



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 2315 OF 2007**

**SALIM HUSSEIN DUNGARWALLA.....PLAINTIFF**

**VERSUS**

**UZIMA PRESS LIMITED.....1ST DEFENDANT**

**RIGHT END PROPERTIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF TITLES.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff entered into a sale agreement with the 1<sup>st</sup> Defendant on 23/6/2005 for the sale of L.R. No. 1870/X/24 (“the Suit Property”) at the agreed consideration of Kshs. 27 million out of which he paid a deposit of 2.7 million. The balance of the purchase price was to be paid within 60 days. The completion date was in 60 days or such later date as the parties would agree. The Plaintiff sought extensions of time to pay the balance of the purchase price which the 1<sup>st</sup> Defendant granted. Subsequently, the Plaintiff informed the 1<sup>st</sup> Defendant of his intention to assign the agreement and nominated the 2<sup>nd</sup> Defendant as the transferee of the property. The Plaintiff agreed with the 2<sup>nd</sup> Defendant to assign the sale of the Suit Property to the 2<sup>nd</sup> Defendant for Kshs. 47 million.

2. The 1<sup>st</sup> Defendant purported to rescind the contract on 24/5/2007 citing the reasons that the Plaintiff had fraudulently altered the consideration in the sale agreement to read Kshs. 37 million when he approached the 2<sup>nd</sup> Defendant for the assignment of the sale of the Suit Property. Thereafter, the 1<sup>st</sup> Defendant entered into an agreement with the 2<sup>nd</sup> Defendant for the sale of the Suit Property for Kshs. 40 million and was paid a deposit of Kshs. 4 million.

3. Through the plaint filed in court on 27/11/2007, the Plaintiff seeks a declaration that the agreement he executed with the 1<sup>st</sup> Defendant dated 23/6/2005 is valid and legally binding. He seeks a permanent injunction to restrain the 1<sup>st</sup> Defendant from disposing of, selling, transferring, leasing or otherwise dealing with the Suit Property. He also seeks to have the 1<sup>st</sup> Defendant execute a transfer in his favour, or in the alternative the Registrar of Titles is to execute and register the transfer in his favour. Further, he seeks a declaration that the transfer lodged for registration in favour of the 3<sup>rd</sup> Defendant over the Suit Property is voidable and subject to the rights and interests of the Plaintiff and a permanent injunction to restrain the 3<sup>rd</sup> Defendant from registering any dealings with the Suit Property.

4. In the Defence and Counterclaim filed on 19/3/2008, the 1<sup>st</sup> Defendant maintains that it was entitled to rescind the agreement for sale dated 23/6/2005 when it became evident that the Plaintiff had unilaterally altered the terms of the agreement by fraudulently altering the purchase price to read Kshs. 37 million instead of 27 million and purporting to append the signatures of the 1<sup>st</sup> Defendant’s agents to the altered agreement. The 1<sup>st</sup> Defendant also contends that the Plaintiff was not ready and willing to complete the sale. The 1<sup>st</sup> Defendant avers that the Plaintiff had the duly executed original sale agreement in triplicate which he refused to return to the 1<sup>st</sup> Defendant.

5. The 1<sup>st</sup> Defendant counterclaims a declaration that the agreement dated 23/6/2005 was voided by reason of the Plaintiff’s fraud, misrepresentation or deceit. The 1<sup>st</sup> Defendant avers that the agreement between it and the Plaintiff was tainted with illegality and upon rescinding the agreement, it entered into an agreement with the 2<sup>nd</sup> Defendant for the sale of the Suit Property at agreed consideration of Kshs. 40 million. It therefore, seeks a declaration that the transfer lodged in favour of the 2<sup>nd</sup> Defendant is valid and not subject to the Plaintiff’s rights and interests.

6. The 2<sup>nd</sup> Defendant filed its Defence on 11/3/2008 in which it claims that the Plaintiff misrepresented to the 2<sup>nd</sup> Defendant the terms of the agreement he had entered into with the 1<sup>st</sup> Defendant by stating that the purchase price was Kshs. 37 million and not Kshs. 27 million. The 2<sup>nd</sup> Defendant claims that it was induced by the Plaintiff to enter into an agreement through which the Plaintiff would assign his rights under the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.

7. The 2<sup>nd</sup> Defendant claims that it learnt of the disparity in the purchase price when it instructed its lawyers to conduct due diligence on the transaction. The 2<sup>nd</sup> Defendant claims that it terminated the agreement with the Plaintiff when it noted the discrepancy in the purchase price. Following the rescission by the 1<sup>st</sup> Defendant of the agreement dated 23/6/2005, the 2<sup>nd</sup> Defendant entered into a sale agreement with the 1<sup>st</sup> Defendant for the purchase of the Suit Property. The Defendant urged the court to dismiss the Plaintiff's suit with costs.
8. The 2<sup>nd</sup> Defendant states in his defence that the cause of action is a commercial dispute and the suit ought to be transferred to the High Court Milimani Tax and Commercial Division for hearing and determination. The 2<sup>nd</sup> Defendant did not pursue this line of argument at the hearing of the suit and the court will make no finding on this issue.
9. The Plaintiff called the advocate who represented him in the sale transaction to testify. Mr. Martin Maina adopted his witness statement dated 10/5/2013. It was his evidence that the Plaintiff informed him sometime in 2005 that he was negotiating to purchase the Suit Property which is situated in Westlands, Nairobi. The Plaintiff later gave him a letter of acceptance from the vendor dated 19/5/2005 showing that the agreed price was Kshs. 27 million. He did not draw the sale agreement but witnessed his client's signature on the agreement. He learnt that the 1<sup>st</sup> Defendant could not complete the sale because it had been sued in **HCCC 635/2005** by Gem Security E.A. and could not therefore give vacant possession as there were injunctive orders in force. The orders issued in that case were discharged on 22/2/2006. He confirmed that the 1<sup>st</sup> Defendant acceded to his client's request for extension of the time to comply with the sale agreement.
10. His client informed him that he wished to assign the sale of the Suit Property and introduced him to the firm of Kipkenda, Lilan & Company Advocates. The assignment was at the cost of Kshs. 47 million with commercial use and Kshs. 45 million if it was without change of user. He stated that Mr. Kipkenda demanded a revalidation of sale agreement. On 16/5/2007, the 1<sup>st</sup> Defendant's advocate wrote to him purporting to rescind the contract alleging fraud and that there was no extension of the completion period. He confirmed that on 21/5/2007 the 1<sup>st</sup> Defendant wrote to his firm giving particulars of the alleged fraud. He claimed that he lodged a caveat against the Suit Property on 24/5/2007.
11. The police conducted investigations into the matter. Mr. Maina claims that he saw the agreement stating the purchase price as 37 million for the first time with the police during the investigations. He claimed that the Deed of Assignment alleged to have been prepared by his firm was doctored. He stated that the 1<sup>st</sup> Defendant did not refund the Plaintiff the deposit of Kshs. 2.7 million which he had paid. It was his conclusion that the Defendants had conspired to deny the Plaintiff his rights under the sale agreement. He stated that the alleged forgery of the sale agreement was reported to the police who investigated the matter and concluded that there was no forgery.
12. On cross examination, he confirmed that he did not give a professional undertaking to the 1<sup>st</sup> Defendant's advocates for the payment of the balance of the purchase price. He referred to the letters dated 12/4/2006, 18/8/2006 and 22/8/2006 on the negotiations for extension of the completion date. He confirmed that they sought extension on 9/5/2007 because his client was negotiating for an assignment of the sale agreement.
13. In his letter dated 14/5/2007, he informed the 1<sup>st</sup> Defendant's advocate that his client had nominated the 2<sup>nd</sup> Defendant to be the beneficiary of the transfer. The letter sought completion documents from the 1<sup>st</sup> Defendant's advocate. He denied that the 1<sup>st</sup> Defendant's letter dated 16/5/2007 amounted to a rescission of the sale. He maintained that the Plaintiff was always ready to perform his obligations under the agreement and to complete the sale. He also denied that the 1<sup>st</sup> Defendant's advocate letter of 24/5/2007 rescinded the contract. The letter makes reference to the unauthorised material alteration of the contract to reflect Kshs. 37 million as the purchase price as the reason for the rescission. The letter stated that the alteration was made without the 1<sup>st</sup> Defendant's knowledge and the Plaintiff gave the altered sale agreement to third parties whilst the Plaintiff's advocate had custody of all the copies of the original sale agreement. He confirmed that the balance of the purchase price had not been paid by the Plaintiff while stressing that the sale transaction did not go through because of the 1<sup>st</sup> Defendant's default.
14. The 2<sup>nd</sup> Defendant called its General Manager as a witness. He stated that he joined the 1<sup>st</sup> Defendant in 2009 and was well acquainted with the facts of this case due to the fact that the issue of the sale of the Suit Property had come up on several occasions on the agenda of the 1<sup>st</sup> Defendant's the board meetings.
15. It was his evidence that the 1<sup>st</sup> Defendant is the registered proprietor of the Suit Property and entered into a sale agreement with the Plaintiff on 23/6/2005 for the sale of the Suit Property to the Plaintiff at the agreed consideration of Kshs. 27 million. Kshs. 2.7 million was paid as a deposit to the 1<sup>st</sup> Defendant's advocate to hold as a stakeholder while the balance of Kshs. 24.3 million was to be paid to the 1<sup>st</sup> Defendant's advocate within 60 days of the date of the agreement. He referred to He identifies the Plaintiff as the deceased in his witness statement. He identifies the Plaintiff as the deceased in his witness statement. If indeed the Plaintiff is dead, then he ought to have been substituted as a party to the suit.
16. The witness stated that Clause 7 of the Special Conditions in the agreement stipulated that if the transaction failed for reasons other than the purchaser's default, the vendor would refund all monies paid by the purchaser plus costs and expenses. The refund would include interest at the prevailing bank lending rates. Clause 8 of the Special Conditions provided that if the purchaser failed to comply with the obligation to complete the sale and pay the balance of the purchase price, the vendor could rescind the agreement by giving written notice to the purchaser and refund the amount paid less 10% of the purchase price which would be forfeited.
17. He maintained that the Plaintiff did not show any serious commitment to complete the sale. He referred to the Plaintiff's advocate's letter of 12/4/2006 which intimated that the Plaintiff had diverted the funds meant to clear the balance of purchase price and requested to have the completion date rescheduled to 22/6/2006. He did not dispute the fact that the 1<sup>st</sup> Defendant extended the completion period on several occasions at the Plaintiff's request.
18. He averred that in May 2007, the 1<sup>st</sup> Defendant learnt that the Plaintiff had altered Clause 3 of page 2 of the Sale Agreement to show the

purchase price as Kshs. 37 million instead of Kshs. 27 million. The agreement had also been altered to show that the balance outstanding was Kshs. 33.3 million after paying a deposit of Kshs. 3.7 million. He produced a copy of that sale agreement. He took issue with the fact that the forged agreement appeared to have been executed by the 1<sup>st</sup> Defendant's directors as well as their advocate Isaac Onyango. The deceased Plaintiff sought to assign his interest in the Suit Property to the 2<sup>nd</sup> Defendant by that agreement.

19. Following this, the 1<sup>st</sup> Defendant exercised its right by terminating the contract vide its letter of 21/5/2007. The witness produced a copy of the Deed of Assignment which showed the consideration as Kshs. 47 million. The assignment states in the recital that by the agreement dated 23/6/2005, Uzima Publishing House Limited agreed to sell the Suit Property for the sum of Kshs. 37 million. The witness also produced a copy of the agreement dated 15/6/2007 entered into between the 1<sup>st</sup> Defendant and Ashraf Savani & Madatali Saburuli Chatur for the sale of the Suit Property at the agreed consideration of Kshs. 40 million.

20. He stated that the 1<sup>st</sup> Defendant rescinded the sale agreement when the 2<sup>nd</sup> Defendant gave the 1<sup>st</sup> Defendant a forged agreement alleging that it had come from the Plaintiff. He referred to the two sale agreements which in his view were similar in every respect save for the consideration which is given as Kshs. 27 million in one agreement and Kshs. 37 million in the second agreement. He maintained that the 1<sup>st</sup> Defendant signed the agreement for 27 million and forwarded it in triplicate to the Plaintiff's lawyers for execution. He believed that the Plaintiff altered the terms of the agreement. He stated that the order of injunction given in this suit was made on 28/11/2007 by which time the 1<sup>st</sup> Defendant had already executed the transfer in favour of the 2<sup>nd</sup> Defendant.

21. It was his evidence that the 1<sup>st</sup> Defendant learnt of the forged agreement from the 2<sup>nd</sup> Defendant when the 2<sup>nd</sup> Defendant was trying to buy land from the Plaintiff, it sought confirmation that the 1<sup>st</sup> Defendant had entered into an agreement with the Plaintiff for Kshs. 37 million. He confirmed that the signatories to the sale agreement dated 23/6/2005 only executed the last page of that agreement and did not sign the other pages of the agreement.

22. The 2<sup>nd</sup> Defendant's director gave evidence. He stated that the Plaintiff, who is now deceased, approached them in February, 2006 and informed that he had entered into a sale agreement for the purchase of the Suit Property situated in Westlands. Since he did not have the money to pay the balance of the purchase price, he requested to sell the Suit Property to the 2<sup>nd</sup> Defendant by way of assignment. Being interested, the witness inquired about the purchase price and the Plaintiff told him it was Kshs. 37 million and that he had already paid a deposit of Kshs. 3.7 million. He stated that the Plaintiff gave him the sale agreement dated 23/6/2005 as confirmation that he was purchasing the property.

23. He stated that a Deed of Assignment was later prepared so that the transaction with the Plaintiff could be completed. When their advocates requested the Plaintiff's advocates to validate the agreement and obtain extension of time to complete the agreement with the 1<sup>st</sup> Defendant, the Plaintiff's advocates failed to do this. Upon carrying out due diligence on the transaction, the 2<sup>nd</sup> Defendant discovered that there were two agreements for the sale of the Suit Property which the Plaintiff had entered into with the 1<sup>st</sup> Defendant both of which were dated 23/6/2005. The agreements reflected the purchase price of Kshs. 37 million and Kshs. 27 million respectively. The 1<sup>st</sup> Defendant's advocates confirmed to the 2<sup>nd</sup> Defendant's advocates that the agreement bearing the purchase price of Kshs. 37 million was forged.

24. He stated upon discovering that the Plaintiff had prepared a different sale agreement in order to sell to them the Suit Property at a higher price through the assignment, the 1<sup>st</sup> Defendant rescinded the agreement with the Plaintiff and entered into an agreement directly with the 2<sup>nd</sup> Defendant at the agreed consideration of Kshs. 40 million.

25. Parties filed submissions and attended court to highlight those submissions. They summarised the issues for determination as (i) whether the agreement between the Plaintiff and the 1<sup>st</sup> Defendant was validly rescinded and (ii) if the Plaintiff is entitled to specific performance of the contract with the 1<sup>st</sup> Defendant.

26. The Plaintiff submitted that since the extension of time for completion was agreed by the parties, the issue is whether the Plaintiff or his agents were guilty of fraud by altering the sale agreement and changing the purchase price as the Defendants contend. On his part, the Plaintiff claims that the 1<sup>st</sup> Defendant fraudulently transferred the Suit Property to the 2<sup>nd</sup> Defendant knowing very well that an agreement existed between the Plaintiff and the 2<sup>nd</sup> Defendant for the assignment of the sale of the Suit Property.

27. The Plaintiff submitted that the burden of proving fraud on the part of the Plaintiff lay on the Defendants and the standard is much higher than that for ordinary civil suits. He relied on the cases of **Nancy Kahoya Amadiva v Expert Credit Limited and Another** [2015] eKLR and **Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar** [2000] eKLR in support of the fact that fraud must be specifically pleaded and that fraudulent conduct must be distinctly proved. The Plaintiff contended that the 1<sup>st</sup> Defendant failed to discharge that burden of proof and that having confirmed that it made attempts to transfer the suit land to the 2<sup>nd</sup> Defendant showed that the agreement between the Plaintiff and 1<sup>st</sup> Defendant was not validly rescinded. He relied on Section 2 of Registration of Titles Act on the definition of fraud.

28. He argued that the Plaintiff is entitled to specific performance since it has a valid agreement with the 2<sup>nd</sup> Defendant and this is the suitable, equitable remedy decreed for contract for sale of land. The Plaintiff relied on the decision of the Supreme Court of Uganda in **Halling Manzoor v Serwan Singh Baram** Civil Appeal No. 9 of 2001 in which the court stated that specific performance is an equitable remedy decreed at the discretion of the court. That the basic rule is that specific performance will not be decreed where a common law remedy such as damages would be adequate to put the Plaintiff in the position he would have been but for the breach. The court noted in that case that damages are inadequate in cases for breach of contracts for sale of land and specific performance is readily decreed.

29. The Plaintiff maintains that the only reason given by the 1<sup>st</sup> Defendant for the rescission was expressed to be circumstantial evidence which pointed to fraud in altering the sale agreement on the Plaintiff's part or his advocates. The Plaintiff denied that a valid rescission notice

was issued by the 1<sup>st</sup> Defendant and faults the 1<sup>st</sup> Defendant for failing to refund the Plaintiff's deposit in line with special condition number 8 of the sale agreement.

30. The 1<sup>st</sup> Defendant maintains that it validly rescinded the sale agreement dated 23/6/2005 vide its letter of 16/5/2007. The 1<sup>st</sup> Defendant argues that the purchaser failed to meet his obligation to complete the sale by paying the balance of the purchase price. It submits that time was of essence and that besides asserting readiness to pay the balance of the purchase price, the Plaintiff has never showed evidence of his readiness to pay the balance. It urged that this is buttressed by the fact that his advocate never gave a professional undertaking to pay the balance of the purchase price. The 1<sup>st</sup> Defendant relied on the recital of the altered agreement which was the basis for the deed of assignment and which stated that the consideration was Kshs. 37 million. The 1<sup>st</sup> Defendant submitted that this showed fraud as the actual consideration in the agreement between the Plaintiff and the 1<sup>st</sup> Defendant was Kshs. 27 million.

31. The 1<sup>st</sup> Defendant urged that specific performance is not open to the Plaintiff. Being an equitable remedy, a party seeking equity must do equity. It maintains that the Plaintiff was never equitable in his conduct relating to this agreement and has not paid the balance of the purchase price and purported to assign his rights by altering and falsifying the consideration under the original agreement. He further submitted that delay defeats equity and the transaction had taken close to two years since the agreement was executed. He relied on the case of *Gurdev Singh Birdi & Marinder Singh Gatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhubuti* Civil Appeal Number 165 of 1996 in which the court stated that a Plaintiff seeking the equitable remedy of specific performance of a contract must show that he has performed all the terms of the contract which he ought to have performed at the date of the writ in the action. The court noted that the conduct of the Appellants who had not tendered the balance of the purchase price to the Respondent prior to filing suit confirmed that they were never ready and willing to carry out their part of the contract. The court also noted that the Appellants could not raise the balance of the purchase price on or before the specified time and they were in fact in breach of the agreement.

32. The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiff's suit. The 1<sup>st</sup> Defendant maintained that it rescinded the sale agreement vide its letter dated 16/5/2007. In the event that the court found that the rescission under Clause 8 was not proper, the 1<sup>st</sup> Defendant urged the court to fall back on Clause 7 which provides for rescission without fault on the part of the Plaintiff and order that the alternative remedy of damages is the appropriate one.

33. The 2<sup>nd</sup> Defendant associated itself with the 1<sup>st</sup> Defendant's submissions. It submitted that it was to enter into sale by assignment with the Plaintiff which is also an equitable right and that it was pegged on the agreement between the Plaintiff and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant argued that the fact that there were alterations to the sale agreement which found their way to the deed of assignment made the agreement between the Plaintiff and the 2<sup>nd</sup> Defendant unenforceable. This Defendant submitted that the burden lay on the Plaintiff who drew the deed of assignment to prove that the purchase price was Kshs. 27 million in line with the earlier agreement he executed with the 1<sup>st</sup> Defendant. It submitted that there was no evidence that another deed of assignment existed and that the Plaintiff had not challenged the transfer of the Suit Property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.

34. On the other hand, the Plaintiff contends that the Defendants did not lead evidence to prove fraud against him and that they did not have any correspondence to support the allegation that the altered agreement came from the Plaintiff. The court notes that the Plaintiff did not lead any evidence to prove the terms of the deed of assignment he entered into with the 1<sup>st</sup> Defendant or the sale agreement he presented to the 2<sup>nd</sup> Defendant to confirm that he had entered into an agreement to purchase the Suit Property from the 1<sup>st</sup> Defendant. In the absence of a deed of assignment showing Kshs. 27 Million as the consideration of the agreement between the Plaintiff and the 1<sup>st</sup> Defendant, the court is inclined to believe that the deed of assignment presented by the Defendants showing Kshs. 37 Million as the consideration was the only deed of assignment in existence.

35. The sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant was the basis for the Plaintiff's assignment of the agreement to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant averred that it forwarded the sale agreement in triplicate to the Plaintiff for execution. This was not denied by the Plaintiff. The 2<sup>nd</sup> Defendant's evidence that it discovered that the Plaintiff had misrepresented the purchase price in the sale agreement he entered into with the 1<sup>st</sup> Defendant as Kshs. 37 Million instead of Kshs. 27 Million was not controverted by the Plaintiff who merely denied this assertion.

36. In *Nabro Properties Limited v Sky Structures Limited and 2 others* [2002] eKLR, the court stated that a party seeking specific performance must show and satisfy the court that it can comply that is, it must be ready willing and able to do so. The 1<sup>st</sup> Defendant submits that the Plaintiff has not shown that it is ready, willing and ready to comply for the court to order specific performance.

37. The Plaintiff informed the 1<sup>st</sup> Defendant that he could not raise the balance of the purchase price and that he would assign his rights to the 2<sup>nd</sup> Defendant. The Plaintiff did not lead any evidence to show that he was ready, able and willing to pay the balance of the purchase price to the 1<sup>st</sup> Defendant. For this reason, the Plaintiff is not deserving of the remedy of specific performance. The agreement between the Plaintiff and the 1<sup>st</sup> Defendant was validly rescinded.

38. The court finds that the Plaintiff has failed to prove his case on a balance of probabilities and dismisses the suit. The court allows prayers (a) and (b) of the 1<sup>st</sup> Defendant's Counterclaim. Each party will bear its own costs since the 1<sup>st</sup> Defendant did not refund the deposit of Kshs. 2.7 Million the Plaintiff paid to it.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of July 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Ngugi for the Plaintiff

Mr. Mulanaya for the 2<sup>nd</sup> Defendant

Mr. Mulanaya holding brief for Mr. Masika for the 1<sup>st</sup> Defendant

Mr. V. Owuor- Court Assistant