



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 64 OF 2015

SIMON GEORGE OBOSI.....PLAINTIFF

VERSUS

SOPHIE KABON LANGAT.....DEFENDANT

JUDGMENT

The facts giving rise to this suit are to a large extent not in dispute. The plaintiff and the defendant entered into an agreement for sale dated 26th June, 2011 under which the defendant agreed to sell and the plaintiff agreed to purchase a property that was described in the agreement as Unit 06 on L.R. No. 140/479 (L.R No. 140/479/06). The land reference number for Unit 06 was subsequently changed to L.R No. 140/482/06 (hereinafter referred to as “the suit property”). The agreement between the parties provided among other terms as follows;

1. The purchase price was Kshs.5,500,000/=.
2. The plaintiff was to pay a deposit of Kshs. 1,500,000/= upon the execution of the agreement which the defendant was to utilize to redeem the suit property from National Social Security Fund (hereafter referred to as “N.S.S.F”) to enable her obtain the relevant completion documents.
3. The balance of the purchase price in the sum of Kshs. 4,000,000/= was to be paid by the plaintiff 14 days after successful transfer of the suit property to the plaintiff.
4. The completion date was 90 days from the date of the agreement or upon successful transfer of the suit property to the plaintiff whichever was earlier.
5. The defendant was to give vacant possession upon receipt of the balance of the purchase price.
6. The defendant upon receipt of an acceptable undertaking from the plaintiff’s advocates or the plaintiff’s financiers if the plaintiff was borrowing money from a financier was to provide the following completion documents;
 - (i) The original certificate of lease.
 - (ii) Duly completed Stamp Duty Valuation Form
 - (iii) Duly executed instrument of transfer in favour of the plaintiff.
 - (iv) Consent to transfer in favour of the plaintiff from N.S.S.F.
 - (v) Three passport size photographs.
 - (vi) Copy of P.I.N certificate
 - (vii) Copy of National I.D Card

7. If the plaintiff defaulted in the payment of the balance of the purchase price, the defendant would upon giving 14 days’ notice be entitled to rescind the agreement for sale and the plaintiff would forfeit to the defendant 10% of the purchase price as liquidated

damages.

8. If the transfer in favour of the plaintiff failed to succeed due to the fault of the defendant, the plaintiff would after giving 14 days' notice be entitled to rescind the agreement and the defendant would refund all the monies paid to her by the plaintiff together with interest at the prevailing commercial bank rate until payment in full.

Pursuant to the said agreement, the plaintiff paid a sum of Kshs. 1,050,908/= directly to N.S.S.F and a further sum of Kshs. 449,092/= to the defendant making a total of Kshs. 1,500,000/= that he was to pay as a deposit under the agreement of sale. The payments were made by bankers cheques that were forwarded to the defendant's advocates on 6th April, 2011.

The plaintiff was to pay the balance of the purchase price in the sum of Kshs. 4,000,000/= from a mortgage loan from Standard Chartered Bank Ltd. (hereinafter referred to as "the financier"). The financier was represented in the transaction by the firm of Cootow & Associates (hereinafter referred to as "the financier's advocates"). The financier's advocates had undertaken to register the transfer of the suit property to the plaintiff and a charge in favour of the financier after which the balance of the purchase price was to be paid to the defendant.

On 4th October, 2011, the defendant's then advocates, Nzavi & Company Advocates (hereinafter referred to as "the defendant's advocates") forwarded to the financier's advocates the following documents;

- (i) Transfer of lease under the Sectional Properties Act, 1987 executed by N.S.S.F in favour of the plaintiff together with the Passport Size Photographs of the trustees of N.S.S.F who executed the same.
- (ii) Consent of N.S.S.F for the transfer of the suit property to the plaintiff.
- (iii) Rent clearance certificate
- (iv) Rates clearance certificate.
- (v) P.I.N certificate for the defendant.
- (vi) P.I.N certificate for N.S.S.F

The financier's advocates were unable to register the transfer of lease in respect of the suit property in favour of the plaintiff because the suit property was registered under Sectional Properties Act, 1987 and the N.S.S.F had not registered a Sectional Plan pursuant to that Act at the lands office to facilitate transactions involving units on the whole of L.R No. 140/482. Since the financier's advocate were unable to transfer the suit property to the plaintiff, they were similarly unable to register a charge on the suit property to secure a loan that was to be advanced to the plaintiff for the balance of the purchase price for the suit property. The plaintiff was therefore unable to pay the balance of the purchase price to the defendant. On her part, the defendant did not manage to have N.S.S.F register the Sectional Plan aforesaid.

There was no progress in the transaction after the financier's advocates letter dated 18th April, 2012 in which they stated that they were unable to register the transfer in the absence of a Sectional Plan. On 2nd May, 2014, the defendant wrote to N.S.S.F informing it that she was no longer interested in the sale transaction between her and the plaintiff and requested N.S.S.F not to allow the transaction to go through. On 30th July, 2014, the defendant's advocates informed the advocates who were acting for the plaintiff in the transaction, Wasuna & Co. Advocates (hereinafter referred to as "the plaintiff's advocates") that the transaction between the plaintiff and the defendant was frustrated by circumstances beyond the defendant's control and that the same could not be completed or revived.

On 14th November, 2014, the plaintiff's advocates on record gave the defendant's advocates 14 days' notice to complete the agreement dated 26th March, 2011 failure to which the plaintiff would file a suit to enforce his rights under the agreement.

The plaintiff's claim:

The plaintiff brought this suit on 29th January, 2015 through a plaint of the same date. In the plaint the plaintiff averred that the defendant breached the sale agreement with the plaintiff by failing to provide all the completion documents. The plaintiff averred that the defendant had continued to collect rent from the tenant on the suit property although she was aware that the plaintiff had contributed to the purchase of the suit property. The plaintiff averred that on 30th July, 2014 the defendant issued him with a notice rescinding the agreement of sale. The plaintiff averred that he had incurred numerous costs in the transaction in fulfilment of his obligations under the agreement of sale. The plaintiff sought the following reliefs against the defendant;

- (i) A mandatory injunction compelling the defendant to transfer the suit property to the plaintiff in exchange for the balance of the purchase price.
- (ii) A mandatory injunction compelling the defendant and any person claiming occupancy of the suit property through the defendant to immediately vacate the same.
- (iii) An order for accounts for the rent collected by the defendant from 26th November, 2011 and a declaration that the plaintiff is entitled to half of the rental income from the suit property.
- (iv) In the alternative to (i), (ii) and (iii) above, an order that the suit property be valued with a view of ascertaining the current

market value and a refund of the monies paid by the plaintiff on a prorata basis to the value.

(v) Special damages in the sum of Kshs. 798,960/= being the expenses incurred by the plaintiff in the transaction.

(vi) General Damages for breach of the contract.

(vii) Costs and interest.

The defendant filed a defence on 17th March, 2015. The defendant admitted entering into a sale agreement with the plaintiff dated 26th March, 2011 in respect of the suit property. The defendant also admitted that the plaintiff paid a deposit in the sum of Kshs. 1,500,000/= towards the purchase price. The defendant denied however that she breached the agreement of sale. The defendant averred that the said agreement was frustrated and terminated for reasons attributed to the plaintiff. The defendant averred that the plaintiff was unable to secure financing for the balance of the purchase price because his financier insisted on a title for the suit property that was not available. The defendant averred that once the plaintiff's financier refused to finance him, the plaintiff was unable to raise the balance of the purchase price from other sources and that led to the frustration of the agreement and its eventual termination.

The defendant averred that the title for the suit property was to be issued by N.S.S.F and N.S.S.F had not issued any title for all the units on L.R No. 140/482. The defendant denied that the plaintiff had indicated that he was able and ready to complete the transaction. The defendant averred that if the plaintiff had raised the balance of the purchase price from other sources once the financier had declined to finance him, the transaction would have been completed and the plaintiff would have been given possession of the suit property.

The defendant averred that she refunded to the plaintiff the sum of Kshs. 1,500,000/= that the plaintiff paid as a deposit and as such she did not owe the plaintiff any money. The defendant denied that the plaintiff contributed to the purchase of the suit property. The defendant averred that the plaintiff was a purchaser of the suit property from her and all the money he paid was refunded to him. The plaintiff filed a reply to defence on 2nd April, 2015 in which he reiterated the contents of the plaint.

At the trial, the plaintiff adopted his witness statement dated 31st March, 2015 as his evidence in chief and produced the documents in his bundle of documents dated 31st March, 2015 as exhibits. In his testimony in court, the plaintiff narrated to the court how he entered into an agreement for sale with the defendant in respect of the suit property. The plaintiff stated that he complied with his obligations under the agreement for sale while the defendant failed to do so. He stated that the defendant was supposed to supply all the completion documents one of which was the certificate of lease. The plaintiff stated that the defendant failed to provide the certificate of lease and as such the property could not be transferred to his name that would have enabled the financier to charge the property. He stated that apart from the said certificate of lease, the defendant had provided all other completion documents. The plaintiff stated that after a long wait for the said document, the defendant wrote to N.S.S.F that she was no longer interested in completing the transaction. She subsequently wrote to the plaintiff through her advocates that the agreement had been frustrated and that she would not complete the same. The plaintiff stated further that the sum of Kshs. 1,500,000/= that he paid as a deposit was refunded after 47 months and while this suit was pending.

In her evidence, the defendant also adopted her witness statement filed on 17th March, 2015 as her evidence in chief. The defendant also produced the documents in her list of documents dated 16th March, 2015 as exhibits. The defendant stated that she purchased the suit property from N.S.S.F through tenant purchase scheme and that as at the time she entered into an agreement to sell the property to the plaintiff, there was a sum of Kshs. 1,050,908/= due to N.S.S.F. She stated that as of that date, the property was not yet registered in her name and the plaintiff was aware of that fact. The defendant stated that her advocates provided the plaintiff with all the completion documents save for the title which he was to receive upon making the final payment. She denied that she defaulted in her obligations under the agreement for sale. She stated that the plaintiff did not indicate that he was going to borrow money to pay the balance of the purchase price. The defendant stated that she cancelled the transaction because it was taking too long. She stated that she was not served with a completion notice.

In cross-examination, the defendant admitted that the financier's advocates gave her advocates an undertaking to pay the balance of the purchase price upon registration of the charge and that it was upon that undertaking that the completion documents were released to the said advocates for the financier. The defendant stated further that the plaintiff was aware that the suit property had no title. She stated that the transaction was frustrated by circumstances beyond her control.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 4th March, 2020 while the defendant filed her submissions on 25th January, 2021. In his submissions, the plaintiff framed five (5) issues for determination by the court namely; why the agreement for sale was terminated and who was at fault, whether the plaintiff contributed to the purchase of the suit property, whether the plaintiff is entitled to the rent being paid for the suit property, whether the plaintiff is entitled to interest and whether the plaintiff is entitled to the reliefs sought in the plaint.

On the first issue, the plaintiff submitted that the agreement for sale between the parties was breached by the defendant who failed to provide all the completion documents and thereafter purported to rescind the agreement on the ground that the same had been frustrated. On the second issue, the plaintiff submitted that when the parties entered into the agreement for sale, the defendant had an outstanding balance of Kshs.1,050,908/= to pay to N.S.S.F before the property could be transferred to her and that the plaintiff paid the said amount to N.S.S.F on behalf of the defendant. The plaintiff submitted that since the defendant purchased the suit property at Kshs. 4,400,000/= from N.S.S.F, the plaintiff's contribution towards that purchase price was almost 24%. The plaintiff submitted that the defendant held a portion of the suit property equivalent to the plaintiff's contribution of the purchase price in trust for the plaintiff. In support of this submission, the plaintiff cited Willy Kimutai Kitilit v. Michael Kibet [2018] eKLR.

On whether the plaintiff was entitled to the rent being paid for the suit property, the plaintiff submitted that there was a tenant on the suit property paying a rent of Kshs. 35,000/= per month. The plaintiff submitted that having contributed to the purchase of the suit property, the defendant was under an obligation to share the rent from the suit property with him. On whether the plaintiff was entitled to interest, the

plaintiff submitted that interest was due to him on the payment he had made to the defendant at commercial rate. The plaintiff submitted that the agreement of sale was not completed due to the defendant's failure to provide completion documents. The plaintiff submitted that he was entitled to interest on the deposit that he had paid from 5th April, 2011 when he issued the cheques for the said deposit until payment in full.

On whether the plaintiff was entitled to the reliefs sought in the plaint, the plaintiff submitted that he paid a sum of Kshs. 220,040/= as Stamp Duty which he never recovered. The plaintiff submitted that in addition to the Stamp Duty, he incurred other costs. The plaintiff submitted that the defendant's contention that it was impossible for her to comply with the terms of sale agreement was not correct. The plaintiff urged the court to enter judgment against the defendant as prayed in the plaint together with the costs of the suit.

As mentioned earlier, the defendant filed her submissions on 25th January, 2021. The defendant framed two (2) issues for determination by the court namely; As between the plaintiff and the defendant who breached the agreement for sale dated 26th March 2011 and whether the plaintiff is entitled to the reliefs sought. On the first issue, the defendant submitted that the defendant furnished the plaintiff's financier's advocates with the completion documents receipt of which was acknowledged. The defendant submitted that the financier's advocates even lodged the transfer for registration. The defendant submitted that the plaintiff had not explained how the failure of the financier's advocates to register the transfer was attributed to the defendant. The defendant submitted that the plaintiff was aware that the suit property was registered in the name of N.S.S.F from which the defendant acquired the property through tenant purchase scheme. The defendant submitted further that the plaintiff did not issue her with a completion notice provided for under special condition (f) of the agreement. The defendant submitted that it nevertheless accepted the plaintiff's decision to rescind the contract and refunded to the plaintiff the deposit that he had paid in the sum of Kshs. 1,500,000/=. The defendant submitted that the contract between the parties was very clear on the manner in which the contract was to be enforced and/or terminated at the instance of either party. The defendant submitted that the plaintiff had failed to demonstrate that the defendant breached the agreement for sale between the parties and that he followed the procedure laid down in the contract in enforcing the same. The defendant submitted that the plaintiff failed to prove his case on a balance of probabilities. On the prayers sought by the plaintiff, the defendant submitted that the plaintiff was not entitled to an order for specific performance because a deposit that was paid by the plaintiff had already been refunded to him and as such the issue of the plaintiff paying the balance of the purchase price could not arise. The defendant submitted that since the plaintiff was not entitled to an order for specific performance, a permanent injunction sought in prayer (b) of the plaint could not be issued.

With regard to the prayer for accounts in respect of rent, the defendant submitted that the plaintiff was entitled to possession of the suit property on completion which never took place. The defendant submitted that the plaintiff was not entitled to the accounts in respect of rent in the circumstances. With regard to the plaintiff's alternative prayer, the defendant submitted that since the plaintiff had failed to demonstrate that the defendant was in breach of the agreement of sale, there was no basis for the valuation of the suit property sought by the plaintiff and the apportionment of the market value.

As concerns the claim for special damages of Kshs. 798,960/=, the defendant submitted that the plaintiff did not prove the same. The defendant submitted further that in any event, the plaintiff did not prove that the defendant was liable to pay the special damages which liability would only attach if the defendant had breached the agreement of sale which was not the case. With regard to general damages, the defendant submitted that the same cannot be awarded for a breach of contract.

Determination:

I have considered the pleadings and the evidence tendered by the parties. The following in my view are the issues arising for determination in this suit.

1. Whether the defendant breached the agreement for sale dated 26th March, 2011 between her and the plaintiff.
2. Whether the agreement for sale dated 26th March, 2011 between the plaintiff and the defendant was frustrated.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Who is liable for the costs of the suit?

The first issue:

From the evidence on record, it is my finding that the defendant did not breach the agreement for sale dated 26th March, 2011 with the plaintiff. When the parties entered into the agreement for sale, the plaintiff was aware that the defendant had acquired the suit property from N.S.S.F and that the property was still registered in the name of N.S.S.F. The plaintiff was also aware that the suit property was registered under the Sectional Properties Act, 1987. The agreement of sale referred to the suit property as "a leasehold unit known as 06 being a portion of the building and improvements erected on land parcel number 140/479." At the material time, the only legislation in place that enabled sale and transfer of apartments was Sectional Properties Act 1987. The evidence before the court shows that the defendant provided the plaintiff through his financier's advocates with all the completion documents that were necessary for the registration of transfer of the suit property in favour of the plaintiff. The said documents were received by the plaintiff's financier's advocates on 5th October, 2011. The letter forwarding the documents was copied to the plaintiff's advocates who also received the same on 5th October, 2011. The only document that was not furnished by the defendant was the certificate of lease. This was not provided because to the knowledge of both parties, the property had not been transferred to the defendant. It was in the name of N.S.S.F which agreed to transfer the property directly to the plaintiff and even executed a transfer for that purpose. The reason why the suit property was not transferred to the plaintiff was not that the defendant had done anything wrong or had refused to do anything under the contract. When the advocates for the financier presented the documents for registration, they found that the Sectional Plan that the N.S.S.F used to bring L.R No. 140/482 under the Sectional Properties Act, 1987 had not been registered at the land office and for that reason, it was not possible to register the transfer of Unit No. 6 (L.R No. 140/482/6) that was sold to the plaintiff. The duty to register the Sectional Plan was on N.S.S.F. It was not possible for the defendant to register the said Sectional Plan. The defendant cannot therefore be blamed for the failure by N.S.S.F to register the said plan.

Due to the foregoing, I am of the view that the defendant did not breach the sale agreement dated 26th March, 2011.

The second issue:

From what I have stated above, the defendant was ready and willing to perform her part of the agreement for sale with the plaintiff and had in fact provided the available completion documents. The plaintiff was also ready to complete the agreement. The plaintiff had paid a deposit of Kshs. 1,500,000/= and had secured a loan from Standard Chartered Bank (K) Ltd. for the balance of the purchase price. The reason why the agreement was not completed was lack of a Sectional Plan at the Land Registry. None of the parties can be blamed for the failure of the N.S.S.F to register the Sectional Plan. The contract was in my view frustrated as claimed by the defendant. It could not be performed as a result of no fault of either party.

The third issue:

Since the plaintiff has not proved that the defendant breached the agreement for sale dated 26th March, 2011, the plaintiff is not entitled to the reliefs sought in the plaint. The plaintiff had contended that he contributed to the purchase of the suit property and as such, he was entitled to a portion of the rent. I am in agreement with the defendant that the relationship between the defendant and the plaintiff was that of a vendor and a purchaser. The plaintiff was not a party to the agreement that the defendant had entered into with N.S.S.F. The sum of Kshs. 1,500,000/= that the plaintiff paid was a deposit for the purchase of the suit property from the defendant. It was not part payment of the purchase price of the suit property from N.S.S.F. I therefore find no merit in the plaintiff's claim that he was a co-owner of the suit property and as such entitled to rent. I also find the plaintiff's claim for specific performance not maintainable. The defendant had already provided the plaintiff with a duly executed transfer. The problem was that the transfer could not be registered due to lack of a Sectional Plan. The plaintiff did not place evidence before the court showing that N.S.S.F had registered a Sectional Plan at the lands office in Nairobi as at the time of giving evidence. In my view, the defendant's letter to N.S.S.F that she was no longer interested in the transaction was inconsequential since the N.S.S.F had already executed a transfer in favour of the plaintiff and issued a consent to transfer. I am also in agreement with the defendant that the special damages claimed by the plaintiff was neither pleaded nor proved. It was only claimed. Even if I had found that the defendant had breached the agreement for sale, I would not have awarded the plaintiff the special damages claimed. For general damages, I am in agreement with the defendant that as a general rule, general damages are not payable for breach of contract. In his particular case, what the plaintiff would have been entitled to if he had established that the agreement for sale was breached was loss of bargain. No material was placed before me on the basis of which I would have assessed this loss.

Due to the foregoing, the plaintiff is not entitled to the reliefs sought because the plaintiff has not proved breach of the agreement for sale dated 26th March, 2011 on which the reliefs were anchored and also on the ground that some of the reliefs have not been pleaded.

The forth issue:

In the circumstances of this case, I will order each party to bear its own costs.

Conclusion:

In conclusion, the plaintiff's suit is dismissed with each party bearing its own costs.

Dated and Delivered at Nairobi this 8th day of November 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Githii for the Plaintiff

Ms. Mathenge h/b for Mr. Bundotich for the Defendant

Ms. C. Nyokabi - Court Assistant