



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 36 OF 2011

KILEY LTD.....PLAINTIFF

VERSUS

VIRGINIA WANJIKU KIMANI.....DEFENDANT

J U D G E M E N T

1. The Plaintiff seeks in this suit rather improbably both an order for specific performance of a contract for sale of land and a refund of the part-purchase price paid in the sum of KShs 1,000,000/00. But in the course of testimony at the hearing of the action it was made clear that what was being sought was refund of the part-purchase price paid.

2. The Plaintiff also seeks KShs 850,000/00 “being 10% penalty in default of the agreement for sale”, special damages of KShs 1,374,000/00, costs of the suit and interest on the monetary awards “at 24% per annum from 8th March 201 until payment in full”.

3. The Plaintiff’s case as set out in the **plaint dated 1st February 2011** is that it entered into an agreement for sale of a portion of land measuring ten (10) acres in land parcel **L.R. No. 10823/22, Thika Municipality**, with the Defendant for the consideration of KShs 8,500,000/00; that the Plaintiff paid a deposit of KShs 1,000,000/00 “with the balance thereof becoming due upon registration of the transfer”; that the Defendant “neglected, refused or ignored to provide completion documents to facilitate the transfer of the land to the Plaintiff, (or) to refund the said deposit of KShs 1,000,000/00”; and that as a result of the Defendant’s breach of the sale agreement (particulars are pleaded) the Plaintiff suffered special loss and damage (which are particularly pleaded).

4. The Defendant filed **defence dated 11th February 2011**. She admitted the sale agreement and pleaded further as follows –

(i) The balance of the purchase price in the sum of KShs 7,500,000/00 was to be paid on or before the completion date.

(ii) She was not in breach of the sale agreement as alleged.

(iii) She has “at all times been ready and willing to complete the sale and ensure transfer of the property to the Plaintiff but ran out of funds to defray outstanding overheads at the lands office”.

(iv) The Plaintiff refused to make further payments towards the purchase price “to facilitate the process of transfer and subdivision of the property”.

(v) The Plaintiff refused to enter into a “supplementary agreement...to extend the completion date...” as mutually agreed.

(vi) The special loss and damage pleaded was denied.

5. In a reply to defence dated 17th March 2011 the Plaintiff joined issue with the Defendant upon her defence.

6. When the case came up for hearing on 5th July 2012 there was no appearance for the Defendant though her advocates had been duly served with hearing notice. The Plaintiff therefore proceeded *ex parte* and called one witness.

7. **Ibrahim Nduati Karanja**, a director of the Plaintiff and its majority shareholder, testified as PW1. In the course of his testimony he produced in evidence the sale agreement dated 8th March 2010 (**Exhibit P2**) duly executed by both parties and copies of the two cheques amounting to KShs 1 million in payment of part-purchase price (**Exhibit P3**).

8. PW1 also produced evidence of payment of stamp duty (**Exhibit P4**) and letter of demand and other letters (**Exhibit P5**).

9. PW1 testified that payment of the balance of the purchase price within 90 days of execution of the sale agreement was conditional upon the Defendant depositing with the Plaintiff’s lawyers the title documents and deed plan within 21 days of execution of the sale agreement. She did not do so and instead she “disappeared” and was thus in breach of the sale agreement.

10. I have considered the testimony of PW1. I have also perused the sale agreement (**Exhibit P2**).

11. Clauses 3 and 4 of the sale agreement provided as follows –

“3. The purchase price is Kenya Shilling Eight Million Five Hundred Thousands Only (KShs 8,500,000/00) shall be paid as follows –

a. KShs 1,000,000/00 (one million) at the execution of this agreement.

b. KShs 7,500,000/00 (Seven Million Five Hundred Thousands) to be paid on or before the completion date.

4 The completion date shall be within ninety (90) days or within twenty-one (21) days from the date of issuance of the Deed Plan for 10 acres whichever is earlier (“the Competition Date”).

12. Clauses 17 and 19 (vii) of the agreement provide as follows –

“17 The Title documents for the ten (10) acres to be deposited with the lawyers within forty-five (45) days from the date of the agreement.

19 (vii) In the event of default on the part of the Vendor to

complete this transaction by the completion date the Vendor shall refund any and all sums received from the Purchaser towards the purchase of the property herein, with interest at the rate of 24% p.a. and pay 10% of the purchase price as liquidated damages to the purchaser.”

13. Despite equivocation, the Defendant has admitted at paragraphs 5, 6 and 7 of the defence that she was in default of the sale agreement after she “ran out of funds to defray outstanding overheads at the lands office”. These “outstanding overheads” probably prevented her from securing the necessary documents of title and other documents for onward transmission to the Plaintiff’s advocates in order to complete the transaction. The agreement clearly failed as a result of her breach.

14 In the circumstances the Plaintiff is entitled to refund of the sum of KShs 1 million paid towards the purchase plus interest at 24% p.a. from the date of payment thereof (15th March 2010) until payment in full as provided for in Clause 19 (vii) of the sale agreement.

15. The Plaintiff is also entitled, under the same clause, to 10% of the purchase price (KShs 850,000/00) as liquidated damages. This sum will carry interest at court rates from the date of judgment.

16. As for special damages, only KShs 140,000/00 was strictly proved as required by law, and I will award only that sum. It will carry interest at court rates from the date of filing suit.

17. In summary there will be judgment for the Plaintiff against the Defendant as follows –

(i) KShs 1 million with interest at 24% until payment in full.

(ii) KShs 850,000/00 with interest at court rates from the date of judgment.

(iii) KShs 140,000/00 with interest at court rates from the date of filing suit.

(iv) Costs of the suit.

18. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS

12TH DAY OF JULY 2013

H. P. G. WAWERU

JUDGE