in contravention of the provisions of the contract relating to cancellation and termination. He held that the notices issued to the Plaintiff were invalid for the purposes of terminating the contract and that therefore, the Plaintiff was awarded damages for unlawful termination of the contract.

[24] The Plaintiff herein has not shown that the contract was unlawfully and/or illegally terminated by the defendants. As I have stated already, it was by her actions and conduct, and in failing to satisfy the conditions under the sale agreement that the transaction abated. It would therefore be inept of the Court in the instance to award damages to the Plaintiff. The plaintiff cannot even claim for lost opportunities in the circumstances of the case. Given the overall impression of the case, the 1st defendant properly and lawfully cancelled the agreement between her and the plaintiff, and the subsequent transfer of the suit property to Azelia Court Apartments was not in breach of the agreement between the 1st defendant and the plaintiff.

[25] Despite the correspondences between the plaintiff’s advocates and the 2nd defendant’s advocates, the fact that the 2nd defendant was aware of the contractual relationship between the

plaintiff and the 1st Defendant as well as the fact that the deposit was paid by the plaintiff, the circumstances of the case are such that the 2nd defendant was not under any legal obligation to transfer the land to the plaintiff. The obligation of the 2nd defendant was to transfer the land to the 1st defendant in so far as the agreement dated 5th March 2004 was concerned. In any event, even if there was any shred of liability, it was blown away by the breach committed by the plaintiff of the agreement dated 29th March 2004. There is also no evidence that the 2nd defendant acted with the desire to cause a breach of the agreement dated 29th March 2004. The charge of inducement is not complete. Accordingly, the 2nd defendant is not liable to the plaintiff on any of the claims presented to court. But with regard to the 1st Defendant she will be liable only to refund the deposit of Kshs. 434,000 and the valuation charges of Kshs. 11,600 incurred herein. The refund will attract interest of 12% from November 2004 until payment in full. The law in situations such as this presumes that, when the money was rejected, the plaintiff should have invested the money in a fixed deposit or other suitable interest earning account. This principle has taken root in the law on trust as well as in the regime of asset recovery and anti-money laundering. The duty serves two purposes, (1) to prevent unscrupulous trustees from using money held on trust for their own benefit and (2) thereby deny the beneficiary of the benefit of the money so held. Accordingly, except for the refund and valuation fee which I have ordered the 1st Defendant to pay, all the other claims in the plain are dismissed with costs to the Defendants. I will not award the plaintiff costs on the refund and the valuation fee given her conduct in relation to the entire transaction. It is so ordered.

Dated, signed and delivered in court at Nairobi this 31st day of July 2015.

F. GIKONYO

JUDGE