



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
MISC. CIVIL SUIT NO. 185 OF 2013(OS)

COLLETTA MUTANU KYULE.....PLAINTIFF

VERSUS

CHARLES JOSEPH MASILA.....1ST DEFENDANT

STEPHEN K. KIBUNJA T/A

KIBUNJA ASSOCIATES ADVOCATES.....2ND DEFENDANT

JUDGMENT

1. In the Originating Summons dated 14th May, 2013 and supported by her affidavit sworn on the same date, the Plaintiff averred that on 4th December, 2012 she entered into an agreement with the 1st Defendant for the purchase of the parcel of land known as LR Number Nairobi/Block 75/962 Buruburu (hereinafter referred to as “the property”) for the purchase price of Kshs. 8,700,000/= . The 1st Defendant at all material times was the registered proprietor of the property, while the 2nd Defendant acted as his Advocate in the sale of the property.
2. One of the terms of the agreement was that the purchase price would be paid by the Plaintiff in two installments, namely, a deposit of Kshs. 870,000/= being 10% of the purchase price and the balance of Kshs. 7,830,000/= , which was to be deposited in a joint interest earning bank account operated by the Advocates for parties to the sale agreement. The completion date of the entire transaction was 90 days the equivalent of 3 months from the date of the sale agreement or a date mutually agreed by the parties. Time was made to be of the essence.
3. The Plaintiff contended that she fulfilled her obligations under the sale agreement and made all the payments as required. She averred that she paid the deposit of Kshs.870,000/= upon execution of the sale agreement directly to the defendant and that the balance of Kshs.7,830,000/= was later deposited in a joint account number 00110051340700 held in Consolidated Bank of Kenya Limited Koinange Street Branch, Nairobi (hereinafter “the joint account”) on 17th and 19th December, 2012, respectively.
4. The Plaintiff contended that subsequently, the 1st defendant did not fulfill his obligations under the sale agreement as he failed to ensure vacant possession of the property and also avail the completion documents to her advocates pursuant to paragraph 4.3 of the sale agreement. That despite her executing a Transfer Document of the property as the purchaser on 19th December 2012, the defendants failed to complete the transaction as agreed within the stipulated 3 months.

- As a consequence, the Plaintiff rescinded the sale agreement after the lapse of the completion period through a letter dated 14th March, 2013. It is the Plaintiff's contention that despite the collapse of the sale transaction, the money she paid as the purchase price held by the Defendants is yet to be released to her despite numerous demands for the Defendants to do so. Learned Counsel for the Plaintiff submitted that the prayers in the originating summons are uncontested and there was therefore no reason why the amounts so held in the joint account should continue to be held at the behest of the Defendants. It was further submitted that owing to this state of affairs, the Plaintiff had lost opportunities to purchase other properties from other persons.
5. The Plaintiff therefore sought an order from the court that Kshs.7,830,000/= together with the interest thereon held in the joint account be released to her. That further, the court do order the 1st Defendant to pay her the sum of Kshs.870,000/= together with the interest of 16.5% per annum calculated from 4th December 2012 until full payment is made. She also prayed for the cost of the suit.
 6. In opposition to the application, the 1st Defendant filed a replying affidavit sworn on 25th June 2013. He contended that he never dealt directly with the Plaintiff on the transaction, but dealt with a man known as Philip Nzenge Kilonzi. That even at the time of executing the sale agreement, he only dealt with the said Mr. Nzenge and not the Plaintiff whom he asserted that he had never seen in person. The 1st Defendant conceded that the balance of the purchase price was deposited in the joint account of the advocates for the parties who were joint signatories. He contended that there was no reason or intent on his part to withdraw or deal with the money in any manner whatsoever. With regard to the delay of the sale of the property, the 1st Defendant contended that he had agreed with Mr. Philip Nzenge, that the transfer of the property was to be effected as soon as a case pending with regard to the property was finalized. The said case involved the 1st Defendant and his in law who resided in the property and had registered a caution claiming beneficial interest on the same.
 7. In conclusion, the 1st Defendant averred that he and the 2nd Defendant were ready and willing to return the proceeds of the botched transaction, but that they did not know whether to release the same to the Plaintiff as they had exclusively dealt with one Philip Nzenge Kilonzi and not the Plaintiff.
 8. I have carefully considered the Originating summons, affidavits on record and the written submissions by counsel to the Plaintiff. I do note that the Defendants did not file written submissions as directed by this court. The 2nd Defendant also failed to respond to the Plaintiff's claim by way of an affidavit or otherwise. However, the Court has to make its determination regardless of this incongruity. The issue for determination is whether the Plaintiff has proved on a balance of probabilities that she is entitled to a refund of monies that she purportedly paid towards the purchase of the property. I shall first deal with the issue of the refund of the deposit of Kshs.7,830,000/= held in the designated joint account.
 9. Having assessed the evidence before me, there is no doubt that the Plaintiff and the 1st Defendant herein signed the agreement of sale dated 4th December, 2012 for the sale of the property. Though the 1st Defendant claims that he dealt with a Mr. Philip Nzenge Kilonzi in the sale, I agree with the submissions of counsel to the Plaintiff, that the said Philip Nzenge Kilonzi is but a stranger to this suit. He was not a party to the agreement of sale, neither was he designated as the intermediary or agent of the Plaintiff. Further, no evidence was tendered by the 1st Defendant to prove his assertion that he dealt exclusively with Mr. Philip Nzenge on the subject transaction. In any event, the 1st Defendant did not deny that he executed the Agreement of sale having the Plaintiff's name and he did not question the veracity of the same. In my view, both the Plaintiff and the 1st Defendant agreed to be bound by the terms and conditions set out in the agreement for the sale of the property, as both parties freely executed the agreement in question. It is therefore erroneous on the part of the 1st Defendant to base his actions on the representations of a person that was not party to the agreement. Having said that, it is imperative to examine the said agreement in view of the Plaintiff's claim.
 10. Clause 4 of the said agreement stipulated that the completion date was to be within three months from the date of execution of the Sale Agreement. Both parties were required to meet certain conditions before the completion date. The Plaintiff as the purchaser was under the obligation to

pay the full purchase price and the 1st Defendant as the vendor had the duty to deliver to the purchaser's advocate completion documents. Such completion documents included, inter alia, the Original Title Deed to the property free from any encumbrance, duly stamped valuation form and the consent to transfer. The 1st Defendant was also, on completion of the sale, obliged to deliver the property with vacant possession to the Plaintiff.

11. Additionally paragraph 4.2 stated as follows;

“4.2 The balance of the purchase price being Kshs. 7, 830,000/=

(Seven Million Eight Hundred and Thirty Thousand) shall be deposited in an interest bearing account with Consolidated Bank of Kenya Limited, Koinange Street in the Joint Account names of the advocate for the vendor and the purchaser. In event the sale does not materialize or it is not concluded for whatever reasons the entire amount together with accrued interest shall be refunded to the purchaser.”

12. From the available evidence, it is clear that the Purchaser paid the initial deposit of Kshs.870,000/= upon execution of the agreement. Further the Plaintiff has produced banking slips marked as Exhibit “CK4” dated 15th December, 2013 and 17th December 2013, as proof that she deposited the amount of Kshs. 800,000/= and Kshs. 3, 900,000/= respectively in the designated joint account. Although the Plaintiff did not attach any documentation with regard to the payment of Kshs.3,130,000/=, her learned counsel submitted that a funds transfer dated 19th December 2012 of the aforesaid amount had been attached to the Plaintiff's further affidavit. However, a perusal of the record does not reveal any such further affidavit having been filed by the Plaintiff. Further, there seems to be some discrepancy in the details of the joint account. While it is pleaded that the said joint account is held at Consolidated Bank Koinange Street Branch account number 0110051340700, the deposit slips and Temporary Account Card annexed to the Plaintiff's bundle of documents and marked as Exhibit “CK4” shows the joint account to be Account Number 0110051340700 held at Consolidated Bank Harambee Branch, Nairobi.

13. However, it is my finding that the discrepancy in the account details from the pleadings and the exhibit CK4 is not a grave anomaly as there can be no two similar bank account numbers held within the same bank. Based on the evidence adduced by the Plaintiff, I am inclined to go by the account details in the banking slips and Temporary Account card attached as Exhibit CK4 that is Account Number 0110051340700 being held at Consolidated Bank Harambee Branch and not the details outlined in the pleadings. With regard to the fund transfer dated 19th December 2012 of Kshs.3,130,000/= am of the view that though the same was not attached to the application, the same was admitted by the 1st Defendant in his Replying Affidavit. According to Paragraph 4 of the 1st Defendant's Replying Affidavit, Kshs. 7, 830, 000/= had indeed been deposited in account number 0110051340700 in the joint account in the name of Kibunja and Musyoki. This in my view corroborates the evidence of the Plaintiff that she paid the balance of the purchase price as stipulated in the agreement of sale.

14. Was there breach of the agreement on the part of the 1st Defendant? From the record, it is obvious that the 1st Defendant did not fulfill his end of the bargain even after the Plaintiff had endeavored to fulfill the terms and conditions of the sale agreement. Through the various correspondence between the parties attached to the Plaintiff's Supporting Affidavit, it is clear that the sale was not completed within the designated completion date, forcing the Plaintiff to rescind the agreement vide a letter dated 14th December, 2013. Though the 1st Defendant, had requested for an advance of Kshs.500,000/= from the joint account to facilitate the costs incidental to stamp duty, valuation and other attendant costs, the Plaintiff was not amenable to that request. The Plaintiff also gave the Defendants twenty one (21) days to refund the deposit and release the sum deposited in the joint account as stipulated by the agreement. I find the Plaintiff's actions plausible since the 1st Defendant failed to fulfill his obligations under the agreement including ensuring that the property was free from any encumbrances. It follows that the only logical step after the frustration of the agreement was for the Plaintiff to rescind the same. The reasonable consequence therefor would be that the money paid towards the purchase of the property would have to be returned to the

Plaintiff as prayed.

15. Indeed the 1st Defendant has conceded that he is not averse to releasing the funds although he claims that he does not know to whom the money should be released. As I said earlier in this ruling, this in my view is an explanation devoid of merit as the alleged Philip Nzenge Kilonzi was not a party to the contract. From the sale agreement, it is clear who the purchaser was and from whom the money was received. Reference to strangers to the agreement, in my view, is but prevarication. The Plaintiff has successfully proved her claim for the monies held in the joint account on a balance of probabilities. The Court only assists a party in the enforcement of a contract if the party has performed its part of the bargain, which in this case the Plaintiff has done. See the case of **Aziz Vs Bhatia brothers Ltd (2001) 1 EA 7.**
16. I now turn to the second prayer for the sum of Kshs.870,000/= paid to the 1st Defendant as the 10% of the purchase price. The Plaintiff claims this money and I have seen no opposition to that claim. The purpose for which it was paid having failed, it follows that it must be returned to the rightful owner. The interest allowed under the agreement was 16.5% per annum.
17. Accordingly, I will allow the Plaintiff's originating summons dated 14th May, 2013 in the following terms :-
 - a. That Kshs.7,830,000/= together with interest thereon held in Consolidated Bank, Harambee Branch account number 0110051340700 in the name of Kibunja and Musyoki be forthwith released to the Plaintiff.
 - b. That the 1st Defendant shall pay the Plaintiff Ksh.870,000/= together with interest at the rate of 16.5 % per annum calculated from 4th December, 2012 until payment in full.
 - c. Costs of the suit and interest thereon are also awarded to the Plaintiff. It is so decreed.

DATED and DELIVERED at Nairobi this 20th day of November, 2013.

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A. MABEYA

JUDGE