



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

Civil Case 500 of 1998

GEORGE WANJUKI GETHI.....PLAINTIFF

VERSUS

LUCY JEZZA.....DEFENDANT

JUDGMENT

By an amended plaint, the plaintiff George Wanjuki Gethi sued the defendant Lucy Jezza seeking specific performance of the contract entered between the plaintiff and the defendant on the 30th of August 1989 and the 5th of March 1992 for the purchase of **LR. No. 8836/1009** (*Nakuru Municipality/Block 3/172*) (*hereinafter referred to as the suit premises*). The plaintiff further prayed for an order of perpetual injunction to restrain the defendant and any other person acting under her authority from evicting the plaintiff from the suit land. The plaintiff in the alternative, prayed for the refund of the purchase price and also to be compensated at the current market value for the work done and completed in the house since 1989. He also prayed to be awarded general damages for breach of contract.

The defendant filed a defence and a counterclaim. In her defence she admitted that she had entered into an agreement with the plaintiff for the purchase of the suit premises but the plaintiff had reneged on the agreement therefore rendering the said agreement null and void. She further averred that the plaintiff had resided on the said premises since 1989 when he had taken possession without paying any rent to her. Furthermore, the plaintiff had failed to pay any purchase consideration and therefore was not entitled to the suit premises. The defendant further averred that the plaintiff had interfered with the structural integrity of the said premises without seeking the authority either of the defendant or of the local authority. The defendant urged this court to dismiss the plaintiff's suit and enter judgment for the counterclaim in which the defendant is claiming for a declaration that she ought to be paid rent by the plaintiff from the date of his occupation to the date of the judgment. The defendant further prayed for orders of this court to compel the plaintiff to vacate the suit premises and pay her compensation for the damage to the suit premises.

At the hearing of the case, the plaintiff called one witness, himself. He testified that he had entered into an agreement with the defendant to purchase the defendant's incomplete house situated at Shabaab Estate Nakuru. He testified that the purchase consideration for the said premises was agreed at Kshs 350,000/=. The plaintiff paid the sum of Kshs 10,000/= as a deposit on the signing of the agreement. The balance of Kshs 340,000/= was to be paid when the plaintiff obtained a loan from a financial institution. He testified that it was a fundamental term of the agreement that the defendant was supposed to release to the plaintiff the conveyancing documents of the said property to enable him charge the same to secure the balance of the purchase consideration. He further testified that after the signing of the agreement he took possession of the said premises. In 1992 the plaintiff and the defendant entered into a further agreement whereby the purchase price was increased from the sum of Kshs 350,000/= to Kshs 450,000/=. The plaintiff testified that he paid the defendant a further sum of Kshs 90,000/=. He also agreed to pay the then remaining

balance of Kshs 360,000/= upon the defendant releasing the title documents in respect of the said premises to him. It was his testimony that the said balance of the purchase consideration was to be paid on or before the 19th of August 1992. The two agreements were produced as plaintiff's exhibit No. 1 & 2 respectively.

He further testified that pending the payment of the balance of the purchase consideration, he agreed to pay a monthly rent of Kshs 2,220/=. The plaintiff complained that the defendant did not fulfil her part of the agreement by releasing the said title documents to him so that he could charge the same and pay the balance of the purchase consideration to the defendant. He testified that in 1998 he was surprised when he learnt that the defendant was intending to sell the suit premises to 3rd parties. He testified that he would have paid the balance of the purchase consideration only if the defendant had released the title documents to him. The plaintiff testified that he had not paid rent to the defendant for the said premises since 1998. He produced copies of the deposit slips which indicated that he had paid rent to the defendant through her bank account upto the year 1995. He reiterated that he had not failed to fulfil his part of the agreement. He stated that the failure of the conclusion of the said agreement was occasioned by the defendant and not by himself.

He conceded that the only sum that he had paid the defendant in cash was Kshs 10,000/=, the other sum of Kshs 90,000/= was assessed as the value of the improvements that he had undertaken on the suit premises. He further conceded that he had redesigned the suit premises without the consent of the defendant. He explained his action by stating that he did so in good faith as he was confident that he was going to purchase the house. He denied the suggestion by the defendant that he had failed to pay rent since 1989 when he took possession of the suit premises. He further denied that he had intended to swindle the defendant by entering into an agreement which he knew he could not conclude. He urged this court to allow his suit for specific performance of the said agreements. He testified that if the court were to order that he vacates the suit premises, he should be compensated for breach of contract and the improvements that he had undertaken on the said premises.

The defendant called one witness, herself. She testified that she had decided to sell the suit premises when she fell into financial difficulties in 1989. She testified that the plaintiff, who was an acquaintance at the time, offered to purchase the suit premises. An agreement was entered into between them whereby the purchase consideration was agreed at Kshs 350,000/=. The plaintiff paid the defendant the sum of Kshs 10,000/=. She testified that it was agreed that the plaintiff would occupy the said premises as tenants pending the conclusion of the said agreement. It was further agreed that the plaintiff would complete the house and credit would be given to him for the work done. The defendant testified that at the time the plaintiff took possession of the suit premises, the work that was not completed was the fixing of the window panes, painting of the house and the fixing of one ceiling board which had fallen. In her estimation the total cost of the incomplete work would not have been more than Kshs 40,000/=.

She testified that the plaintiff had informed her that he would get part of the purchase consideration after he had sold some parcels of land which he then owned. She testified that she entered into a second agreement with the plaintiff in the year 1992. In the said agreement it was agreed that the plaintiff was to pay the balance of the purchase consideration within three months of the signing of the said agreement. She testified that the plaintiff failed to fulfil his part of the bargain. It was her testimony that the allegation by the plaintiff that she had failed to release the title documents to him was untrue as she had informed the plaintiff that the said property had been charged to her employer, Kenya Commercial Bank who would have released the said documents to the plaintiff if he had given a professional undertaking to the said bank.

According to the defendant, the plaintiff instead chose to give the undertaking to her instead of her employer. She testified that in 1998 she informed the plaintiff's wife that she would sell the property to other persons if the plaintiff was unwilling to conclude the agreement. Instead of the plaintiff paying the balance of the purchase consideration, he filed the current suit against her. The defendant further testified that the plaintiff has redesigned the suit premises by creating two residential premises and interfering with the original design of the building without her consent. She further testified that since 1989, the plaintiff had not paid any rent to her as per the agreement. She testified that this court should order the plaintiff to

restore the said premises to its original position. She admitted that during the period between 1989 to 1998 she had not sent any demand letter to the plaintiff demanding that he pays rent arrears. She denied that she had deliberately refused to transfer the said parcel of land to the plaintiff by not discharging the said property.

She testified that she was no longer willing to sell the said premises and would wish to take possession of the same. She further testified that although the rent for the said premises was Kshs 2,220/= in 1989 by 1998 the rent had increased to Kshs 5,000/=. She estimated the rent at the time of her testimony to be Kshs 8,000/=. She testified that the defendant had not paid her any rent since he took possession of the suit premises. She denied that she had received the sum of Kshs 90,000/= as purchase consideration in 1992 but reiterated that the said amount could be considered as the improvements which were undertaken by the plaintiff on the suit premises. She urged this court to dismiss the plaintiff's suit and enter judgment in her favour as prayed in the counterclaim.

I have read the pleadings filed by the parties in this suit. I have carefully considered the evidence that was adduced by the parties to this suit. I have also read the submissions which were filed by the parties to this suit. The issue for determination by this court is two fold; firstly whether or not the agreements entered between the plaintiffs and defendant is still valid and enforceable. The second issue for determination is what remedies should be ordered that would determine the issue in dispute between the plaintiff and the defendant.

Certain aspects of this case are not in dispute. It is not disputed that the plaintiff and the defendant entered into two agreements whereby the defendant agreed to sell to the plaintiff all that parcel of land then known as LR. 8836/1009 and now known as Nakuru Municipality Block 3/172. In the first agreement which was produced as plaintiff's exhibit No. 1, the purchase consideration was Kshs 340,000/=. The plaintiff paid the sum of Kshs 10,000/= on the date of the signing of the agreement. It was agreed that the balance of Kshs 330,000/= would have been paid once the plaintiff secured a financier. In this regard the defendant undertook to have the title of the suit premises discharged and availed to the plaintiff so that he could take the said title documents to his financiers to secure the balance of the purchase consideration. An important clause of the said agreement was that it was agreed that the plaintiff was to take possession of the suit premises so that he would complete the construction of the house which had been commenced by the defendant.

It is apparent that the plaintiff and the defendant were not satisfied with the first agreement. They entered into a second agreement on the 5th of March 1992. The agreement was produced as plaintiff's exhibit No. 2. In the said agreement the plaintiff and the defendant agreed that the purchase consideration for the suit premises would be Kshs 450,000/=. It was indicated in the agreement that the plaintiff would pay the defendant a sum of Kshs 90,000/= on the signing of the agreement. However the defendant denies that she received the said sum of Kshs 90,000/=. On his part, the plaintiff admits that he did not pay the said sum of Kshs 90,000/= in cash but rather calculated the amount that he had used to complete the house in the said premises when he took possession of the same. The defendant acknowledges that the plaintiff repaired the suit premises and brought it to a level where it could be habitable. She however estimates the costs for the said completion of the suit premises to be not more than Kshs 40,000/=.

Having carefully evaluated the evidence in this aspect of the case it is clear that the defendant accepted the valuation of the repairs undertaken on the suit premises to be Kshs 90,000/= when the agreement dated the 5th of March 1992 was signed. In the circumstances of this case, I am not prepared to vary the written provisions of the agreement by parole evidence. I therefore hold that the defendant acknowledged to have received the sum of Kshs 90,000/= being the costs of completing the house in the suit premises. The said agreement also provided that the plaintiff was to pay the balance of Kshs 360,000/= on or before the 19th of August 1992 "*without default whatsoever*". The defendant agreed to have the title documents discharged and handed over to the plaintiff to enable him process the loan to settle the said balance. During the hearing of this case, the plaintiff testified that he was frustrated in obtaining the said loan because the defendant failed to discharge the title of the suit premises within the requisite period. He testified that he could not therefore obtain the loan to pay the balance of the purchase consideration. The defendant however disagreed with the plaintiff's assertion on this point. She testified that at the material

time the title of the suit premises was charged to her employer Messrs Kenya Commercial Bank. She testified that she told the plaintiff to give a professional undertaking to the said bank so that the said title documents could have been released to him. She testified that the plaintiff did not do as instructed instead he gave the profession undertaking to her.

Having carefully evaluated the evidence and further having observed the demeanour of the plaintiff and the defendant when they testified in court, I do believe the explanation given by the defendant. It is apparent that the plaintiff was invoking the clause relating to the discharge of the title documents as an excuse for his failure to pay the balance of the purchase consideration before the 19th of August 1992 as he was required by the agreement. It is evident that the plaintiff used the non-availability of the title documents to delay in paying the balance of the purchase consideration as he was required to by the said agreement. I therefore hold that the plaintiff breached a fundamental term of the said agreement which required him to pay the balance of the purchase consideration of Kshs 360,000/= on or before the 19th of August 1992. The payment of the said balance of the purchase consideration was not subject to the plaintiff obtaining a loan from the bank to pay the defendant. The agreement was explicit. There was no such pre-condition. Therefore the plaintiff having breached the said agreement, the defendant was at liberty to rescind or revoke the said agreement as the breach by the plaintiff was a fundamental one.

Another aspect that was introduced in the agreement of the 5th of March 1992, was the payment of rent by the plaintiff to the defendant pending the payment of the balance of the purchase consideration. The plaintiff testified that he paid the agreed rent upto the year 1998 when he refused to pay the said rent when he learnt that the defendant intended to sell the suit premises to a third party. The plaintiff produced deposit slips which were produced as plaintiff's exhibit No. 5 which established that indeed the plaintiff paid rent to the defendant through her account at Kenya Commercial Bank until October 1995 when he stopped paying the said rent. The defendant testified that the plaintiff had not paid her rent since he took possession of the suit premises in 1989. Having considered the evidence adduced by the plaintiff and the defendant on this aspect of the case, it is clear that the plaintiff established on a balance of probabilities that he paid rent upto and including October 1995. The last rent payable was Kshs 4,000/= per month. In the premises therefore and according to the evidence adduced, I do hold that the plaintiff has resided in the suit premises from October 1995 to date without paying any rent. This is rent which is due and owing to the defendant. The plaintiff has not given any reason why he failed to pay the said rent to the defendant. Furthermore the evidence adduced in this case confirms that the plaintiff redesigned the suit premises and interfered with the structural integrity of the suit premises without seeking the permission of the defendant or the Nakuru Municipal Council. By doing this, the plaintiff radically changed the premises that he took possession from the defendant in the year 1989.

Having considered the totality of the evidence adduced, it is clear that the suit filed by the plaintiff against the defendant must fail. The plaintiff breached the agreement entered between himself and the defendant on the 5th of March 1992. He failed to pay the balance of the purchase consideration before the 19th of August 1992. This was fundamental breach that entitled the defendant to rescind or revoke the agreement. Furthermore the plaintiff has since October 1995 been occupying the suit premises without paying any rent. This was a further fundamental breach of the said agreement. To add insult to injury, the plaintiff redesigned the suit premises and altered its original design during the pendency of this suit without the consent of the defendant. When the defendant sought to assert her proprietary rights over the suit premises, the plaintiff brought the said suit in court. In my considered opinion the plaintiff filed this suit to achieve one purpose only; that is, to continue occupying the suit premises rent free to the detriment of the defendants. This suit was filed by the plaintiff to achieve maximum nuisance value of frustrating the defendant from taking possession or selling the suit premises to other parties.

Having carefully re-evaluated the evidence adduced on a balance of probabilities, I do hold that the plaintiff has failed to prove his case against the defendant. His suit against the defendant is therefore dismissed with costs. I enter judgment for the defendant against the plaintiff as prayed in her counterclaim. I hereby declare that the plaintiff being a tenant of the defendant was obligated to pay the rent for occupying the said suit premises.

Since the plaintiff has not paid the defendant rent since October 1995 I hereby enter judgment for the sum

of Kshs 500,000/= being the rent arrears owing at the then rate of Kshs 4,000/= per month to date (*March 2006*). The defendant prayed that the plaintiff be ordered to restore the suit premises to its original design. In the circumstances of this case, such an order would be difficult to enforce. I therefore order the plaintiff to pay the defendant the sum of Kshs 500,000/= being damages for the said interference by the plaintiff of the structural integrity of the plaintiff's premises. I further order that the plaintiff shall vacate the suit premises within thirty days of the delivery of this judgment or in default thereof he be evicted by the defendant. The said total sum of Kshs 1,000,000/= awarded to the defendant shall be paid less Kshs 90,000/= which the plaintiff paid as part of purchase consideration in the vitiated agreement for the sale of the said premises. I will however make no orders as to interest for the said amounts for both the plaintiff and the defendant. The defendant shall have the costs of the counterclaim.

DATED at NAKURU this 14th day of March 2006.

L. KIMARU

JUDGE