IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 330 OF 2011

SIMON KIPYEGON TANUI……..…..PLAINTIFF/APPLICANT

VERSUS

EUNICE NYAMU……..……..DEFENDANT/RESPONDENT

JUDGMENT

Simon Kipyegon Tanui filed the Originating Summons dated 30/8/2011 on 18/11/2011, against Eunice Nyamu, in which he seeks the following prayers:-

1. **The defendant/respondent do forthwith or within such reasonable time as this Honourable court may set, refund Kshs.1,100,000.00 deposit paid by the plaintiff/applicant on 16th December 2003 towards the purchase of part of the Land Reference number 13287/141;**
2. **That the defendant/respondent do forthwith or within such reasonable time as this Honourable court may set, pay the plaintiff/applicant Kshs.220,000.00 being penalty for breach of contract;**
3. **That in default of complying with order (1) and (2) above, a decree do issue against the defendant/respondent in the sum of Kshs.1,320,000.00;**
4. **That the defendant/respondent to pay interest at the rate of 20% from 18th November 2003 until payment in full together with costs and interest;**
5. **Any other relief that the Honourable Court may deem fit to grant.**

The Originating Summons was supported by the affidavit dated 22/8/2011, sworn by the applicant. The Originating Summons was opposed by a replying affidavit sworn by the respondent, Eunice Nyamu. The counsel also filed written submissions.

A brief background of this case is that the respondent is the owner of piece LR 13287/141, Nakuru as supported by the search certificate. The plaintiff and defendant entered into a sale agreement dated 18/11/2003 whereby the respondent agreed to sell 10 acres from LR 13287/141 to the applicant at a sum of Kshs.220,000/- per acre. A deposit of Kshs.1,000,000/- was made to the respondent after the signing of the agreement. An additional Kshs.100,000/- was demanded to assist in the subdivision process and a cheque for that sum was issued and was acknowledged by the respondent (Ex.3a & b). The applicant laments that the defendant has refused to proceed with the transaction in accordance with clause (b) of the special conditions of that sale agreement and it is his view that he is entitled to 10% of the purchase price for breach. Despite demand, there has been no refund or transfer of the 10 acres.

The applicant therefore prays for a refund of the sum paid together with 20% interest. In his submission,

counsel for the applicant urged that the defendant was supposed to subdivide the land but has failed to do so despite reminders and at no time did the respondent request the advocates acting for both parties for the original title or that any request was made by the advocates. Counsel urged that having admitted to receiving Kshs.1,100,000/- in the replying affidavit which represents the defendant's defence, it is a sham, and should be dismissed. Counsel relied on the following cases.

1. **Equatorial Commercial Bank Ltd v Microhouse Net Ltd, HCC 186/05 on what constitutes an admission;**
2. **Starline General Supplies Ltd v Discount Cash and Carry, Ltd, HCC 710/2005;**
3. **Rose Wathiru Waruinge v John Njenga Kimani (2006)eKLR on what constitutes a breach of contract.**

In her replying affidavit, the respondent admitted to being the owner of the suit land measuring 25 acres. She also admitted that in 2003, she entered into an agreement for sale of 10 acres of land to be excised from the suit land consisting 25 acres. According to the respondent, the firm of Kiptui, Mbabu Advocates were acting for the applicant while she had no legal representation; that after the agreement was signed, Grace Kiptui Advocate insisted that the respondent do release the original title deed to her. She then appointed Zackary Murithi Surveyor to carry out subdivision but he did not finish the work for lack of the title deed. Due to the failure of Kiptui Advocate to release the title to the respondent, all efforts to procure the title have been fruitless. It is when she threatened to sell the land to another person that she got a demand letter on 12/7/2011. The respondent denies that the applicant is entitled to Kshs.220,000/- because it is their advocate who failed to release the title and it is therefore the applicant who was in breach of the said contract. According to her, she can only refund Kshs.880,000/- and the applicant to return the original title.

Ms Omwenyo, counsel for the respondent submitted that the applicant was in breach of clause 1 of the agreement and that the agreement only became binding on 16/12/03 when the first intalment was paid. Counsel also urged that although clause 5 of the agreement provided that Kiptui, Mbabu Advocates acted for both parties, they favoured the applicant. In her view, it is the applicant who breached the sale agreement.

It is not denied that the applicant and respondent entered into a sale agreement for sale of 10 acres of land out of LR 13287/141.

The parties do not deny having entered into the sale agreement (SKT1) dated 18/11/2003. The agreement was signed on 18/11/2003 but it seems the payment of Kshs.1,000,000/- was not made until 16/12/2003. Although it was agreed at paragraph 2(c)(1) that payment was to be made at the time of execution of the agreement, it seems the agreement was varied by the parties because the respondent accepted the payment of the Kshs.1,000,000/- on 16/12/03 about a month after executing the agreement.

Although the defendant depones that Kiptui and Mbabu Advocates were the applicant's advocates, it is clear from paragraph (5) of the agreement that the said firm of Advocates acted for both parties. It is alleged in the submissions that the said advocate favoured the applicant by protecting the applicant's interests to the detriment of the whole deal. I have read the affidavit of the respondent and it has not been demonstrated anywhere that Kiptui, Mbabu Advocates favoured the applicant. The applicant had paid money for the land and wanted the land transferred to him. If the advocates were favouring the applicant, then they should have released the title so that the process of survey, subdivision and transfer would have been speeded up so that the contract could have been completed.

The respondent even contradicts herself when at paragraph 6, she denies having had any legal representation and in the same affidavit at paragraph 23, admits that Kiptui Mbabu Advocates acted for both of them in the sale agreement. If the advocate took the original title deed, the firm did so as counsel for both parties but not the applicant's counsel as alleged.

The applicant contends that demands for release of the original title from Kiptui, Mbabu and Co. Advocates have fallen on deaf ears. The court has no idea how the defendant demanded for the said

document. If indeed the respondent had asked verbally and failed to get the title, this court would have expected some document in writing demanding a release of the original title. The respondent seems to believe that the advocate and applicant worked in link to deny her the original title but if that were the case, there is not a demand written to the applicant for release of the title. It was upto the defendant to demonstrate why she has failed to survey, subdivide and have the transfer effected so that the contract could be completed. The respondent has not done so.

In my view, it seems the respondent did nothing towards completing the contract and I would adopt the view of J Ojwang in **Rose Watheru's** case, (supra). The respondent signed the sale agreement on 18/11/2003, was paid the first instalment on 16/12/003 but has shown no intention to perform her obligations under the contract to have the land surveyed, subdivided and transferred to the applicant and instead blames the advocate.

So what relief should the court grant? At paragraph 18 of the replying affidavit the respondent deponed that the applicant took possession of the land in 2003 and has been in occupation since. The applicant has not disputed that allegation. The sale agreement was supposed to be completed within 90 days from the date of execution meaning 18/11/2003. There is no explanation why it took the applicant so long to come to court for redress. If the applicant took possession of the land, it means he has been on the land for the last 9 years. He did not file this suit till November 2011, that is 8 years later. He has benefited from the use of the said land. Paragraph 9(b) of the agreement provides as follows:-

> **"If either party shall fail to complete this transaction on the completion date herein before mentioned then the defaulting party shall pay to the other an amount equal to 10% of the purchase price and the vendor shall be at liberty to sell the said property at her sole discretion as she thinks fit."**

It means that in the event of default, the defaulting party had to pay 10% of the total purchase price to the other. 10% of the purchase price was Kshs.220,000/-. The applicant had paid about half the purchase price of Kshs.1,100,000/-. In my view, and to do justice to the parities, I think the respondent should only refund to the applicant Kshs.1,100,000/- while what would have been 10% goes to the use of the said land by the applicant for 9 years. The applicant did not justify the prayer for 20% interest. In the end, I enter judgment for the applicant against the respondent for Kshs.1,100,000/- plus costs and interest at court rates from 16/12/2003 till payment in full.

DATED and DELIVERED this 27th day of September, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. K. Mbugua holding brief for Mr. Kimengich for the plaintiff/applicant

Ms Omwenyo for the defendant/respondent

Kennedy – Court Clerk