



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Shyanguya & another v Mitei (Environment and Land Case Civil Suit 378 of 2017) [2023] KEELC 16251 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16251 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 378 OF 2017
MN GICHERU, J
MARCH 9, 2023**

BETWEEN

CAROLYNE BUSHURU SHYANGUYA 1ST PLAINTIFF

TIMOTHY MALINGI KOE 2ND PLAINTIFF

AND

CHRISTOPHER MITEI DEFENDANT

JUDGMENT

1. The Plaintiffs seek the following reliefs against the Defendant.
 - (a) An order of specific performance and completion of the sale agreement dated 27/6/2011 over LR Kajiado/Kitengela/21086 and 21232 (suit property).
 - (b) A declaration that the Plaintiffs are entitled to the suit property measuring 0.65 hectares and 0.58 hectares respectively and an order that the Defendant transfers the suit land forthwith and in default to be evicted forcefully therefrom.
 - (c) A declaration that all steps taken and all documents held by the Defendant in regard to the suit land are null and void ab initio and do not confer any interest to the Defendant or anyone acting in his succession.
 - (d) An order for the cancellation of entries created and/or subdivision of LR 21232 into parcels numbers Kajiado/Kitengela/63935, 63936, 63937, 63938, 63939, 63940, 63941, 63942, 63943, 63944 and 63945 and all subsequent subdivisions, sales and or transfers arising therefrom and the restoration of the said LR 21232 and its registration in the joint names of the Plaintiffs.
 - (e) A permanent injunction against the Defendant compelling him, his employees, servants or agents to vacate the suit property.



- (f) An order that the suit property be registered in the names of the Plaintiffs and the Deputy Registrar to execute all the relevant transfer instruments to facilitate issuance of title to the Plaintiffs.
 - (g) In the alternative, an order of restitution be granted requiring refund of the monies paid to the Defendant at current market rates of the suit property and subject to a valuation report by a reputable valuer and the Plaintiff to yield possession within 14 days of payment in full.
2. The Plaintiffs' case is as follows. On 27/6/2011, they entered into an agreement with the Defendant for the sale of the suit property. The total purchase price was Kshs 12.6 million. The following were the agreed conditions.
- (i) 10% of the purchase price to be paid directly to the vendor by the purchasers upon execution of the agreement.
 - (ii) Vacant possession upon payment of the full purchase price to the vendor.
 - (iii) The purchasers to pay a further Kshs 2.4 million upon completion.
 - (iv) The vendor to obtain all necessary clearances/consents to facilitate the transfer and completion.
 - (v) Time shall be of essence in this agreement.
 - (vi) The purchasers are being financed by Equity Bank Limited who shall pay the full purchase price.
 - (vii) Upon signing of this agreement, the purchasers' advocates shall facilitate the obtaining of a professional lawyer on payment of Kshs 3 million.
 - (viii) "Completion Date" means the Business Day falling 90 days from the date of this sale agreement.
3. According to the Plaintiff she complied by paying Kshs 6.2 million which included 10% deposit. Having paid 50% of the purchase price, the Defendant was expected to hand over the original titles and duly signed transfer forms to enable the Plaintiffs' Lawyers process the title deed in their favour.
4. The Defendant failed to perform his part of the agreement. The Plaintiff instructed Malonza Advocates to issue reminders to the Defendant. The reminders did not yield any fruit. The Defendant did not communicate to the Plaintiff to inform them if there was any breach on their part.
- In addition to the breach of the term of the agreement, the Plaintiffs came to learn that the Defendant had fraudulent and illegally subdivided LR 21232 into twelve parcels namely 63935-46. It is for the above reasons that the Plaintiffs filed this suit.
5. In support of their case the Plaintiffs filed the following evidence.
- (a) Copies of title deeds for the suit property.
 - (b) Copy of letter from Equity Bank dated 17/8/2021.
 - (c) Copies of agreement for sale of the suit property both of which are dated 27/6/2011.
 - (d) 3 cash deposit slips into the Defendants account by the first Plaintiff for Kshs 750, 000/- , Kshs 200,000, and Kshs 250, 000/- dated 29/6/2011, 2/7/2011 and 16/7/2011.
 - (e) Copy of demand letter dated November 17, 2014.



- (f) Copies of caution in respect of the twelve subdivisions of LR 21232.
 - (g) Other documents.
6. In a written statement of defence dated December 18, 2017, the Defendant through counsel on record, blames the Plaintiffs for failure to provide a professional undertaking for payment of the balance of the purchase price which was a precondition for the release of the title deeds by the Defendants to the Plaintiffs.
 7. In addition to the above the Defendant blames the Plaintiffs for the following breaches of the agreement for sale.
 - (a) Failure to pay 10% of purchase price on execution contrary to clause 3.1 of the sale agreement.
 - (b) Failure to pay the purchase price within 90 days.
 8. The Defendant avers that on October 25, 2011, he issued a 21 days notice to the Plaintiffs to pay the balance of the purchase price. This prompted the Plaintiff to deposit Kshs 500,000/- into the Defendant's account on November 10, 2011 which was 21 days after the expiry of the notice.
 9. Owing to the breach by the Plaintiffs, the Defendant rescinded the sale agreements. He says that the subdivision of LR 21232 into twelve plots is lawful since the original agreement had been rescinded. He prays for the dismissal of the Plaintiffs' suit.
 10. In support of his case, the Defendant filed the following evidence.
 - (i) Copies of title deeds for 14 land parcels in issue.
 - (ii) Copies of sale agreements for parcels numbers 21086 and 21232.
 - (iii) Copy of letter dated October 25, 2011 to Malonza Advocates.
 - (iv) Copy of letter dated 1/11/2011 to Malonza Advocates.
 - (v) Copy of letter dated 17/3/2015 to B.N. Kiptoo advocates.
 11. At the trial, the first Plaintiff testified and called two witnesses Duncan Kitur and John Orenge. Their evidence is to the effect that the Plaintiffs performed their part of the bargain and all the blame for breach goes to the Defendant.
 12. On the other hand, the Defendant testified at the trial and called one witness by the name of Mwenda Kinyua. Although the Defendant said that he filed a witness statement dated November 19, 2014 that witness statement is not on record. It could have been filed on the related file which unfortunately is not attached to this record. Be that as may, he testified and shifted the blame to the Plaintiffs saying they breached the sale agreement and failed to heed the completion notices.
 13. Counsel for the parties filed written submissions on 19/1/2022 and 14/2/2023 respectively in which they raised various issues.
 14. I have carefully considered all the evidence adduced by the parties as well as the submissions by their learned counsel and the case law cited therein.
- I find that the following issues arise.
- (i) Which party breached the agreement?
 - (ii) Whether the remedies sought by the Plaintiffs are available to them?



(iii) If the sought remedies are not available, what is available to the Plaintiffs?

15. On the first issue, I find that it is the Plaintiffs who breached the agreement. They did not pay Kshs 1,260,000/- on execution of the agreement. They paid Kshs 1,200,000/- in three deposits one of which was paid on 16/7/2011. This was 20 days after the date of the agreements yet the agreements provided at clause 4.2 that time was of essence.

16. The second breach happened when the purchasers' advocates failed to obtain a financial undertaking from the financiers lawyers on payment of a total 7 million for the two agreements. From the clauses 5.2 in the two agreements it was upon the Plaintiffs to pay this amount before obtaining the said professional undertaking.

There is no evidence of payment of this sum. The failure to obtain this undertaking can only be visited upon the Plaintiffs. Having found that the Plaintiffs are responsible for the two fundamental breaches of the agreement, I need not consider any other breach.

17. On the second issue, I find that none of the remedies sought by the Plaintiffs and enumerated in paragraph 20 of the plaint dated November 25, 2014 is available to them for the simple reason that they are in breach.

18. On the available remedy, I find that the Plaintiffs are entitled to a refund of the partly paid purchase price of Kshs 6,200,000/- with interest at court rates from the date of deposit to the date of refund in full. It would be unconscionable to let the Defendant keep the money and the land.

Finally on costs, I find that each party should bear its own.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF MARCH, 2023.

M.N. GICHERU

JUDGE

.....

