REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO. 206 OF 2018

MARGARET NGINA KAMAU.....PLAINTIFF

VS

CHRISTOPHER KARANJA MUCHAI.....1ST DEFEDANT

MARGARET NJERI KARANJA.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit against the Defendants and sought the following orders;

    a. The sum of Kshs 10,670,000/- together with interest.

    b. Costs of the suit.

2. The Plaintiffs' case is that she sold RUIRU/RUIRU EAST BLOCK2/5374 to the Defendants vide three successive agreements of sale, all of which the Defendants have failed to pay the purchase price in full.

3. The Defendants denied the Plaintiffs claims and vide their statement of defence blame the Plaintiff for frustrating the transaction through interalia failing to deliver the completion documents to enable them acquire funding from their bank, coercing them to execute the 2 additional agreements. They urged the Court to dismiss the Plaintiff's case.

4. At the hearing the Plaintiff led evidence and relied on her witness statement dated 16/12/14 and list of documents in support of her case. She stated that she caused RUIRU/RUIRU EAST BLOCK2 /5374 to be subdivided into 10 plots and sold to the Plaintiffs at the sum of Kshs 2.4 million out of which they paid Kshs 200,000/- leaving the balance of Kshs 2.2 million to be paid in agreed installments of Kshs 1.1. million in September 2007 and march 2008.

5. That the Defendants failed to pay the balance of the purchase price as agreed.

6. She proceeded to consolidate the 10 plots and registered them as LR RUIRU/RUIRU EAST BLOCK2 /7442 and entered into another agreement with the Defendants for the sum of Kshs 6 Million. That at the Defendants urging registered the suit land in the name of the Defendants to enable them secure a loan in the sum of Kshs 6 million. That she transferred the land to the Defendants in anticipation of being paid the purchase price. The title was registered in the name of the Defendants on the 8/9/2014.

7. That the Defendants failed to pay the purchase price and sought to evict them from the suit land. That they further entered into a third agreement dated the 28/9/2013 to capture further commitments with the Defendants, this time the purchase price agreed was Kshs 9,700,000/-. That the Defendants reneged on the agreement and failed to pay the purchase price.

8. That after every default the parties would meet and consider a new agreement before executing it and she denied ever coercing the Defendants into it. That she neither referred the matter for arbitration nor sent a notice to complete the same.

9. The evidence of the Defendants was led by DW1 – Christopher Karanja Muchai who informed the Court that he runs a school on the suit land with his wife, the 2nd Defendant. He relied on is witness statement dated the 23/10/2017 and the list of documents of even date.

10. That the Plaintiff put the Defendants in possession of the suit land whereupon they constructed a school by the name Ruiru School of Achievers in 2007.

11. He testified that he entered into an agreement of sale with the Plaintiff in 2007 initially for the purchase of 10 plots for the purposes of establishing a school. The Purchase price was Kshs 2.4 million out of which they paid Kshs 200,000/- leaving a balance of Kshs 2.2 million. That they later agreed to a new price of Ksh 6 Million for the land. This sale was to be funded through a loan from Equity bank, their bankers. That the title of the suit land was to secure the loan from the bank. That to allow them register the school with the authorities, the title of the suit land was transferred into their names.

12. He stated that he paid Kshs 1 million to the Plaintiff but when asked to produce evidence of acknowledgement he stated that he did not have.

13. That they failed to obtain the loan because the Plaintiff did not avail the original title deed for charging by the bank.

14. That the Plaintiff threatened them with eviction if they continued to default on the agreement and this forced them to execute the third agreement dated the 28/8/13 to avoid eviction. That he has carried out developments on the land.

15. That the Plaintiff did not give any formal notice of completion to the Defendants before filing the suit.

16. That he and his wife signed the 3rd agreement for sale and as per that agreement they owe the Plaintiff the sum of Kshs 9.7 million. He added that the amounts were committed to under duress. That the sum is too high. In addition, the witness confirmed that there was no threat to his person save for a threat of eviction.

17. The witness admitted that they have been on the suit land since 2007, running the school without paying any rent to the Plaintiff. That though the sale was to be funded interalia from school fees on a termly basis he did not pay at all contrary to the agreement of sale agreement dated the 28/9/2013.

18. The witness informed the Court that they owe the Plaintiff Kshs 5 million as per the 2nd agreement of 2010.

19. The Plaintiff submitted that the 1st Defendant is a dishonest individual carrying out business on the Plaintiffs property without payment. That 1st Defendant has not explained why he is not bound by the 2013 agreement and yet he does not deny it.

20. The Defendants submitted that time was not of essence in the agreement and therefore it left it open for the Plaintiff to issue 21 day notice of completion based on what was reasonable time in the circumstances of the case.

21. That by withholding the original title deed the Plaintiff displayed malice against the Defendants denying the opportunity to source purchase funds from the bank. That she frustrated the contract and should not be allowed to reap from it.

22. That the Plaintiff has not come to Court with clean hands. That she is guilty of frustration, duress and coercion. That the Defendants are not in default and that the agreement entered into in 2013 is null and void because of duress and coercion. That he is willing to enter into an undertaking with the Plaintiff to honour the transaction but not willing to pay the sum demanded because it was arrived at through duress and coercion.

23. That the agreement which is valid is the one dated the 30/9/2010. That it would be oppressive unjust and financially injurious to require the Defendants who are not guilty of laches nor inordinate delay to pay the said sum.

24. Having read and considered the Pleadings, the evidence and the written submissions the issues for determination are;

a. Whether there is a binding agreement between the parties?

b. What orders should the Court grant?

c. Who meets the cost of the suit?

25. It is not disputed that the parties in this case executed three agreements dated the 1/8/2007, 30/9/2010 and 28/9/2013.

26. It is not in dispute that the title of the suit land is registered in the name of the Defendants with the Plaintiff holding the original title deed.

27. It is also not in dispute that the Defendants took possession of the suit land in 2007 and have constructed a school thereon.

28. It is majorly acknowledged by both parties in this contest that the purchase price has not been fully paid notwithstanding occupation by the Defendants.

29. The Plaintiff has explained to the Court that the Defendants have cunningly defaulted on the agreements which default in my view was cured by the parties entering into a fresh agreement with an enhanced price at every point.

30. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592**, Scrutton L.J. held as follows:

"The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract."

31. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993**, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609**, held as follows:

"The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable."

32. The importance of interpreting contracts strictly was further reiterated in the case of **Curtis Vs Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631** in which Lord Denning held as follows:

"If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

33. The Defendants have averred that the contract entered into in 2007 and that of 2013 are null and void except for the one entered in 2010. Interalia that the agreement of 2010 is valid.

34. Let me examine the validity of the agreements of the parties. To start with the Defendants have claimed that they entered into agreement through duress and coercion.

35. It is on record that the Defendants have admitted that they executed the agreements. That they have not paid the Plaintiff the full purchase price under any of the agreements and yet they are enjoying the benefit of the property by running a school on commercial basis.

36. In the case of ***Lole vs Butcher [1949] All Er 1107*** Lord Denning, LJ considered factors which may render a contract a nullity. The Court held that: -

"*The correct interpretation of the case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their innermost state of mind have to all outward appearances agreed with sufficiently certain in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some conditions expressed or implied in it or for fraud or on some equitable ground".*

37. The Supreme Court of the United Kingdom later stated as follows in the case of **RTS Flexible Systems Ltd *v* Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14,[45]** :

"*The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.*

38. The legal concept on duress has been defined by **Halsburys Laws of England 4th Edition Volume 9** as:

"The compulsion under which a person acts through fear of personal suffering, whereas undue influence has been defined as the conscientious use by one person of power possessed by him over another to induce the other enter into a contract."

39. In the case of **Pao *on vs Lau Yiu* [1978] 3 All ER 65**, the Privy Council said at page 78:

"*Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree …… that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent. ……*

In determining whether there was a coercion of will such that there be no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".

40. **In the case of Astley v Reynolds [1731] 2 Stra 915, 93 ER 939, the Court held that the** compulsion had to be such that the party was deprived of "*his freedom of exercising his will*." It would appear that American law, also, now recognizes that a contract may be avoided on the ground of economic duress. See **Williston on Contracts** (3rd Edn, 1970 Chapter 47). The commercial pressure alleged to constitute such duress must, however, be such that the victim:-(i) must have entered the contract against his will; (ii) must have had no alternative course open to him and (iii) must have been confronted with coercive acts by the party exerting the pressure. This holding was upheld by the Court

of Appeal in the case of **Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others [2008] eKLR.**

41. In this case the Defendants have admitted executing the agreements without any threat to their persons. That they never reported any threat to the police. That they owe the Plaintiff the sum of Kshs 9.7 million. That the only basis of objection to the agreement is because in their view the sum demanded is high and secondly that it was made under duress.

42. The Defendants failed to place any evidence in support of any duress or coercion on the part of the Plaintiff. The issue of threat to eviction cannot be said to be duress. It is a consequence of and a method of enforcing a lawful contract by the Plaintiff.

43. The Defendants have urged the Court to hold that the 2010 agreement is valid. My reading of the case is that the parties entered into the 3 agreements successively with their eyes open and they made commitments in each respect to each other. The Plaintiff was motivated by the enhancement of the purchase price while the Defendants were insidiously buying time to avoid paying the purchase price. The Defendants admitted that though the 2010 agreement was subject to securing the funds from their bankers, they failed to place before the Court any evidence of an application for the loan, letter of loan offer stipulating that the suit land would secure the facility. The Court concludes that the Plaintiff cannot be blamed for failure of the Defendants to secure the loan and or pay the purchase price.

44. The Defendants cannot therefore turn around and reject two agreements and claim that the 2010 agreement is valid. There is no basis and this is rejected.

45. The sum total of the evidence received in this case is that the Defendants have admitted their default in paying the Plaintiff.

46. The parties contemplated the default in Para 4 of the sale agreement as follows;

> "in the event of default of payment of an installment and the next installment becomes due when the earlier one has not been paid or has some arrears, the contract shall stand terminated and the full balance shall become due and payable within 30 days."

47. In the end I enter judgement in favour of the Plaintiff as prayed. Costs in her favour.

48. It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 21ST DAY OF JANUARY 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Kagiri for the Plaintiff

Ms Musyoka for the 1st and 2nd Defendants

Court Assistant: Lucy