



REUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ECL CIVIL SUIT NO. 31 OF 2009

ANNE KARURA KIBATI.....PLAIFNTIFF

VERSUS

SAMUEL BEDE OGEMBO.....DEFENDANT

JUDGMENT

By an agreement of sale dated 8th September, 2004 the defendant herein agreed to sell part of his land known as LR. NO. 2259/141(Original No. 2259/23312) portion 4 thereof to the plaintiff for a sum of Kshs. 5,000,000/=. The said agreement provided that the plaintiff shall pay a deposit of Kshs. 1,250,000/= and thereafter pay the balance within 90 days of execution of the said agreement. It is common ground that the plaintiff paid the said deposit and it is also common ground that the balance has not been paid to date.

According to the plaintiff she is ready and willing to pay the balance provided that the defendant meets the special condition clause (d) of the sale agreement which he has refused and or failed to comply with. On the other hand the defendant's position is that the plaintiff having failed to pay the balance of the purchase price of Kshs. 3,750,000/= within the ninety days provided at clause (d) of the agreement then the plaintiff is in breach and therefore the agreement and everything therein contained is null and void for all purposes.

The parties having failed to agree, the plaintiff moved to court and by a plaint dated 27th and filed on 28th January, 2009 sought the following orders,

1. A permanent injunction restraining the defendant whether by himself, his agents, successors or assigns from selling, transferring, disposing or in any other way offering plot No. 4 of the parcel of land known as LR. NO. 2259/141(Original 2259/23/2) to any other party except by way of transfer to the plaintiff.
2. An order of specific performance compelling the defendant to complete the sale agreement dated 8th September, 2004 and transfer plot No. 4 of all that parcel of land known as LR. No. 2259/141(Original

2259/23/2) in favour of the plaintiff.

3. Costs of this suit plus interest.

4. Any other or further order that the honourable court may deem just and expedient. The plaintiff gave evidence in support of her pleadings. It however transpired that the defendant is indisposed and incapable of attending court proceedings. It was then agreed that he files a witness statement and an affidavit in answer to the plaintiff's evidence.

The substratum of any land transaction is the agreement for sale and any dispute can only be resolved by reference thereto. Special conditions (g) and (k) of the Agreement between the plaintiff and the defendant herein provided as follows,

“(g) This agreement and everything herein contained shall be null and void for all purposes and all monies paid hereunder shall be forfeited by the purchaser should they fail to pay the aforementioned balance as stipulated in (d) above”.

“(k) Time shall be of the essence as regards payment.”

Clause (d) of the special conditions of the agreement provided that the defendant's advocate would deliver all the completion documents on or before the completion date. That clause reads as follows,

“On or before the completion date the vendor's advocate will deliver to the purchaser's advocate the following documents.

- a) **Consent to transfer from the Commissioner of Lands and the relevant local authority (if any)**
- b) **A valid rates clearance certificate;**
- c) **Land rent clearance certificate;**
- d) **Form for valuation of stamp duty duly completed and signed;**
- e) **All documents of title relating to property that are in the vendor's possession(if any), upon the purchaser's advocates professional undertaking to pay the purchase price within 30 days from the delivery of the document”.**

It is the defendant's case that clause (d) herein above notwithstanding, time was of the essence and therefore the failure by the plaintiff to pay the balance of the purchase price within 90 days as stipulated in the agreement for sale rendered the agreement null and void. On the other hand, the plaintiff holds that the agreement is still in force and failure on the part of the defendant to comply with clause (d) above is what delayed the completion. She added that the Nairobi City Council has approved the transaction and there is no reason the defendant cannot complete the same .

I have looked at the sale agreement and particularly the special conditions and, with respect, see no conflict or ambiguity whatsoever. It is also standard procedure that it is the documents set out under clause (d) of the special conditions that facilitate the preparation of transfer documents that lead to completion of any sale agreement. Therefore, whereas there would appear to be a conflict in the sale agreement clauses (d) (g) and (k) above, the same are complimentary and not in conflict.

The conduct of the plaintiff after the defendant delayed and or failed to provide the completion documents is instructive. She instructed her advocates to ask for the completion documents. There was failure on the part of the defendant. To mitigate her loss she moved the court to accept her prayer that she deposits the balance of the purchase price in court. This she did. The money has been in the custody of the court all along.

On the other hand, the conduct of the defendant portrays a party who was not keen to complete the sale transaction. In the first place, he failed to provide completion documents. Without a demand from the plaintiff, he offered to refund the deposit paid by the plaintiff and did in fact forward the cheque for Kshs. 1,250,000/= to the plaintiff through her advocates which cheque was however returned to the said advocates.

There was also the allegation by the plaintiff that the defendant offered to sell the same property he had agreed to sell to her to a third party by the name Dancan Kabui. Although the defendant has denied this and stated that what he was selling to Dancan Kabui was a different portion, the judgment in ELC No. 210 of 2009 which was produced by the plaintiff as exhibit 13 proved him wrong. The court found that that was the same property and in fact the portion described in the sale agreement tallies in all material particulars with what was being sold to the plaintiff.

There was also plaintiff's exhibit No. 11 which showed that the defendant had offered to sell the suit property to yet another party thereby compelling the plaintiff to make a report and record a statement with the police. The conduct of the defendant is against him and proves that he had no intention of completing this transaction with the plaintiff.

Proof in any civil proceedings is on a balance of probability. The facts and issues herein are not complex at all. My assessment of the evidence is that the plaintiff performed her part of the agreement but the defendant did not. The question is whether or not he should be compelled to do so. The answer is yes. Therefore going by the pleadings I find for the plaintiff in line with her plaint aforesaid and grant orders in the following terms,

That the defendant shall be restrained from dealing with the property as prayed in terms prayer 1 of the plaint and that he shall complete the agreement for sale and execute the documents in favour of the plaintiff to achieve the order for specific performance. He shall receive the balance of the purchase price on execution of the transfer documents which sum is lying in court. These proceedings would not have proved necessary had the defendant performed his part of the agreement. The plaintiff is therefore entitled to the costs of this suit plus the interest at court rates.

Orders according.

Dated, signed and delivered at Nairobi this 22nd day of July , 2011.

A. MBOGHOLI MSAGHA

JUDGE