



Bentley v Isaac & another (Environmental and Land Originating Summons E004 of 2022) [2023] KEELC 20680 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2022
A OMBWAYO, J
OCTOBER 12, 2023**

BETWEEN

SHEILA BENTLEY APPLICANT

AND

CHEPTUMO AND CO ADVOCATES 1ST DEFENDANT

JOSPHINE JERONO ISAAC 2ND DEFENDANT

JUDGMENT

1. Sheila Bentley, (hereinafter referred to as the plaintiff) entered into agreement with Josphine Jerono Isaac (hereinafter referred to as the 1st defendant) in respect of parcel number Njoro/Ngata Block 1/4432 (hereinafter referred to as the suit property). The agreement was drafted by Cheptumo and Company advocate (hereinafter referred to as the 2nd defendant) The purchase price was 5,300,000 whereas the terms of payment were that the 1st defendant was to pay a deposit of ksh 2,500,000 and the balance of ksh 2,800,000 was to be paid in monthly instalments of ksh 30,000/= until or before the 30th November 2021. The 1st defendant paid a deposit of ksh 2,500,000/= but failed to pay the remainder of ksh 2,800,000/= even after demand.
2. It had been agreed in clause 9 of the sale agreement that whoever breached the agreement would pay 20% of the purchase price and the money would be refunded and the vendor would take possession. The 1st defendant breached the agreement hence the plaintiff issued notice and stated that she was willing to refund the purchase price less 20% of the same.
3. The 1st defendant on her part states that, she has complied with monthly instalments through mpesa transactions. She claims to have approached the plaintiff to re-negotiate the agreement in terms of payment as she was affected by Covid and that she is still capable and willing to pay.
4. The plaintiff submits that the 1st defendant has breached the agreement to warrant rescission by the plaintiff. She has failed to pay the remainder of the agreed purchase price on before the completion



date which was on or before 30th November 2021 whereas the plaintiff honored her part of agreement, and released the original title documents. The plaintiff wrote to the 1st defendant but no action was taken to comply with the terms of the contract. The plaintiff submits that the plaintiff's has rescinded the contract by giving reasonable notice.

5. The plaintiff further submits that the 1st defendant should give vacant possession of the land to the plaintiff. He refers to section 39 of the Land Act 2010. The plaintiff prays that the court orders that 2nd defendant to release the original title of the suit property to the plaintiff.
6. The plaintiff relied on the provisions in the Black's Law Dictionary 9th Edition that defines rescission as a party's unilateral unmaking of a contract for a legally sufficient reason such as the other party's material breach or judgment rescinding the contract. According to the plaintiff, rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance thus restoring the parties to their pre-contractual positions. The plaintiff further submits that the intention of parties in this matter was that whoever breaches the terms of the agreement was to pay the other party 20 % of the purchase price in liquidated damages and in addition thereof the vendor was to take possession of his piece of land on refund of the purchase price paid to him by the purchaser. He submits that rescission can only happen upon notice being given and where an opportunity is given to pay.
7. The 1st defendant submits that time was not of essence in the agreement of sale dated 6th November, 2020 because the same was not a term of the contract and therefore the law society conditions of sale regarding completion apply. The defendant contends that in this case for the plaintiff to rescind this contract, she must show that the defendant was in default and that she gave notice of default and that the defendant was unable to remedy the default by performing their part of contract.
8. I have considered the evidence and submissions on record and do find the following issues ripe for determination.
 1. Whether the plaintiff was entitled to rescind the agreement dated 6th November 2020 due to breach.
 2. Whether the 1st defendant should deliver vacant possession
 3. Whether the court should order the 2nd defendant to release the original title of the suit property to the plaintiff.
9. On the 1st issue, whether there was rescission of agreement dated 6th November, 2020 due to breach of the same. I do find it a fact that the plaintiff and 1st defendant entered into agreement in respect of the suit property. The agreement was signed by both parties and therefore created a situation of a willing seller and a willing buyer in respect of the suit property. The purchase price was ksh 5,300,000. The 1st defendant was paid ksh 2,500,000 whereas the balance of ksh 2,800,000 was to be paid in monthly instalments of ksh30,000 with the completion date of 30th November 2021. The completion dated passed without the 1st defendant paying the whole balance and to-date the balance has not been paid. This court finds that the 1st defendant was in breach of the agreement and therefore the plaintiff was entitled to rescind the agreement and to refund money so far paid towards the purchase price. The 1st defendant was liable to a penalty of 20% of the purchase price. This court further finds that the plaintiff issued adequate notice to the 1st defendant.
10. On whether the plaintiff is entitled to vacant possession, I do find that section 39 of the *Land Act* 2012 is relevant Section 39 of the Act provides for the Vendor's right to regain possession that is if, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may



exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the purchaser by Obtaining an order for possession of the land from the court in accordance with the provisions of section 41 Moreover, the plaintiff is still the registered owner of the suit property. Section 24 of the [Land Registration Act](#) provides that :-

24. Interest conferred by registration

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the said Act provides:-

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

11. On the 3rd issue as to whether the 2nd defendant should release the title documents to the plaintiffs, I do find that the plaintiff has demonstrated that the 1st defendant is in breach of the agreement and therefore the 2nd defendant has no lawful justification of holding the plaintiff's original title.

12. The upshot of the above is that this court orders the 1st defendant to vacate the suit property and the plaintiff to refund the 1st defendant the payment made by the 1st defendant less 20% of the purchase price for breach of the sale agreement. Moreover, I do order that 2nd defendant to release the original title parcel of the suit property to the plaintiff. Costs of the suit to the plaintiff. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF OCTOBER 2023.

A. O. OMBWAYO

JUDGE

