

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 3521 OF 1994.

ANN MUTHONI
PENTET.....PLAINTIFF

VERSUS

PATRICK CAMPBELL MUNYUIRA.....DEFENDANT

J U D G M E N T

The Plaintiff brings this action seeking an order for specific performance of an agreement sale in writing dated the 2.8.1994 and other orders sought therein. The land in question has been sub-divided and is now known as L.R. No.209/8879/17 in respect of which there is a deed plan issued by the Director of Surveys being Deed plan No. 193020. (the suit premises).

The Defence alleged that the sale Agreement which the Defendant avers was rescinded in accordance with its terms. The reason for the rescission is not pleaded. The Defendant also alleges that the deposit of Shs.100,000/- paid by the Plaintiff was returned to her but says that she refused to accept it.

The issue in this case is “did the Defendant have a right to rescind the Agreement for sale and if so was the Plaintiff wrong in refusing to accept back her deposit.

The only witness in this case was the Plaintiff who stated she entered into the Agreement for Sale of the suit premises at a price of Shs.3.5m.in respect of which she paid a deposit of shs.100,000/. Although the suit premises are now sub-divided the Defendant has refused to complete the matter. The Agreement provided for a further sum of Shs.250,000/- to be paid but the condition on which it was to be paid namely the completion of the sub-division was not in place at the time of the signing of the Agreement Subsequently the Defendant after the subdivision took the stand that he had a right to rescind the sale. His reason for not being able to sell his property to the Plaintiff is contained in a letter dated the 31.8.94 marked ‘without prejudice’. The Defendant’s advocate objected to this letter being adduced in evidence. If the letter is not admissible this is of no help to the Defendant who has given no reason whatsoever as to why he has a right to rescind the sale. There is no condition in the Sale Agreement in which it is alleged the Plaintiff has breached the agreement and in fact all the conditions for completion of the matter lay with the Defendant which he failed to honour. The Plaintiff is perfectly entitled not to accept the rescission and insists on specific performances of the Agreement.

The Defendant has consistently sought to delay the hearing of this case as appears from the record. The Defendants advocate has filed in application to withdraw from acting for the Defendant which has not as yet been heard as he claims he has been unable to serve his client with it. I refused an adjournment on the 14.12.2000 of this suit as it is clear the Defendant has no defence of any merit and is merely seeking to delay the hearing of this suit.

In view of the fact that the Plaintiff has proved her claim and the Defendant has no defence to it, I order that the sale of the suit premises be specifically performed. I order that that the Defendant do produce the title deed to the property within 30 days from today and that he execute a transfer in favour of the Plaintiff. Additionally the Plaintiff must also provide all necessary consents to the sale within that period.

If he fails to do so then the matter is to be mentioned before me for further orders. I also order that the Defendant give vacant possession of the suit premises to the Plaintiff within the same period against deposit of the balance of the purchase price with the Plaintiff's advocate to be paid to the Defendant on vacant possession being given and the title to the suit premises being transferred to the Plaintiff. I will deal with the encumbrances against the title at a mention date on the 24.1.2001. No damages are awarded but the Plaintiff will have the costs of this suit to be taxed or agreed.

Dated and delivered at Nairobi this 21st day of December, 2000.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.