



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 417 OF 1989

MARGARET ALIVIDZA.....PLAINTIFF

V E R S U S

L.Z. ENGINEERING CONSTRUCTION LTD.....DEFENDANT

J U D G M E N T

On 24th February, 1987 Ms. Margaret Alividza (hereinafter referred to as “the Plaintiff”) and L.Z. Engineering Construction Ltd (hereinafter referred to as “the Defendant”) entered into an agreement whereby it was agreed between them that the Plaintiff would purchase the Defendant’s subplot number 203 (hereinafter referred to as “the suit premises”) on land situate in the City of Nairobi in the Nairobi Area known as Land Reference Numbers 209/9734, 9735, 9736 and 9737 (hereinafter referred to as “the said plot.”) The suit premises was described in the Plaint filed in this Court on 30th January, 1989 as Land Reference Number NAIROBI/BLOCK/106/242(HOUSE NO. 203). In the agreement, the Defendant was to sub-divide the said plot into numerous sub-plots which included the suit premises and build on each subplot a dwelling house with usual conveniences connected therewith. The construction was to be completed on or before 30th September, 1987. The Plaintiff duly paid the deposit as required under the agreement. The suit premises were to be transferred to the Plaintiff on the completion date which was defined in clause 6 of the agreement as follows:-

“6. The completion dated shall be twenty eight days after the service of a written notice requiring completion served by the..... (Defendant’s) advocates on the.....(Plaintiff); such notice shall not be given more than one month before the.....(suit premises) are expected to be ready for occupation.” Clause 10 and 11 of the agreement are also important in this case.

They provided as follows:

“10. The sale and purchase hereunder shall be subject to any Building Society or Financial Institution agreeing to give to the.....(Plaintiff) on the security of the..... (suit premises) a loan of not less than eighty per cent of the purchase price. The.....(Plaintiff) shall use his best endeavours to obtain such loan before the completion date; provided however if the(Plaintiff) fails to obtain such loan before the completion date this agreement shall be voidable at the instant of the..... (Plaintiff) if the.....(Plaintiff) elects to avoid it the..... (Defendant) will refund to the.....(Plaintiff) any money paid to the(Defendant) on account of the purchase price but without any interest.

11. If the(Plaintiff) fails to comply with the obligations under this agreement including the obligation to complete the sale and pay the balance of the purchase price (and the time shall be of essence for the purpose of this obligation) the.... (Defendant) may rescind this agreement by notice in writing to the(Plaintiff).....”

The Plaintiff duly paid the deposit and initial disbursements on account of stamp duty and legal fees as

acknowledged by Nairobi Homes Ltd vide their letter dated 16th February, 1987. There is no dispute that Nairobi Homes Ltd were the agents of the Defendant. On 5th July, 1987 the Plaintiff applied to the Housing Finance Company of Kenya Ltd (hereinafter referred to as “the HFCK”) for a mortgage over the suit premises.

On 13th June, 1988, Messrs Esmail & Esmail Advocates acting for the Defendant wrote to the Plaintiff to notify her that the construction on the suit premises was expected to be completed at the end of that month and that it was hoped “to complete the sale soon thereafter”.

On 24th August, 1988 the Defendant’s Advocates aforesaid wrote to the Plaintiff inquiring whether the Plaintiff had received an offer of loan from the HFCK. They also gave notice under clause 6 of the agreement (already mentioned above) fixing the completion date as the 28th day after receipt of that letter by the Plaintiff.

On 27th October, 1988, the HFCK instructed Messrs Waruhiu & Muite Advocates to prepare a mortgage/charge over the suit premises. That letter was copied to the Plaintiff and the Defendant but was not copied to the Defendant’s Advocates. On 8th November, 1988, Messrs Esmail & Esmail Advocates once again wrote to the Plaintiff giving “a final notice fixing the completion date as the 28th day after receipt of this letter by you.” On 16th November, 1988, the Plaintiff wrote to Messrs Esmail & Esmail Advocates requesting that the completion date be extended upto 31st December, 1988, the Defendant’s Advocates wrote to the Plaintiff in the following terms:-

“We refer to your letter of 16th November and are most disappointed to note that you are not ready to complete the the sale. [W]e have already received the charge from Waruhiu & Muite and in the circumstances you should call upon us to sign the same. [A]lso note that the completion date is now fixed as the 28th day after the receipt of this letter by you.....”

On 4th January, 1989 the Plaintiff sent to the Defendant’s Advocates a post dated cheque for K.shs. 77,000/=. This cheque was delivered by the Plaintiff personally on 5th January, 1989 to Mrs. Esmail an Advocate with the Defendant’s Advocate’s firm. That cheque was returned by the Defendant’s Advocates vide their letter dated 5th January, 1989. That letter went ahead to say as follows:-

“In view of the fact that you have failed to complete the sale in accordance with the agreement of sale the(Defendant) have now elected to cancel the agreement under clause 11 thereof.”

On 19th January, 1989, the Plaintiff wrote to the Defendant’s Advocates seeking indulgence. The Advocates replied on 25th January, 1989 stating that the cancellation of the agreement could not be reversed. In that letter, they enclosed their cheque of K.shs. 60,500/= being the deposit that had been paid by the Plaintiff. They advised that the balance of K.shs. 10,000/= would be sent by Nairobi Homes Ltd. On 31st January, 1989, the Plaintiff’s Advocates Messrs Khaminwa & Khaminwa Advocates returned to the Defendant’s Advocates the cheque sent to the Plaintiff vide the Defendant’s Advocate’s letter of 25th January, 1989. On 15th June, 1989, the Plaintiff wrote to the Defendant asking that the Defendant’s Advocates be instructed to proceed with the transaction. On 28th September, 1989, the HFCK suspended its offer of advance to the Plaintiff.

In her oral testimony in this Court, the Plaintiff stated that she handed the cheque with her letter dated 4th January, 1989 to Mrs. Esmail of Esmail & Esmail Advocates on 5th January, 1989 who asked her to see a Mr. Bornstein, a representative of the Defendant on the question whether the time for completion could be extended. The Plaintiff admitted upon crossexamination that no extension had been allowed. She stated that when she was asked to obtain an extension of the clearance certificate and to pay outstanding rents to the Commissioner of Lands, she understood this as constituting an extension of the completion date. On this last matter, the Plaintiff did not impress me at all. She is unclear whether the request was made by Messrs Esmail or Mr. Bornstein. However, as it shall be seen later, that is besides the point.

On 26th February, 2001, the Plaintiff’s Advocates filed draft issues in this Court to which Counsel for the parties consented to be agreed issues before the hearing of the case commenced. Those issues were as

follows:-

1. Whether the date of completion of the sale had been fixed by the time the Defendant cancelled the Sale Agreement.
2. Whether the Plaintiff was willing and is still ready and willing to fulfill all the obligations under the said agreement.
- . Whether the Defendant served on the Plaintiff notice requiring completion of sale. And if so, whether the Plaintiff failed to complete within the time fixed for completion.
4. Whether the Defendant lawfully exercised its contractual prerogative by canceling the sale agreement.
5. Whether the Plaintiff is guilty of laches.
6. Whether the Plaintiff is entitled to remedy of specific performance.

In her Complaint filed in this Court on 30th January, 1989, the Plaintiff sought an injunction to restrain the Defendant from selling disposing or otherwise alienating the suit premises. The Plaintiff also sought an order for specific performance of the said agreement and a “declaration that the date of completion has never been set.”

Dr. Khaminwa for the Plaintiff argued that, from the evidence, the parties had agreed to vary the date of completion which was done by oral agreement. With all due respect, this argument is very hard to justify in view of the Plaintiff's own free admission that the completion date had not been extended. Although the failure of the Defence to call Messrs Esmail would have left the Plaintiff's testimony unchallenged in this respect, her admission as already mentioned clears the matter. By asking for more time vide her letter dated 19th January, 1989, it would appear that the Plaintiff had recognized that she was out of time. There is no obligation in the agreement upon the Defendant to extend time for completion upon request from the Plaintiff. There is no doubt from the evidence as a whole that the Defendant severally extended the period of completion in writing. That did not make the date of completion perpetual. And further, if that was the course, it is highly improbable that the date of completion was fixed orally on the last occasion by Mrs. Esmail as the Plaintiff wanted this Court to believe. She said that she was asked to pay for outstanding rents and clearance certificate. This, as has already been stated is unclear as the Plaintiff was not certain who between Mrs. Esmail and Mr. Bornstein asked her to do this. That aside, it is clear to my mind, as I have already said that it is highly improbable that the parties having severally extended the date of completion in writing, they could on the final occasion do so orally. The concrete evidence of the last date fixed for completion was contained in the Defendant's Advocate's letter dated 23rd November, 1988. The Plaintiff did not contend that she was able to complete within the period fixed in that letter. Indeed, the tenor of her case and the submissions proffered by her Counsel strongly suggest that she could not have completed within the period contained in that letter. In that case, issue number 1 above is resolved in the affirmative. As the Plaintiff could not complete within the fixed period, this Court cannot hold that she was willing to fulfill her obligations under the agreement. Whether she is ready and willing to fulfill the obligation now is besides the point. That is outside the agreement. That does for issue number 2 above. It follows that issue number 3 above must also be answered in the affirmative. Notice for completion was served vide the Defendant's Advocate's letter dated 23rd November, 1988 and as has already been seen, there was no compliance therewith prompting the Defendant to rescind the contract. Issue 4 above is also resolved in the affirmative. In view of the fact that the Plaintiff was unable to complete the sale within the stipulated period, the Defendant was expressly empowered by clause 11 of the agreement to rescind the agreement.

Based on the Court's finding on the first four issues, it is unnecessary to determine the other two issues as no case in respect thereof has been made out. If the Defendant was entitled to rescind the contract, the Plaintiff's claim for specific performance automatically fails and by extension the question of laches will have no relevance.

Dr. Khaminwa relied on the following authorities to argue his case.

(a) VOLUME I OF CHITTY ON CONTRACTS (GENERAL PRINCIPLES) at page 18 where the Learned authors said as follows at paragraph 29:

“Variation or discharge. It was at common law an attribute of a contract under seal that it could only be varied or discharged by another contract under seal, and not by contract under hand or by word of mouth; but in equity such contracts could be varied or discharged by parol, and the rule of equity now prevails.”

(b) **Berry v. Berry** [1929] 2 K.B 316 which also supported the Equitable principle that contracts under seal could be varied or discharged by parol.

(c) **Steeds v. Steeds** [1889] 22 Q.B. 537 also to the same effect.

However, as Mr. Esmail pointed out, this case was distinguishable since, unlike in those authorities, the Plaintiff in this case had not pleaded the fact of variation to enable her rely on it. In any event, it has already been seen that the Plaintiff admitted that there was no extension granted to her, The general evidence also contradicts the proposition that there was any such extension. In fact, this argument contradicts the prayer in the Plaint where the Plaintiff sought a “declaration that the date of completion has never been set.” Whether there had been an extension of the date of completion or not was not actually submitted as an issue for determination in this case.

The text of S.K. MITRA is also of no useful purpose since the notice in this case was clearly given as stipulated in the agreement vide the Defendant’s Advocate’s letter dated 5th January, 1989.

I, therefore, dismiss the Plaintiff’s suit with costs.

DATED and DELIVERED at NAIROBI this 24th day of September, 2001.

ALNASHIR VISRAM

JUDGE